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“A Force Created”: The U.S. Chamber of Commerce and The Politics of Corporate Immunity

*Myriam Gilles*¹

I. INTRODUCTION

Upon its founding in 1912, the U.S. Chamber of Commerce was conceived as a “force created” to exert “a beneficent influence upon our national life” by integrating the views of the business community into governmental policies and regulations.² That a force was created is beyond question. Beneficence is a separate issue.

This is the story of how the Chamber transformed from that early vision of a public-minded, apolitical organization intent on providing “enlightened economic policymaking advice . . . for the benefit of the nation” into its current form—a partisan enterprise focused on securing, among other things, broad and lasting corporate immunity from suit. Abandoning its early promise to steer clear of politicking, the modern Chamber has fully embraced its role as a lobbying powerhouse at both the federal and state levels, pressing for regulatory, legislative and legal changes to the form and availability of litigation lodged against its corporate membership.³ The Chamber has actively pursued corporate immunity in two steps: first, by charging that the civil justice system is grossly unfair and abusive; and second, by aggressively lobbying for “reform” of its alleged excesses. Over the years, the group has argued for eliminating punitive damages, making class actions harder to certify, forcing plaintiffs to disclose litigation

1. Professor of Law, Cardozo School of Law. My thanks to Steve Landsman and other participants in the 28th annual Clifford Symposium held at DePaul University College of Law in June 2022.

2. *U.S. Chamber of Commerce: The Early Years*, U.S. CHAMBER OF COMMERCE, https://www.uschamber.com/assets/archived/images/uscc_HistoryBook.pdf (last visited Jan. 13, 2023). The Chamber’s first president, Henry A. Wheeler proclaimed that, through the Chamber’s work, “history will be made and a force created that shall endure throughout the years as a beneficent influence upon our national life.” *Id.*

3. Over the past decade, the Chamber has spent more money on federal lobbying than any other entity. *See US Chamber of Commerce*,] OPENSECRETS, <https://www.opensecrets.org/orgs/us-chamber-of-commerce/lobbying?id=D000019798> (last visited Jan. 11, 2023) (reporting that since 2008, the Chamber has spent over \$400 million dollars on lobbying aimed at federal regulators and Congress).

financing arrangements, and finally—the coup de grace—the enforceability of class-banning mandatory arbitration provisions in standard-form contracts.⁴

At first glance, an account of the Chamber’s efforts on behalf of its corporate membership seems unexceptional— after all, “local chambers of commerce and similar industry groups have long existed in this country” without courting much controversy.⁵ Moreover, interest-group lobbying itself is an accepted (albeit disdained) activity: labor unions, trade groups and other influential organizations spend tens of billions of dollars pressing Congress and federal agencies for rules beneficial to their members, or challenging rules deemed harmful. In 2021 alone, private corporations spent \$3.7 billion lobbying Congress and the federal agencies for favorable rules – and that number doesn’t include state and local lobbying, nor efforts aimed at foreign or international bodies.⁶ Viewed from this perspective, the Chamber’s political activities may seem benign, if shadowy: the work of Washington insiders keen on shielding their corporate clientele from burdensome regulations, increased taxes, and other obligations.

But the modern Chamber is no ordinary corporate lobbyist or trade association, it is not the typical litigant or campaign donor. The Chamber is all of these things, but it is also much more—it is a multi-tentacled, well-resourced, secretive strategy shop that, together with its affiliates, has “played a pivotal role in shifting the balance of power to business.”⁷ As I show in Part I, its evolution from milquetoast trade group to far-right political machine was spurred by the anti-corporat-

4. Christopher P. Bogart, *The Case for Litigation Financing*, 42 No. 3 LITIG. 46, 49 (2016) (“It is well known that the Chamber of Commerce is . . . generally critical of litigation in all forms [and is engaged in] an overarching effort to limit the use of the judicial process, regardless of the merits.”).

5. See, e.g., ALYSSA KATZ, *THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE* 25 (2015) (“New York State’s chamber dates back to the Revolutionary War. The National Association of Manufacturers emerged from the depths of a late 1800s recession.”); see also *U.S. Chamber of Commerce: The Early Years*, *supra* note 2 (reporting that in 1773, “a newly-formed Chamber of Commerce in Boston led a vigorous public protest against the tax that had been imposed by the British on tea [. . .] known as the Boston Tea Party”).

6. Jonathan O’Connell & Anu Narayanswamy, *Lobbying Broke All-Time Mark in 2021 Amid Flurry of Government Spending*, WASH. POST, Mar. 12, 2022 (reporting that lobbying spending rose 6% in 2021 as “aimed to roll back regulations on their industries . . . while others vied for a slice of the trillions in new spending”).

7. KATZ, *supra* note 5, at 7; see also Charlton Copeland, *Building a Litigation Coalition: Business Interests and the Transformation of Personal Jurisdiction in Brooke Coleman, Suzette Malveaux, Elizabeth Porter & Portia Pedro* (eds.), *A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES* at 197 (observing that, between 1987 and 2001, “the Chamber found its voice” in spearheading a campaign to limit state adjudicatory power over large corporations).

ist policies of the New Deal and the Great Society. In both periods, the Chamber sought to identify a common enemy as a means of rallying its members and other constituents.⁸ In the New Deal, that enemy was communism which, according to the Chamber, had infiltrated the very institutions that posed the gravest threat to free enterprise: organized labor and progressive policymakers.

Four decades later, in seeking to dismantle the Great Society, the Chamber hit upon an enemy even more potent than Soviet sympathizers: trial lawyers. Since then, the organization has had tremendous success sullyng lawsuits and badmouthing the plaintiffs' bar. Lawsuit immunity is, today, one of the Chamber's signature legislative and judicial projects, a primary strain of its complex DNA.⁹ On behalf of its secret roster of powerful corporations, the Chamber says and does what each alone would not.¹⁰ And as the nation has grown more divided along stark political lines, so too has the Chamber moved further to the right, tailoring its techniques to meet the political moment.¹¹

It is pure irony that the Chamber's greatest achievements in securing corporate immunity from litigation have come as the result of the very processes it seeks to dismantle, lawsuits. As I explain in Part II, even as the Chamber has worked to dispatch lawsuits as a means of regulating business practices, it has itself made aggressive use of the courts to restrain the work of plaintiffs' lawyers. Most prominently, in a series of hard-fought cases before the Supreme Court, the Chamber has helped establish the broad enforceability of class action-banning

8. See LYN SPILMAN, *SOLIDARITY IN STRATEGY: MAKING BUSINESS MEANINGFUL IN AMERICAN TRADE ASSOCIATIONS* (2012) (observing that trade associations "find it beneficial for fundraising" to identify a concrete problem facing the majority of their members, one that only the association "is in a good position to remedy").

9. To be clear, its support of forced arbitration is but one path to the Chamber's immunity goal; the organization is also a staunch advocate for heightened pleading and class certification standards, limitations on Art. III standing, and changes to attorneys' fee calculations.

10. The Chamber purports to operate by consensus vote of its membership, only taking positions where there exists "quasi-unanimity" among members. See Mark Alan Smith, *The Paradox of Unity: Business and Democracy in America* at 51 (June 25, 1997) (Ph.D. thesis, University of Minnesota). But see Lee Fang, *The Business of America is Dirty Tricks: Meet the United States Chamber of Commerce*, *THE BAFFLER* at 118 (2014) (writing that the Chamber's "decisions are largely made by a small clique of executives hailing from Fortune 500 companies, such as Pfizer and Dow Chemical").

11. See, e.g., Scott Bland, *Is the Chamber of Commerce No Longer Bipartisan?*, *ATLANTIC* (Mar. 31, 2014), <https://www.theatlantic.com/politics/archive/2014/03/is-the-chamber-of-commerce-no-longer-bipartisan/434391/>.

forced arbitration provisions, producing an indemnity from civil liability unparalleled in our legal history.¹²

This story—which lies at the intersection of law and politics, capitalism and democracy—is told in two acts. The first chronicles the Chamber’s historical progression from 1912 to the present, and the second focuses on the organization’s central role in the arbitration wars. In the latter, I detail the Chamber’s long-range, multi-faceted strategy for identifying and shepherding the most promising case vehicles to the Supreme Court, a grooming process made possible with the help of prominent corporate defense firms and their Fortune 100 clients. If there is a moral to this story, it is simply this: business interests, rather than exerting a beneficent influence upon national life,” represent a fundamental threat to our democracy when they seek to “eliminate courts as a means for ordinary Americans to uphold their rights against companies” .¹³ Through the Chamber, corporate America has done precisely that: co-opting public courts for their own use, relegating ordinary citizens to lesser or non-existent forms of adjudication and immunizing themselves from liability for all manner of wrongful acts.

II. MAPPING THE TRANSFORMATION

Even a brief sketch of the Chamber’s history reveals its startling transformation from a standard trade association—working on the sidelines to promote the interests of industry—to a full-blown political machine, not simply advising on policy but crafting and implementing policies. To be fair, some of the shifts in the Chamber’s trajectory may be explained by the evolution of corporate lobbying itself, which has grown “from a sparse reactive force into a ubiquitous and increasingly proactive one. . . .”¹⁴ As one measure, before the 1970’s, only a handful of companies thought it worthwhile to hire their own Washington lobbyists; today, many corporations “have upwards of 100 lobbyists [full-time] representing them” in Congress and before federal agen-

12. This essay focuses on class action-banning, pre-dispute arbitration provisions imposed via adhesion contracts, which require the parties to resolve disputes in one-on-one private proceedings rather than in court. I, and many others, have written extensively on the harmful effects of these provisions for consumers, employees and other weaker counterparties whose substantive legal rights are diminished or foregone where they are unable to adjudicate collectively in public courts.

13. Lina Khan, *Thrown Out of Court: How Corporations Became People You Can’t Sue*, Wash. Monthly (Summer 2014), <https://washingtonmonthly.com/2014/06/06/thrown-out-of-court/>

14. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (April 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/>.

cies.¹⁵ And modern-day corporate lobbyists do more than simply advocate for business-friendly legislation or rules—they draft legislation, educate staffers, fund like-minded think tanks to churn out studies, mobilize grassroots constituencies, and work to discredit the opposition.¹⁶

But while changes in the lobbying industry may generally track those of the Chamber, the organization exists in a category all its own—and its unique history helps explain its relentless assault on civil litigation. As I argue below, the modern Chamber was forged from two inflection points in which American business felt itself embattled and beleaguered, losing ground to government regulation and progressive causes: the New Deal and the Great Society. In both periods, the Chamber grew more militant in both its messaging and its methods in defense of free enterprise. And so, by the 1980’s, the modern Chamber had found its political voice and its common cause: corporate immunity.

A. *The Early Years, 1912–1950s*

On March 1, 1912, President William Taft summoned to Washington delegates and representatives from hundreds of private companies across dozens of industries to discuss a simple idea: as the federal government sought to expand its regulatory role, it needed to deal with a group that could speak with authority for the interests of business.¹⁷ The president and his Secretary of Commerce and Labor, Charles Nagel, were eager to create a centralized organization that would serve as the voice of business—a more efficient approach than dealing with the hundreds of delegations that regularly arrived in Washington “to make their demands heard and to press for advantages.”¹⁸ Savvy

15. LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING* at xiv (2015) [hereinafter DRUTMAN, *THE BUSINESS*]; see also Drutman, *supra* 14 (noting that “[t]o the extent that businesses did lobby in the 1950’s and 60’s (typically through associations), they were clumsy and ineffective”).

16. DRUTMAN, *THE BUSINESS*, *supra* note 15 at 1 (observing that corporate lobbyists “serve as de facto adjunct staff for congressional offices, drafting bills, providing testimony and generally helping legislation move forward”; and “provide policy expertise, helping stretched-too-thin staffers to get up to speed on a wide range of subjects and assisting administrative agencies in writing complex rules”).

17. KARL A. LAMB, *THE PEOPLE, MAYBE: SEEKING DEMOCRACY IN AMERICA* (1971). See also Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an “Associative State,”* 61 J. AM. HIST. 116 (1974) (reporting that the 1920’s witnessed “a growing federal bureaucracy that tried to use as well as serve business groups”); KATZ, *supra* note 5, at 26 (observing that efforts to regulate antitrust meant that “the federal government became involved in American commerce to an unprecedented degree”).

18. KATZ, *supra* note 5, at 26. See also Wilbur B. Jones, *Charles Nagel and the United States Chamber of Commerce*, 26 WASH. U. L. Q. 177, 178 (1941) (Nagel was “convinced that there

business leaders also understood the value of organizing behind a single entity, as the growth of commercial enterprise had resulted in “varied business groups [with] no sense of interdependence, and no single interest to bind them together.”¹⁹

From this initial meeting came the U.S. Chamber of Commerce, designed to serve as a “barometer of business opinion” and a means of securing “advice from those [] best qualified by experience and training to give it.”²⁰ Alongside other pressing news (such as the recent sinking of the *Titanic* on April 15, 1912) the Washington press heralded the launch of a national Chamber aimed at providing government with “powerful aid in solving harassing commercial problems.”²¹

In its first year, with Chicago banker Harry A. Wheeler serving as president, the Chamber grew its membership to include 297 separate commercial interests and over 750 individual members – representing, in the words of one observer, “a large part of the enlightened, forward-looking opinion of the industrial and professional leaders of this nation.”²² In these early years, the organization primarily studied and reported on various facets of the American economy,²³ issuing monthly newsletters²⁴ and occasionally opining on uncontroversial, pro-business policies such as cutting tariffs to increase international trade²⁵ and cutting taxes to stimulate private investment.²⁶ It endeavored to avoid “partisan politics,” and vowed not to “muck-rake, de-

should be a central organization at Washington in touch with chambers of commerce and trade associations throughout the country, and ‘able to keep purely American interests closely in touch with commercial affairs’”).

19. *U.S. Chamber of Commerce: The Early Years*, *supra* note 2 (describing corporations in the early 20th century as “a team of horses galloping in different directions”).

20. KATZ, *supra* note 5, at 26–27 (“[Taft’s] intention was that the organization would work with the White House and Congress as they developed laws and policies that affected business.”).

21. *U.S. Chamber of Commerce: The Early Years*, *supra* note 2 (quoting Washington Post).

22. Jones, *supra* note 18, at 188. Initially, the Chamber’s attention was given over “almost entirely to the consideration of certain industries, such as railroads and steel,” but as its membership grew, the Chamber embraced a trans-industry philosophy. *Id.*

23. See, e.g., *Gain In Business Seen: U.S. Chamber Of Commerce Finds Activity Ahead of Year Ago*, N.Y. TIMES, July 6, 1935, at 22 (reporting a 5% “higher level of production” over the past year); *Meeting to Discuss Building Decline: U.S. Chamber of Commerce Plans Washington Conference on Structural Interests*, N.Y. TIMES, Oct. 10, 1937, at 202 (reporting on Chamber-organized conference organized to “analyze the causes of the decline in residential building and to suggest means for stimulating activity”).

24. See *U.S. Chamber of Commerce: The Early Years*, *supra* note 2 (“The purpose of [*The Nation’s Business*] was to tell the story of the Chamber, as well as business in general. Printed in a newspaper format, 1,000 copies were distributed monthly, mostly to editors of leading newspapers and magazines.”).

25. See, e.g., *Supports Turkish Treaty: President of U.S. Chamber of Commerce Urges Senate to Ratify Treaty with Turkey*, N.Y. TIMES, Jan. 7, 1925, at 44 (quoting a letter from the President of the Chamber to the Senate Committee on Foreign Relations urging ratification of a trade

nounce or defame” its opponents.²⁷ As Alyssa Katz writes, “in its first decades, the Chamber was a careful and not especially vocal presence in Washington.”²⁸ It tried and generally succeeded in walking a “narrow, neutral path” shorn of political advocacy or interest group lobbying.²⁹

That path began to shift in the 1920’s and 30’s as American business confronted the worst economic downturn in modern history. While the nation had experienced a number of economic slumps in the 1800’s, none were as severe or widespread as the worldwide fiscal downturn that followed the stock market crash of 1929.³⁰ For private industry, this period posed an existential threat to the dominance of free-market ideologies that had long held sway; business interests worried that laissez-faire capitalism could not hold in the face of rising unemployment, labor strikes, homelessness and a loss of faith in private enterprise. Corporate America needed a trusted and savvy mouthpiece to effectively communicate its positions and deflect further proposals for economic regulation—and it naturally looked to the Chamber.³¹

The Chamber ably served this role during the Hoover administration, which was comprised of likeminded officials who shared the organization’s distrust of “big government” and stalwart belief in “economic self-government.”³² In the immediate wake of the crash, Hoover called upon the Chamber—led by his good friend, Julian

treaty that would enable American businesses to better compete with their European counterparts).

26. See, e.g., *U.S. Chamber of Commerce to Consider Tax Law Changes*, 1 NAT’L INCOME TAX MAG. 17 (1923); Turner Catledge, *Byrd Denounces New Deal on Taxes: Speak at U.S. Chamber of Commerce*, N.Y. TIMES, May 3, 1939, at 1.

27. *U.S. Chamber of Commerce: The Early Years*, *supra* note 2; see also Fang, *supra* note 10, at 123 (describing Wheeler as “a pragmatic and moderate executive . . . who refused to get involved in electoral politics, [and] preached ‘commercial patriotism’”).

28. KATZ, *supra* note 5, at 28 (“The group operated with painstaking formality, in deference to the kaleidoscope of different interests under its tent and the founding mandate to do business by rule of the majority.”).

29. *U.S. Chamber of Commerce: The Early Years*, *supra* note 2.

30. Major economic downturns had occurred in the 1830’s under President Martin van Buren, in the 1850’s under James Buchanan, during Ulysses Grant’s term in the 1870’s and, most notably, under Grover Cleveland in the 1890’s.

31. Chamber of Commerce of the United States, Manuscripts and Archives 4, Hagley Library (reporting that the “1920s were a decade of dramatic growth for the Chamber, which by 1929 had more than 16,000 affiliated business organizations”).

32. Hoover believed that voluntary business associations like the Chamber could effectively self-regulate, avoiding “the evils long associated with . . . governmental bureaucracies.” Hawley, *supra* note 17, at 117; see *id.* at 118 (in Hoover’s view, “unlike government bureaus, [organizations such as the Chamber] would be flexible, responsive and productive, built on service and efficiency rather than coercion and politics, and staffed by men of expertise and vision, not by self-serving politicians or petty drudges”).

Barnes—to help stabilize wages and shore up the economy.³³ But these and other efforts failed, as unemployment soared from five million in 1930 to over eleven million in 1931. By the time FDR entered the White House, inaugurating a “new, never-before-seen activism from government,” the Chamber and its corporate membership had been relegated to a marginal, almost-defensive role in economic policymaking.³⁴

For the most part, the Chamber’s “New Deal-era leadership remained resolutely moderate,” but members soon grew discomfited by FDR’s strong support of organized labor.³⁵ Their concern rose with passage of the National Labor Relations Act and the Wagner Act—federal laws protecting the rights of workers to organize into unions and strike when their labor demands went unmet.³⁶ These legal protections, along with rising employment, falling wages and poor working conditions, were enough to convince millions of American workers to join unions. Union membership grew from 4.1 million in 1915 to 14.3 million in 1945, and the number of strikes, walk-outs and sit-downs more than doubled in this period.³⁷

Faced with the mounting power of unions and an administration immune to its influence, the Chamber struggled for relevance. The organization itself was sound—the number of full-time employees “had ballooned to 300 by the end of 1921” and that year, it reported an operating budget of nearly \$400,000.³⁸ But how could it employ these vast resources to counter the unprecedented government intrusion into private enterprise? On what issue could it unite its disparate membership? In what would become a signature move, the Chamber’s

33. At the start of the depression, Hoover “call[ed] a series of White House Conferences with the nation’s leading financiers and industrialists and induced them to pledge that wage rates would not be lowered and that they would expand their investments.” *Id.* at 132. But it soon became impossible for companies to maintain wages given declining profits, resulting in massive unemployment.

34. KATZ, *supra* note 5, at 30 (FDR’s administration instituted “[p]rice controls, the right to organize labor unions, . . . new taxes for Social Security, and unemployment insurance – President Roosevelt and his New Deal engineers would bring on a succession of repulsive obligations for American businesses . . .”).

35. Fang, *supra* note 10, at 123 (writing that Henry Harriman, president of the Chamber in this era, supported FDR’s public works program and other early initiatives but parted ways on the subject of organized labor).

36. See National Industrial Recovery Act, 48 Stat. 195 (1933); National Labor Relations Act, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169; see also Chamber of Commerce of the United States, Manuscripts and Archives, *supra* note 31, at 5 (reporting that “when the New Deal began to adopt a reform agenda with the passage of the Wagner and Social Security acts, [the Chamber] became a leading voice expressing business’ opposition”).

37. Graham Boone, *Labor Law Highlights, 1915–2015*, MONTHLY LAB. REV., U.S. BUREAU OF LAB. STAT. (Oct. 2015), <https://doi.org/10.21916/mlr.2015.38>.

38. See *U.S. Chamber of Commerce: The Early Years*, *supra* note 2.

leadership determined that the only course of action was to discredit the opposition in both labor and government. Accordingly, these leaders—“bent on transforming the Chamber into a more partisan organization”—launched an all-out smear campaign accusing union leaders and pro-labor officials of being communists and socialists intent on destroying the nation’s economy.³⁹ The Chamber published hundreds of red-baiting reports purporting to show “Communist infiltration” into organized labor and “high-ranking government posts,” which left “America’s democracy exposed to grave danger from within.”⁴⁰

The Chamber’s fear tactics were enormously effective in undermining the labor movement, legitimizing “what had been a fringe movement and set[ting] the table for the paranoia and purges soon to follow.”⁴¹ In this period, the Chamber abandoned all pretense of political neutrality; it actively “urged members to sway elections” and sought out “ways to assert itself as a political force” to be reckoned with.⁴² Having shed its initial pledge to abstain from muckraking or defaming its opponents, the Chamber profited from hard-knuckled politics and intensified its communications apparatus.⁴³ By mid-century, the organization was again ascendant, having largely “re-established in the people and in the government the favor which business had lost during the depression” by adopting an intensely partisan pub-

39. Fang, *supra* note 10, at 124. See, e.g., *Communist Purge in Unions Is Urged: Chamber of Commerce Study Contends Elimination Would Aid Labor-Owner Relations*, N.Y. TIMES, Mar. 13, 1947 (quoting the Chamber that “the problem of communism exists in scattered locals of the American Federation of Labor and in a more serious way in international unions”); *To Fight Reds Locally: Chamber of Commerce Aims to Guide Communities in Drive*, N.Y. TIMES, Oct. 29, 1948 (urging local communities to “combat . . . infiltration by communists” into unions); *Chamber Opens Campaign to Oust Reds in U.S. Posts*, N.Y. TIMES, Oct. 10, 1946 (reporting that communists had “real success” infiltrating unions); see also Katz, *supra* note 5, at 32 (“The Chamber had estimated that some four hundred individuals within the federal government . . . were members or sympathizers of the Communist Party, and that forty thousand more were members of the ‘Communist-dominated’ Congress of Industrial Organizations.”).

40. KATZ, *supra* note 5, at 31–32 (warning the public that “Communists and their followers have achieved leadership positions in worker unions where they can do immense harm”). See also COMMUNIST INFILTRATION IN THE UNITED STATES (Chamber, 1946); COMMUNISTS WITHIN THE GOVERNMENT: THE FACTS AND A PROGRAM (Chamber, 1947); COMMUNIST WITHIN THE LABOR MOVEMENT (Chamber, 1947).

41. KATZ, *supra* note 5, at 32. See also Fang, *supra* note 10, at 124 (reporting that the “Chamber provided research to the House Committee on Un-American Activities and, later, to [Senator Joseph] McCarthy”).

42. KATZ, *supra* note 5, at 33. In 1959, for example, the Chamber distributed “some forty thousand sets of an audiovisual education series called Action Course in Practical Politics [which] detailed every step a local chamber or company would need to take to influence an election.” *Id.* at 33–34.

43. *U.S. Chamber of Commerce: The Early Years*, *supra* note 19.

lic image.⁴⁴ At the dawn of the 1960's, the Chamber's membership had grown to over 2.5 million dues-paying members, unified behind the organization's strong support of capitalism in the face of direct challenges, both domestic and foreign, and its willingness to engage in all manner of political activism.⁴⁵

B. *The Chamber Gets Political, 1960-1985*

At a dinner celebrating the Chamber's 50th anniversary, President Kennedy gave an address, remarking that "there are some who say that the events of April 1962 have [] marked a turning point in the relations between government and business."⁴⁶ The President was referring to a stand-off between his administration and the nation's steel manufacturers over the price of steel, which ended when Kennedy took to the airwaves to blast the industry for "acting in defiance of the public interest."⁴⁷ Indeed, the early 60's was a defining moment for "the relations" between public regulation and private enterprise, as Democratic majorities in Congress went "on a regulatory binge . . . spurred on by a new wave of public-interest groups" and the grass-roots efforts of Ralph Nader and others.⁴⁸ The newly created federal

44. James J. Stansell, *A Rhetorical Study of the Public Speaking of Eric A. Johnston During His Presidency of the United States Chamber of Commerce at 2* (1952) (Ph.D. dissertation, Louisiana State University); see also Fang, *supra* note 10, at 125 (writing that by "the latter half of the last century, the Chamber [had] settled into its new identity as a vigilant guardian of the laissez-faire way, lobbying against much of the modern welfare state").

45. See Allen W. Dulles, CIA Director, Speech Before U. S. Chamber of Commerce (April 29, 1958), reprinted in the New York Times, available at <https://www.proquest.com/docview/114612094/2706C9AE9A3E44CBPQ/40?accountid=15178>.

46. See 100 Years Standing Up for American Enterprise, <https://www.uschamber.com/timeline/>

47. Gerald Berendt et al., *Arthur J. Goldberg's Legacies to American Labor Relations*, 32 J. MARSHALL L. REV. 667, 722 (1999). The authors explain that Kennedy's "jawboning policy" "frightened the business community, which feared a return to the acrimonious relations, encountered during the Truman administration. *Id.* at 722-23.

48. Drutman, *supra* note 14. See also Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 372,378 (2016) (observing that 1970's witnessed "an unprecedented expansion of private rights of action" as the result of both federal statutes that created new "federal rights and private rights of action by which to enforce those rights" and new "attorneys' fee provisions" that provided public interest lawyers with resources to pursue litigation).

Nader, "the self-appointed, nationally-recognized leader of . . . consumer disquiet" in the 1960s and 70s, grew to prominence with his indictment of the auto industry in *Unsafe at Any Speed*—along with the revelation that General Motors had spied on him. Nicholas Lemann, *The Last Battle Over Big Business*, NEW YORKER (May 31, 2021), <https://www.newyorker.com/magazine/2021/06/07/the-last-battle-over-big-business>. Nader later sued G.M. and "used the proceeds of the resulting settlement" (*id.*) to establish the Center for the Study of Responsive Law, which "served as a staging area for 'Nader's Raiders'—groups of idealistic students and others who investigated industries or business practices to expose consumer abuses." ROBERT N. MAYER, CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE 29 (1989).

agencies of the Great Society—the Environmental Protection Agency, Consumer Product Safety Commission, and Occupational Safety and Health Administration—intervened in previously unregulated business practices, and many federal statutes endowed citizens with broad enforcement authority via private rights of action.⁴⁹ Meanwhile, the U.S. economy began to weaken in the early 1970's; the rise of foreign competition and signs of “stagflation” would eventually lead to a decade-long recession.⁵⁰ Like a perfect storm, these issues converged so that by 1971, “the American business corporation, and consequently America itself, suddenly appeared economically vulnerable.”⁵¹

For its part, the Chamber in the 1960's “largely sat by idly, unsure of what to do,” finding itself stuck “on the sidelines” of major policy debates over the burgeoning regulatory state.⁵² Despite its earlier success “at getting business involved in politics,” the “new political mood” proved inhospitable to the Chamber's pro-business message.⁵³ As a result of this perceived disengagement, the organization began to suffer “declining membership rolls” amidst “a lingering sense of uncertainty” about its role in reviving the fortunes of American business.⁵⁴

This period of political passivity came to a swift end on August 23, 1971, when Lewis F. Powell, Jr.—a corporate lawyer in Virginia and very-soon-to-be Supreme Court Justice—sent a fateful memo to his

49. See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS* 116-17 (2010) (“Washington undertook a vast expansion of its regulatory power, introducing tough and extensive restrictions and requirements on business in areas from the environment to occupational safety to consumer protection.”); KATZ, *supra* note 5, at 34 (“During [the 1970's], the federal government spawned twenty-one regulatory agencies . . . and some 120 regulatory measures.”).

50. See “*An Economic Dilemma*,” *ECONOMIST*, June 26, 1971 at 53–54 (describing the stagflation of the era as caused by rising inflation coupled with rising unemployment); DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 9 (1989) (describing the economic woes of the period, including “[p]ersistent double-digit inflation, declining real wages and stagnant family income, increased dependence on imported oil, and a dramatic growth in imports in highly visible sectors of the American economy”).

51. Vogel *supra* note 50 at 9; see also Smith, *supra* note 10, at 102 (describing the “public's growing suspicion of and perhaps even hostility toward the nation's corporations,” as reflected in newspaper and magazine articles of the era—such a Newsweek “cover story on May 24, 1971 with the provocative title, ‘The American Corporation Under Fire,’” and a 1972 Business Week story titled “America's Growing Antibusiness Mood”).

52. Drutman, *supra* note 14. See also VOGEL, *supra* note 50, at 7 (describing this period as “the nadir of business political influence in the postwar period”); KATZ, *supra* note 5, at 37 (“What was the U.S. Chamber of Commerce doing as this great threat to business brewed? Not much . . . the Chamber's influence against the sheer force of the Great Society remained tepid.”).

53. KATZ, *supra* note 5, at 36–37 (observing that “the Chamber's influence against the sheer force of the Great Society remained tepid” into the early 1970's).

54. *Id.*

friend Eugene Sydnor, a muckety-muck at the Chamber.⁵⁵ Powell's memo was both a call-to-arms and a warning: he declared that the very foundation of America's economic system was "under broad attack," and cautioned that business would continue to be saddled with onerous regulations and higher costs if it did not fight back.⁵⁶ Declaring Ralph Nader "the single most effective antagonist of American business," Powell urged American business to duplicate his tactics by making more effective use of national media. Most importantly, Powell stressed that the Chamber was to play a critical role in this battle to restore business's rightful position in American society.⁵⁷ From his vantage point, companies across all sectors of the economy faced a common threat in the "increasingly powerful regulatory agencies"; "to craft an appropriately broad political defense," these disparate entities needed a centralized organization to take aggressive actions on their behalf that none dared take on their own.⁵⁸

The Chamber was immediately galvanized by Powell's battle cry.⁵⁹ Jumping into the political fray, it began lobbying for regulatory roll-backs, "actively us[ing] the country's economic travails—inflation, recession, energy crisis—to argue for a new vision of politics" linked to social and economic conservatism.⁶⁰ Fully abandoning its posture of political agnosticism, the organization "identified vulnerable Republicans in Congress" and, backed by its powerful corporate membership, promised political (read: financial) support in exchange for delaying

55. Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce, "Attack on American Free Enterprise System" (Aug. 23, 1971), available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=Powellmemo>.

56. *Id.* ("Business must learn the lesson . . . that political power is necessary; that such power must be assiduously cultivated; and that when necessary, it must be used aggressively and with determination – without embarrassment and without the reluctance that has been so characteristic of American business.").

57. *Id.* ("Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations."); *see also* KATZ, *supra* note 5 at 38–39 (Powell "advised the Chamber that it was at war and that it would have to arm itself to counter the ideological programming of the anti-capitalist movement").

58. KATZ, *supra* note 5 at 38–39 ("This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.").

59. *Id.* at 44 (observing that the "Chamber changed tactics: no more would it stay on the sidelines of major fights . . . it would fight fire with fire").

60. BENJAMIN COOPER WATERHOUSE, *A LOBBY FOR CAPITAL: ORGANIZED BUSINESS AND THE PURSUIT OF PRO-MARKET POLITICS, 1967–1986* (Harvard 2009).

or derailing regulatory efforts and enacting pro-business measures.⁶¹ The Chamber also “mobilized from below,” coordinating ersatz grassroots campaigns to press members of Congress on key issues.⁶²

The Chamber also partnered with other conservative groups of the era (such as the newly-formed Business Roundtable and Coors-funded Heritage Foundation) to change “outcomes on specific pieces of legislation,” using their combined “size and wide-ranging network” to mobilize political support for pro-business initiatives.⁶³ For instance, these groups joined forces to form the Consumer Issues Working Group (CIWG) as a “united front” against federal consumer protection legislation.⁶⁴ When consumer groups began advocating for an independent consumer protection agency, the CIWG blocked progress on this initiative, helping defeat multiple Congressional bills with aggressive lobbying and targeted campaign spending.⁶⁵ [By the end of the decade, the resources of the business lobby easily trounced that of the consumer groups. By 1979, for example, corporations and trade associations spent nearly \$1 billion in federal lobbying efforts, while the three major consumer groups—the Consumer Federation of

61. KATZ, *supra* note 5, at 43 (writing that the Chamber raised the “specter of political fallout” should these representatives fail to heed its message); *see also* Lee Joan Epstein, *Conservatives and the Courts: A New Perspective on Interest Group Litigation* at 137 (1983) (Ph.D. dissertation, Emory University) (“Since the enactment of FECA in 1971, the Chamber has been ‘actively encouraging corporations to form political action committees and solicit funds from executives and stockholders to help candidates friendly to business’”).

62. KATZ, *supra* note 5, at 43 (writing that the Chamber pioneered a “teleconferencing interactive on-line network with receiver sites throughout the country” that it used to bring members “together by video to coordinate lobbying efforts”); *id.* at 45 (observing that “[d]ecades before ubiquitous email blasts,” the Chamber’s “mailed letters served as a potent source of persuasion”); *id.* at 46–48 (reporting that by forming ‘Citizen’s Choice’ in 1976, the Chamber pioneered “‘Astroturf’ lobbying – deploying purported citizens’ groups to advocate for laws and regulations favored by businesses that were paying the bills”).

63. Patrick J. Akard, *The Return of the Market: Corporate Mobilization and the Transformation of U.S. Economic Policy, 1974–1984* at 106 (1989); *see also* Livia Gershon, *Why Ronald Reagan Became the Great Deregulator*, *JSTOR DAILY* (Feb. 9, 2017), <https://daily.jstor.org/why-reagan-became-the-great-deregulator/> (observing that these “groups advanced their plans cooperatively,” and “had interlocking boards of directors and coordinated their policy campaigns”).

64. Akard, *supra* note 63, at 234 (describing the CIWG as “an important innovation” because “prior to that time, most business lobbying was done by individual firms promoting their own interests, or by trade associations for specific industries,” whereas the CIWG represented a rare instance of “pan-industry cooperation”).

65. *Id.* at 233, 236 (writing that *Fortune* magazine praised the “newly unified business lobby” for chipping away at the public’s previously positive perception of a federal consumer agency until “it became known as a proposal for yet another ‘super agency’ and, of course, no one wanted that”); *see also* Diya Berger, *A Tale of Two Movements: Consumer Protection in the U.S. from 1969 to 2010* at 35–36 (2013) (observing that from 1969 to 1978, the CIWG helped to defeat twelve separate congressional bills seeking to establish a federal consumer protection agency);

America, Ralph Nader's Congress Watch, and the National Consumers League—together spent only about \$352,000.⁶⁶]

The Powell memo also spurred the Chamber to seek media outlets to communicate its “pro-business, pro-free enterprise” message, expanding its broadcast outreach from radio to television.⁶⁷ In fall 1979, it debuted a nationally-syndicated weekly television show, *It's Your Business*, and announced plans to “build a multimillion dollar broadcasting studio—complete with satellite transmitters—to help get its viewpoint on the air.”⁶⁸ In the words of then-Chamber president Richard Leshner, “our main mission in life is to influence the United States Congress” and television was fast becoming the means to that end.⁶⁹

Once on the brink of obsolescence, the Chamber thoroughly reinvented itself in this era, adopting political strategies and technological solutions to maximize its influence.⁷⁰ From 1975 to 1985, it “doubled its membership and trebled its annual budget,” so by the mid-1980's, it claimed nearly a million members representing every segment of the American economy.⁷¹ Its bold political activism cemented the Cham-

66. Akard, *supra* note 63 at 233 (citing Kathleen O'Reilly, Testimony before the House Subcommittee on Legislation and National Security, April 21, 1977 (quoting the executive director of the Consumer Federation of America that “as the largest consumer group in the country, we have an annual budget of under \$300,000 By way of comparison with the Chamber of Commerce, their budget is about \$20 million.”)).

67. Starting in 1956, the Chamber had produced a half-hour radio show called *What's the Issue?* and in 1968, it launched a television show called *Enterprise* that was carried on 40 local cable channels. VOGEL, *supra* note 50 at 217 (reporting that between 1970 and 1978, “annual expenditures to improve the corporate image or promote good will increased from \$149 million to \$330 million”).

68. See Jerry Knight & Lawrence Laurent, *Chamber Starting Business TV Show*, WASH. POST, Aug. 30, 1979 (reporting that *It's Your Business* would be carried by 74 television stations, reaching about 55 percent of the nation's homes and that the Chamber had “budgeted \$1.7 million for the first year's shows”). The show was scheduled in time slots that put it in direct “competition with the interview programs on the three networks each Sunday.” *Business to Fill TV “Void,”* N.Y. TIMES, Sept. 4, 1979, at 62. Later, the Chamber would launch the American Business Network, aka BizNet, “a business-oriented, closed-circuit private television subscription service transmitted via satellite from the chamber's studios in Washington, D.C., to its members.” ROBERT L. HEATH & MICHAEL J. PALENCHAR, *STRATEGIC ISSUES MANAGEMENT: ORGANIZATIONS AND PUBLIC POLICY CHALLENGES* 232 (2008).

69. Knight & Laurent, *supra* note 68.

70. See, e.g., VOGEL, *supra* note 50, at 10–11 (for example, “the sponsorship of research studies to influence elite opinion, the attention to the media as a way of changing public attitudes, the development of techniques of grassroots organizing to mobilize supporters in congressional districts, and the use of ad hoc coalitions to maximize political influence”).

71. Michael DeCourcy Hinds, *The Consumer Movement: What Happened?*, N.Y. TIMES, Jan. 21, 1983, at A16; see also KATZ, *supra* note 5, at 46 (describing “the Chamber's rise as the most fully realized political influence machine the nation has ever seen [as] a direct reaction not the stunning success of consumer, environmental and labor groups”); VOGEL, *supra* note 50, at 199 (“In 1980, [the Chamber] had a budget of \$55 million and employed 45 full-time lobbyists.”).

ber's strong association with the Republican party—an alliance that would only grow stronger over the next several decades.⁷² When the GOP's newly-elected leader, Ronald Reagan, addressed the Chamber in 1980, he pledged the organization would enjoy a closer working relationship with his administration than it had with his predecessors; with that proclamation, the Chamber's powerful role in politics was solidified.⁷³

C. *The Chamber Takes Aim, 1985-present*

By the mid-1980's, the U.S. Chamber of Commerce had come fully into its own as a conservative, pro-business lobbying and litigation powerhouse. Under Reagan, the Chamber and its cohort were “finally able to begin dismantling the New Deal state and Lyndon B. Johnson's Great Society,” and the business lobby was once again a dominant voice in Washington.⁷⁴ Reagan's election had “solidified the influence of market-based predispositions in American government,” heralding a protracted period of deregulation, small government and solid Republican rule.

From this secure perch, one might have expected the Chamber to bask in its success and relish its proximity to power. But internal politics within the organization erupted in a struggle between apolitical moderates and deeply-partisan extremists. Tellingly, many of the latter were “far-right House members, including the influential Texas dyad of Dick Armey and Tom DeLay”—a signal that electoral politics had fully infiltrated the Chamber.⁷⁵ By 1997, the extremists prevailed, propelling the group further to the right by selecting Thomas Donahue as their new leader.⁷⁶

The Chamber's growth in this decade is part of the broader rise of the conservative legal movement, as detailed by numerous scholars. *See, e.g.*, STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2009).

72. Aaron J. Rabinowitz, *The Fourth Branch of Government: The Role of Interest Groups, the Media, and Political Advertisements in Contemporary Health Policy Debates* at 27 (Feb. 2012) (Ph.D dissertation, Harvard University) (reporting that the Chamber “contributed overwhelmingly to Republican candidates for federal office during the past 6 election cycles”).

73. VOGEL, *supra* note 50, at 4–5 (observing that during the Reagan presidency, commentators “argued that the administration's probusiness policies . . . revealed the vulnerability of the American political system to a highly organized and well-financed campaign by the nation's corporate elite to increase its economic and political power”).

74. Claire Bond Potter, *The Shadow of Ronald Reagan is Costing Us Dearly*, N.Y. TIMES (Nov. 11, 2021) <https://www.nytimes.com/2021/11/11/opinion/reagan-social-welfare.html>.

75. Fang, *supra* note 10 at 125.

76. *Id.* (describing a conservative “ouster” of Chamber president Richard Leshner for his failure to “categorically oppose everything that [President] Clinton was in favor of”). *See also* Terry Carter, *A Lesson Learned*, 84 ABA J. 70, 70 (May 1998) (writing that Donahue's ascent signaled

Donahue's first task was to find an issue on which to unify members—a rallying cry that would tap into the populist vein of the Chamber's free-market ideology. And he came to the job with the ideal foe in mind, hitting upon a policy mission that would become one of the Chamber's highest priorities over the next four decades: solving the nation's so-called "liability crisis."⁷⁷ Concern over the alleged "litigation explosion" had been building for years in conservative circles: a decade earlier, *Fortune* magazine had blamed this paroxysm on "consumerism, environmentalism, and other forms of Naderism," warning that the nation was headed down a dangerous path "in which business is endlessly besieged by legal problems" and even the Chief Justice of the Supreme Court decried the "legal activism" of the era.⁷⁸ In response, a number of states had already enacted legislative limits on tort liability.⁷⁹

Enter the Chamber, with its vast financial resources and tried-and-true political tactics, ready to do battle against the "unholy alliance" of plaintiffs' lawyers and "activist" state court judges.⁸⁰ Just as the Chamber and its allies had concocted a communist threat in the 1930's and 40's, so too was its battle against the plaintiffs' bar a false flag operation, as businesses of the era reported that lawsuit abuse was of minor concern.⁸¹ Nonetheless, the Chamber's onslaught against frivolous litigation helped to shape and coalesce the argument that litigation presented a grave threat to the U.S. economy, and Donahue

an end to the "careful grayness that ha[d] characterized Chamber leadership during its 85 years").

77. Kenneth B. Noble, *Liability Insurance Reported Easier to Get Than Year Ago*, N.Y. TIMES, March 27, 1987, at D18 (quoting Jeffrey Joseph, vice president for domestic policy at the Chamber that the organization's "primary focus" was to remedy an "out of control" civil liability system). Much has been written debunking the very existence of a "litigation explosion." See e.g., Marc Galanter, *The Day After the Litigation Explosion*, 46 MD L. REV. 3, 5-8 (1986) (asserting that, despite a "phalanx of mournful and indignant comm commentators concur[ring] that America is in the throes of a litigation crisis requiring urgent attention from policymakers," there is no empirical data do not support this notion).

78. Eleanor Carruth, *The "Legal Explosion" Has Left Business Shell-Shocked*, FORTUNE, April 1973, at 65). See also Chief Justice Warren E. Burger, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), transcript available at <https://archive.mpr.org/stories/1976/04/07/warren-burger-agenda-for-2000-ad-a-need-for-systematic-anticipation>.

79. These included adoption of a "collateral source" rule offsetting financial benefits received from other sources and caps on punitive and noneconomic damages. By 1985, forty-six states had enacted some type of tort reform legislation.

80. See *Buying Justice*, FORBES (July 21, 2003), <https://www.forbes.com/forbes/2003/0721/064.html?sh=569a1e01592b> (describing the Chamber as "waging a secret election-campaign war on judges who favor plaintiffs in tort cases").

81. Surveys of corporate risk managers and general counsels in this era found the majority rejected the idea that the country was in the midst of a liability crisis. See NATHAN WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE REPORT NO. 893 4 (1987).

proved a perfect match for this new version of the Chamber, “fashion[ing] himself as a general leading a campaign” to beat back greedy lawyers and their costly lawsuits.⁸²

While a full recounting of the Chamber’s war against lawyers is beyond the scope of this short essay, a few highlights warrant mention. First, the organization redoubled its efforts at the state level, seeking to influence legislators and judges with faux grassroots operations,⁸³ an army of full-time state lobbyists,⁸⁴ streamlined local lobbies,⁸⁵ and a massive war chest of campaign donations.⁸⁶ Historically, state elections had been relatively quiet affairs—but in the 1980’s and 90’s, the Chamber began pouring unprecedented resources into these races, running negative ads distorting the records of candidates it opposed and ranking states’ lawsuit “climates” based on their hospitality to business.⁸⁷ “Having witnessed the resounding success of progressive groups in registering new voters loyal to their causes in the 1970’s, the organization launched “extensive get-out-the-vote initiatives” to oust

82. *Id.*; see also Terry Carter, *Boosting the Bench: The U.S. Chamber of Commerce Is Spending Big Bucks to Influence Judicial Elections*, 88 ABA J. 28, 32 (Oct. 2002) (quoting Donahue that “trial lawyers are sapping the vitality out of American enterprise,” and are “busy reworking legal principles to enrich themselves, regardless of the impact on society”). See also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 749 (1998) (reporting that the Donahue “launched a campaign against ‘class action suits and ambulance chasing trial lawyers, who suck billions of dollars out of consumers and companies. . . .’” (internal citations omitted)).

83. Chamber-funded “local” groups with near-identical names such as “New Jersey Citizens Against Lawsuit Abuse” and “Virginians for Lawsuit Reform” worked to make lawsuit reform “a decisive issue in local legislative races.” *Civil Law Minutiae to Become an Issue*, N.Y. TIMES, June 7, 1999 (describing “Texans for Lawsuit Reform” as one of “the largest political action committees in the state,” sponsoring “heavily financed media campaigns” aimed at demonizing plaintiffs’ lawyers).

84. See Anna Johns Hrom, *Between Fraud Heaven and Tort Hell: The Business, Politics, and Law of Lawsuits* at 120–22 (2018) (Ph.D. dissertation, Duke University).

85. The Chamber facilitated a series of mergers of its local chapters with other powerful business lobbies; for example, the Alabama Chamber of Commerce merged with the Associated Industries of Alabama to form the Business Council of Alabama – a “business super-lobby” dedicated to litigation reform. See *id.* at 104–14. Between 1980 and 1985, local chambers in thirty-eight states “had undertaken a similar consolidation venture.” *Id.* at 113.

86. See Grace Aylmer, *U.S. Chamber Tips the Scales in State Supreme Court Elections*, CHAMBERWATCH (Nov. 10, 2016), <https://chamberofcommercewatch.org/u-s-chamber-tips-scales-state-supreme-court-elections/>.

87. See, e.g., *Buying Time 2004: Television Advertising in State Supreme Court Elections*, BRENNAN CTR. (Sept. 8, 2004), <https://www.brennancenter.org/our-work/analysis-opinion/buying-time-2004-television-advertising-state-supreme-court-elections>. In 2002, the Chamber launched its annual “Lawsuit Climate Survey” which purported track excessive corporate liability exposure in various states and counties. See Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 971 (2009) (asserting that the Chamber’s surveys, used “to attack courts and juries” was “substantively inaccurate and methodologically flawed”).

“activist” judges who were “in bed” with the plaintiffs’ bar, “systematically chang[ing] the composition of influential state courts . . . because of the sheer amount of money involved and the maliciousness of its advertising campaigns.”⁸⁸ By 2000, several states were targeted as “proving grounds for the U.S. Chamber of Commerce’s new war on lawyers” and courts, and the organization spent nearly \$10 million to influence judicial elections in Alabama, Illinois, Michigan, Mississippi and Ohio.⁸⁹ By 2020, that sum had more than doubled as the Chamber worked elections in sixteen states.⁹⁰

Second, the Chamber funded ad campaigns and commissioned studies aimed at tilting public perception against plaintiffs and their lawyers.⁹¹ The Chamber’s efforts were part of a broader movement in this period to finance “think tanks and journals, foundations and advocacy groups, all devoted to promoting core conservative ideals of judicial restraint, social order and deregulation.”⁹² This nascent network provided the Chamber with information it could use in its war against lawyers.⁹³ Here, the Chamber was aided by a series of high-profile jury verdicts awarding eye-popping damages.⁹⁴ In the hands of the Chamber, these verdicts—shorn of all facts and pathos—served as an indictment of an “out of control” liability regime in desperate need of reform.

And finally, the Chamber continued to advocate for lawsuit reform at the federal level, perfecting its now-distinctive brand of “hyperbole

88. STEPHANIE MENCIMER, *BLOCKING THE COURTHOUSE DOOR* 71 (2006).

89. Terry Carter, *Boosting the Bench: The U.S. Chamber of Commerce is Spending Big Bucks to Influence Judicial Elections*, 88 ABA J. 28, 30 (2002) (“With surprising speed, the national chamber has become a major player in judicial elections. For now, the efforts are in a handful of states it believes are inhospitable to business.”).

90. See Douglas Keith, *The Politics of Judicial Elections, 2019–20*, BRENNAN CTR. (Jan. 25, 2022), <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2019-20>. In all, the Chamber has spent \$143 million on all elections at the state and federal levels since the 2010 cycle.

91. See, e.g., MENCIMER, *supra* note 88, at 21.

92. Gilles, *supra* note 48, at 375 (internal citations omitted).

93. ANDREW E. BUSCH, *REAGAN’S VICTORY: THE PRESIDENTIAL ELECTION OF 1980 AND THE RISE OF THE RIGHT* 181 (2005). As Busch notes, this nascent network later evolved into a “new media—based in the Internet, talk radio, and the ‘blogosphere’ and much friendlier to Republicans and conservatives than the old mainstream media.” *Id.*

94. For example, in 1994, a federal jury ordered Exxon to pay \$5 billion dollars to Alaskans harmed by the Valdez oil spill. See Keith Schneider, *Exxon is Ordered to Pay \$5 Billion for Alaska Spill*, N.Y. TIMES, Sept. 17, 1994. That same year, a jury awarded \$2.9 million in punitive damages against McDonald’s for burns caused by scalding hot coffee. See Hilary Stout, *Not Just a Hot Cup Anymore*, N.Y. TIMES (Oct. 21, 2013), <https://www.nytimes.com/2013/10/21/booming/not-just-a-hot-cup-anymore.html>. See William Glaberson, *The \$2.9 Million Cup of Coffee: When the Verdict Is Just Fantasy*, N.Y. TIMES, June 6, 1999, at D1 (“Unusual or big verdicts make news.”).

and doomsday scenarios” to prod legislators to enact limits on litigation. Strategic deployment of campaign donations and citizen petitions made the Chamber a formidable political actor—a position it used to secure promises of lawsuit reform.⁹⁵ In the mid-1990’s, its efforts bore fruit with the Republicans’ “Contract with America,” which included initiatives to “stem the endless tide of litigation” that had been ghost-written by the Chamber.⁹⁶ A decade later, the Chamber’s agenda was again met with enthusiasm by George W. Bush, who had ushered in tort reform while Governor of Texas and sought to replicate that success on the federal level.⁹⁷

By any measure, the Chamber’s multi-pronged strategy for waging a war on plaintiffs’ lawyers was extremely successful in changing both laws and minds⁹⁸—all of which inured to the organization’s benefit, as it “experienced a period of substantial growth” in membership and funding.⁹⁹ Indeed, in just three years, Donahue had “more than doubled the contributions to the organization, mostly from large corporate donors, to more than \$100 million a year.”¹⁰⁰ Some observers

95. See Gretchen Morgenson & Glen Justice, *Taking Care of Business, His Way: Hardball Tactics at U.S. Chamber*, N.Y. TIMES, Feb. 20, 2005, at B1 (reporting that the Chamber “spent more than \$53 million on lobbying in 2004, more than any organization has ever spent in a year”).

96. Republican Contract with America, U.S. House of Representatives (1994), available at <https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html>. See also Common Sense Legal Reforms Act, H.R. 10, 104th Cong., 1st Sess. (1995); Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. (1995). See also Susan J. Becker, “Common Sense Legal Reforms Act” Takes Center Stage, 20 LITIG. NEWS 4 (1995) (reporting that Republicans characterize the bill as “vital to curb the overuse and abuse of the legal system which they claim costs United States citizens \$300 billion a year for ‘needlessly higher-priced goods and services’”).

97. THOMAS O. MCGARITY, *THE PREEMPTION WAR WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 3–4 (2008). (During his 2000 presidential campaign, George W. Bush complained that “vexatious” litigation “was threatening the economic vitality of American businesses” and he promised to make tort ‘reform’ a high priority in his presidency.).

98. See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995); Prison Legal Reform Act, 42 U.S.C. § 1997e; Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005); see also David Rogers & Monica Langley, *Bush Set to Sign Landmark Bill on Class Actions*, WALL ST. J., Feb. 18, 2005, at A1 (“Future civil actions will be subject to a new, more federalized framework that would remove cases from state courts if the aggregate claims are more than \$5 million.”).

99. See, e.g., Randall Samborn, *Anti-Lawyer Attitude Up; But NJL/West Poll Also Shows More People Are Using Attorneys*, 15 NAT’L L. J., Aug. 9, 1993, at 1; *Civil Law Minutiae Become an Issue*, N.Y. TIMES, June 7, 1999 (“The change in political attitudes has been so dramatic that some politicians now seem to view measures protecting businesses from suit as uncontroversial.”). See also Tom Hamburger, *U.S. Chamber of Commerce Grows Into a Political Force*, L.A. TIMES, March 8, 2010 (reporting that the Chamber had “signed up some 6 million” members and raised “record-setting amounts of money” to fund a “political operation [that] has begun to rival those of the major political parties”).

100. Carter, *supra* note 82, at 32.

attributed the Chamber's fundraising success to the organization's prominence on the hot topic of lawsuit reform, along with Donahue's "offer to let big corporations remain anonymous while [the Chamber] lobbies for them" —i.e., to "take on difficult public relations campaigns" that might sully a corporation but would do no damage to the "Teflon Chamber."¹⁰¹ Others pointed to his tireless politicking and hardball tactics.¹⁰² But no one could doubt that Donahue had "reinvented the Chamber as an unanswerably powerful arbiter" of the issues and enemies that galvanized corporate America—and in the years to follow, would lead the organization in pursuing the ultimate goal of corporate immunity from litigation.

III. THE CHAMBER GOES TO COURT

The second act shifts from the Chamber's political strategy in the executive and legislative branches to its work in the courts.¹⁰³ Having witnessed the spectacular litigation successes of progressive groups in the 1960s, the Chamber decided that federal courts might be "a more effective conduit" for achieving its anti-litigation goals.¹⁰⁴ Accordingly, in 1977, the Chamber formally established an in-house litigation unit—the National Chamber Litigation Center (NCLC or the Center)—with the mission of aggressively challenging government regulations and helping the Chamber's members win cases. The NCLC, like the Chamber itself, was conceived as corporate America's advance team—an entity willing to make legal arguments that corporations themselves hesitate to assert for fear of damaging public relations. For instance, the Center has challenged provisions of the

101. *Id.*; see also Fang, *supra* note 10, at 126. See also Hamburger, *supra* note 99 ("Under a system pioneered by Donohue, corporations have contributed money to the chamber, which then produced issue ads targeting individual candidates without revealing the names of the businesses underwriting the ads."); Mortenson & Justice, *supra* note 95, at B1 ("A large part of the chamber's job appears to be taking unpopular stances that its members, by themselves, are unwilling or unable to pursue."); Corynne Cirilli, *The US Chamber of Commerce Might Not Be What You Think*, RACKED (Oct. 2, 2017), <https://www.racked.com/2017/10/2/16370014/us-chamber-commerce-explainer> (quoting Donahue that "I want to give [members] all the deniability they need.").

102. See Mortenson & Justice, *supra* note 95, at B1 (quoting Donahue on the lobbying efforts behind the Class Action Fairness Act: "We worked it from one end of this country to the other — morning, noon and night . . . That's our strength. We have an ability over longer periods of time to create perceptions, to educate people, to persuade them and get stuff done.").

103. Epstein, *supra* note 61, at 1004 (heeding Powell's advice to work in both Congress and the courts, the Chamber launched the National Chamber Litigation Center (NCLC) in 1977 serve as "the only [firm] devoted exclusively to representation of business before the courts and regulatory agencies").

104. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 143–44 (2010).

Sarbanes-Oxley Act, repeatedly sued the Securities and Exchange Commission (S.E.C.) over its corporate governance and disclosure rules, and boldly defended egregious instances of corporate misconduct.¹⁰⁵ And it has done so in a highly visible way, litigating before the nation’s highest court as a means of establishing itself as a major player in conservative legal circles.¹⁰⁶ The Center has exerted the greatest effort—and achieved the greatest success—in the legal battles over enforceability of class-banning arbitration provisions in standard-form contracts, chipping away at adverse precedents with a long-range plan of getting the strongest case vehicles before the Court.

That the Chamber and its affiliates grew fixated on class-action banning arbitration clauses as the most straightforward, feasible path to corporate immunity isn’t surprising. After all, alternative dispute resolution had already gained a following as a cost-effective substitute for litigation; and by the 1990’s, class action liability had become business’ greatest fear.¹⁰⁷ Moreover, private arbitration providers and corporate defense firms in this period were busy “marketing innovative new techniques to avoid exposure to aggregate litigation—in particular, arbitration clauses with embedded class action bans.”¹⁰⁸ Their pitch was simple: imposing these provisions upon claimants whose access to justice is dependent on collective adjudication would eliminate fear-inducing liability—and might even end liability altogether, given the certainty that consumers and employees would almost never arbitrate small-dollar claims individually. The Chamber’s membership was highly responsive to this pitch, accelerating the adoption of these provisions in standard-form contracts.¹⁰⁹

105. See Sasha Abramsky, *The U.S. Chamber of Commerce’s Multimillion-Dollar Attack Plan*, NATION (Aug. 29, 2012), <https://www.thenation.com/article/archive/us-chamber-commerces-multimillion-dollar-attack-plan/>.

106. The NCLC has almost single-handedly increased the Court’s business docket by hiring a crop of ex-Supreme Court clerks to raise interest in these cases. John Shiffman, *Chamber of Commerce Forms Its Own Elite Law Team*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/article/us-scotus-firms-chamber/chamber-of-commerce-forms-its-own-elite-law-team-idUSKBN0JM10Q20141208> (noting that “no other national advocacy organization has so embraced the trend toward Supreme Court specialization as the chief American business lobby, the U.S. Chamber of Commerce”). The conservative Justices of the Roberts Court have been especially receptive to the Chamber’s arguments. See, e.g., Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013) (finding that the five most conservative Justices voted with the Chamber in 82% of cases).

107. Gilles, *supra* note 48, at 376 (observing that by the 1990’s, “class action liability avoidance [had] moved to the top of the priority list for corporate counsel” as these lawsuits “racked up many billions of dollars in settlements, spread across an ever-expanding range of subject areas and industries”).

108. *Id.*

109. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Defeat of the Modern Class Action*, 104 MICH. L. REV. 373, 397 (2005) (describing efforts by the National Arbitra-

The stage was therefore set for this part of the story, which begins in 2002, when the NCLC took on its first arbitration case, *Edward D. Jones & Co. v. Kloss*, in which a ninety-five year old client challenged the arbitration clause in her brokerage contract as unconscionable—arguing that, because her broker had failed to explain the effect of the provision, her assent was not fully informed.¹¹⁰ The trial court rejected this argument and granted the broker’s motion to compel arbitration; but the Montana Supreme Court reversed, finding that a broker must “explain[] the consequences” of signing an arbitration clause as a condition of enforcement.¹¹¹ The NCLC—whose involvement in this case may have been a favor to John Bachman, then-Chairman of the Chamber’s Board and President of the losing party, Edward D. Jones & Co.—filed an amicus brief urging the U.S. Supreme Court to review the Montana Court’s decision, as it ran afoul of the principle that agreements to arbitrate should be treated the same as all other contracts.¹¹² While the Justices declined review, an idea began to form within the NCLC about the possibilities that lay within the fine print of mandatory arbitration provisions. For instance, in addition to mandating arbitration of disputes, the Edward D. Jones clause also prohibited clients from asserting their rights “to reasonable discovery, [] to findings of fact based on the evidence, and [] to enforce the law [] by way of appeal.”¹¹³ So—if an arbitration clause could be rendered immune from legal challenge on state-law grounds, drafters could include within its margins similar restraints on available remedies, or any number of liability-limiting elements that might dissuade plaintiffs’ lawyers from bringing suit in the first instance.

The real lightbulb moment was making the connection between mandatory arbitration and the “obstacle preemption” doctrine that had become a favored vehicle for limiting regulatory impact.¹¹⁴ Obsta-

tion Forum, “a for-profit arbitral body designated in the arbitration provisions of many large companies,” in disseminating marketing materials cautioning corporate attorneys that the only way to insulate their clients from class action liability . . . was to implement arbitration provisions containing terms that expressly waive the right to class treatment”).

110. Brief for COC as Amici Curiae Supporting Petitioners at 4, *Jones & Co. v. Kloss*, 538 U.S. 956 (2003) (No. 02-1112).

111. *Kloss v. Jones & Co.*, 54 P.3d 1, 10 (Mont. 2002). See also Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1463–64 (2008) (discussing the arguments made by the Chamber in *Kloss*—namely that the “Montana Supreme Court has used the cloak of the common law to do precisely what this Court ruled that the Montana legislature may not do by statute . . .”).

112. *Jones & Co. v. Kloss*, No. 02-1112, cert. denied, 538 U.S. 956, 956 (2003).

113. *Kloss v. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002).

114. See, e.g., Linda S. Mullenix, *Strange Bedfellows: The Politics of Preemption*, 59 CASE W. L. REV. 837, 852 (2009) (asserting that “the concept of preemption doctrine as a conservative civil justice reform strategy concretely emerged in 1995”); David C. Vladeck, *Preemption and*

cle preemption exists “where ‘under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹¹⁵ In a series of cases in the 1980s and 90s, drug manufacturers argued that they were immune from state common law negligence actions where they had obtained the FDA’s “pre-market approval” to market and sell the offending drug to the public.¹¹⁶ While nothing in the relevant federal statutes governing the sale of pharmaceutical drugs expressly nullified state damage claims, dozens of courts nonetheless held these claims preempted where they stood “‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹¹⁷ Given this success, the Chamber was keen on pushing obstacle preemption as a way of eliminating damages suits wherever possible.¹¹⁸ For its part, the NCLC had successfully argued obstacle preemption in a number of cases¹¹⁹—which ultimately led to a blockbuster preemption decision in the Supreme Court in 2008.¹²⁰ Having established a beachhead in tort law, the

Regulatory Failure, 33 PEPPERDINE L. REV. 95, 101 (2005) (“[M]ake no mistake about preemption defenses; they are efforts by industry to shed an important source of market discipline – the threat of liability for visiting unjustifiable harm on others.”). Vladeck points to *Cipollone v. Liggett*, 505 U.S. 511 (1992), as “unleash[ing] a torrent of preemption litigation.” *Id.* at 106 (describing *Cipollone* as holding that state damage claims for injured alleged to have been caused by cigarette smoking were preempted by the Federal Cigarette Labelling and Advertising Act).

115. *Crosby v. Nat’l Foreign Trade Council*, 530 US 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 US 52, 67 (1941)).

116. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, at 66; see also Thomas O. McGarity, *The Perils of Preemption*, TRIAL, Sept. 2008, at 20 (describing the “accountability crisis” and the effort to “shield corporate America from . . . ‘burdensome and unnecessary’ regulatory responsibilities and ‘frivolous’ common law tort liability”).

117. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 n.14 (2000) (listing cases).

118. *Id.* (listing cases). *Id.* at 229 n.18 (citing Cindy Skrzycki, *The Chamber Reached a Sticking Point*, WASH. POST, Sept. 17, 1999, at E1 (reporting on the Chamber’s efforts to defeat a bill that would have curtailed preemptive effect of federal statutes)). See also Mullenix, *supra* note 114, at 853 (“[d]uring the Bush [II] administration, conservative advocates pursued civil justice reform [by trying] . . . to add express preemptive language to various federal regulatory schemes . . . [in order to] expressly preempt all future common law” claims).

119. The Chamber’s support of preemption as a means of limiting corporate liability dates back to the early 1980’s. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (amicus brief by the Chamber in support of the employer’s argument that ERISA preempted a New Jersey workers’ compensation law). See also *Chamber of Com. v. Brown*, 554 U.S. 60, 64, 66 (2008) (finding that the National Labor Relations Act preempts California law); *Watters v. Wachovia Bank*, 550 U.S. 1, 3–4 (2007) (finding that state banking laws were preempted by the OCC).

120. In *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), an 8-1 Supreme Court held that victims of a defectively-designed medical device were expressly preempted from suing under state tort law where the FDA had deemed the device safe and effective under federal law. Justice Ginsburg was the sole dissenter, arguing that Congress could not possibly have intended such a “radical curtailment” of state personal injury suits. *Id.* at 333.

NCLC began to advance its obstacle preemption theory in a series of arbitration cases, arguing that challenges to the enforceability of an arbitration provision grounded in state contract law—i.e., procedural or substantive unconscionability—were preempted by the 1925 Federal Arbitration Act (FAA).¹²¹

In the early stages of this campaign, three branches of the Chamber universe came together to draft, implement and defend mandatory arbitration. First, the NCLC occupied the role of *amicus curiae* before the Court, representing the right of the Chamber's membership to impose pre-dispute, class action-banning arbitration clauses. Between 2003 and 2010—when the Court granted review of *AT&T Mobility v. Concepcion*—the NCLC filed *amicus* briefs in 8 cases that came before the Justices seeking a determination of whether the FAA preempted state law in some respect.¹²² But the Center soon came to view this strategy as too passive: rather than defending clauses that by happenstance arrived before the Justices, it needed to *craft* an arbitration provision that squarely put the preemption question before the Court.

This is where the main Chamber got involved: in this period, the organization began to work closely with its members—including Bank of America, Citigroup, American Express, Chase Manhattan, Sears and a collection of white-shoe law firms—to draft bolder arbitration provisions, seeding the fertile ground with strong case vehicles.¹²³ Its vast network enabled the Chamber to easily identify members that were “considering adopting arbitration to resolve disputes with their

121. It was a propitious moment, as a line of Supreme Court decisions in the 1980s and 90s had upheld arbitration in a number of new contexts, announcing an “international policy favoring commercial arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985); *see also* *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989) (holding that claims arising under Securities Act of 1933 were arbitrable).

122. *See, e.g.*, Brief for COC as *Amicus Curiae* Supporting Petitioner, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634); Brief for COC as *Amicus Curiae* Supporting Petitioners, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235); Brief for COC as *Amici Curiae* Supporting Petitioners, *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006) (No. 04-1264); Brief for COC as *Amicus Curiae* Supporting Petitioners, *Preston v. Ferrer*, 51 Cal. Rptr. 3d 628 (Cal. Ct. App. 2006), *cert. granted*, 552 U.S. 346 (2007) (No. 06-1463); Brief for COC as *Amicus Curiae* Supporting Petitioners, *14 Penn Plaza, L.L.C. v. Pyett*, 498 F.3d 88 (2d Cir. 2007), *cert. granted*, 556 U.S. 247 (2008) (No. 07-581); Brief for COC as *Amicus Curiae* Supporting Petitioners, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 559 U.S. 662 (2009) (No. 08-1198); Brief for COC as *Amicus Curiae* Supporting Petitioner, *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2010) (No. 09-893) (*cert. granted*); Brief for COC as *Amicus Curiae* Supporting Petitioner, *Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010) (No. 09-497) (*cert. granted*).

123. Gilles, *supra* note 107, at 395–96, 398–99 n.117 (citing Complaint, *Ross v. Bank of Am.*, 05 Civ. 7116 (S.D.N.Y. 2005) (alleging that this group “held a series of secret meetings to discuss the implementing” of class action-banning forced arbitration provisions)).

consumer customer.”¹²⁴ And, as decisional law on arbitration evolved, the Chamber became a central clearinghouse of information and best practices, advising members on how to shrewdly draft arbitration provisions that pushed the envelope.¹²⁵

The third member of the team—the Institute for Legal Reform, yet another affiliate of the national Chamber—supported the pro-arbitration mission by publishing multiple “studies” for use in the Center’s briefs as supporting “evidence” that arbitration was fairer, cheaper and faster than litigation.¹²⁶ Working in tandem—the Chamber urging its corporate membership to experiment with arbitration provisions, the Institute issuing reports helpful to the cause and the NCLC defending these provisions in amicus briefs before the Supreme Court—the organization soon became synonymous with the corporate crusade to enforce mandatory arbitration provisions in standard-form contracts. Acting as a “clearinghouse for megacorporations that want[ed] to shape policy without leaving any fingerprints,” the Chamber’s pro-arbitration campaign would become its signature project.¹²⁷

Around 2004, the Center ratcheted up its legal strategy on arbitration by resolving to become involved in disputes at an earlier point in the litigation. First, the NCLC began submitting *cert-stage* amicus briefs in support of petitions for Supreme Court review; and second, it began filing (or seeking to file) amicus briefs in cases before lower federal and state courts that it identified as likely cert. opportunities. On the former, much has been written about the spike in cert-stage amicus briefs and their effect in raising the probability of review on the merits.¹²⁸ The NCLC is paradigmatic of this phenomenon: while

124. *Id.* (citing Ross Complaint at ¶¶ 97–118 (describing an internal group labeled the “‘Arbitration Coalition’” whose primary responsibility was to identify potential members” with an interest in adopting these provisions)).

125. See generally Myriam Gilles, *Killing Them With Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012) (asserting that arbitration clauses evolved from “first-generation” provisions which were unfair and one-sided, to “second and third generation” provisions in which the drafter bore “all filing and administrative fees” and offered to “double attorneys’ fees” if the claimant received a larger arbitration award than its “last, best offer”).

126. See generally *Arbitration*, U.S. CHAMBER FOR LEGAL REFORM, <https://instituteforlegalreform.com/issue/arbitration/> (last visited Jan. 13, 2023); see also PETER B. RUTLEDGE, *ARBITRATION: A GOOD DEAL FOR CONSUMERS* (United States Chamber Institute for Legal Reform, 2008); Institute For Legal Reform, *Bogus Attack On Arbitration Really About Plaintiffs’ Lawyers’ Right To Sue* (Sept. 27, 2007).

127. Abramsky, *supra* note 105.

128. See, e.g., Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1938 (2016) (observing that “this early recruitment of amici is a marked change from years past” so that today, there are “almost double the amount of cert-stage amici” than a decade ago); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Su-*

the Supreme Court generally hears fewer than 2% of cert. petitions, those with a Chamber brief attached had a 26% chance of being granted review.¹²⁹ Singling out arbitration cases, the Center's success rate more than doubles: between 2000 to 2010, the Supreme Court heard 61% of the cases in which the Chamber filed a cert-stage brief.¹³⁰

Even more interesting is the Center's decision to devote institutional resources to convincing federal appellate and state supreme courts of the preemptive effects of the FAA.¹³¹ For one, there is little evidence that amicus briefs filed in the federal appellate courts are relied upon—much less appreciated.¹³² Less has been written on how state courts of last resort receive these briefs, but the restrictive rules

preme Court, 82 AM. POL. SCI. REV. 1109, 1122 (1988) (concluding that presence of amicus briefs at petition stage is associated with substantial and statistically significant increases in grant rate).

129. Rosen, *supra* note 7. See generally Adam Feldman, *Empirical SCOTUS: Successful Cert-Stage Amicus Briefs In Cases With Financial Implications*, SCOTUSBLOG (Feb. 12, 2019), <https://www.scotusblog.com/2019/02/empirical-scotus-hitting-the-nail-on-the-head-successful-cert-stage-amicus-briefs-in-cases-with-financial-implications/> (distinguishing between amicus briefs, which are “tied to cases already on the court’s merit docket” and cert-stage amicus briefs, which are “seen as a way to provide the court with an additional signal or signals that a case warrants its review”); *id.* (noting that between 2007–2010, the Chamber filed the most cert-stage briefs – more than twice as many as the group with the next most filings – making it a “a filing leader in this area,” with a high percentage of granted cases based on its cert-stage filings).

130. The Chamber/NCLC filed thirteen cert. stage amicus briefs in this period, eight of which were granted review. See, e.g., Brief for COC as Amicus Curiae Supporting Petitioners, *Pacific-Care Health Sys., Inc. v. Book*, 538 U.S. 401 (2002) (No. 02-215) (*cert. denied*); Brief for COC as Amicus Curiae Supporting Petitioner, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634) (*cert. granted*); Brief for COC as Amicus Curiae Supporting Petitioner, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235) (*cert. granted*); Brief for COC as Amici Curiae Supporting Petitioner, *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006) (No. 04-1264) (*cert. granted*); Brief for COC as Amicus Curiae Supporting Petitioner, *Cingular Wireless v. Mendoza*, 547 U.S. 1188 (2006) (No. 05-1119) (*cert. denied*); Brief for COC as Amici Curiae, *Taylor v. Progress Energy Inc.*, 493 F.3d 454 (4th Cir. 2007) (No. 04-1525) (*cert. denied*); Brief for COC as Amicus Curiae Supporting Petitioner, *Preston v. Ferrer*, 552 U.S. 346 (2007) (No. 06-1463) (*cert. granted*); Brief for COC as Amicus Curiae Supporting Petitioners, *14 Penn Plaza, LLC v. Pyett* 556 U.S. 247 (2008) (No. 07-581) (*cert. granted*); Brief for COC as Amicus Curiae Supporting Petitioner, *Circuit City Stores, Inc. v. Gentry*, 552 U.S. 1296 (2008) (No. 07-998) (*cert. denied*); Brief for COC as Amici Curiae Supporting Petitioner, *SSC Odin Op. Co. v. Carter*, 976 N.E.2d 344 (Ill. 2009) (No. 08-805) (*cert. denied*); Brief for COC as Amicus Curiae Supporting Petitioners, *Stolt-Nielsen. v AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2009) (No. 08-1198) (*cert. granted*); Brief for COC as Amicus Curiae Supporting Petitioner, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010) (No. 09-893) (*cert. granted*); Brief for COC as Amicus Curiae Supporting Petitioner, *Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010) (No. 09-497) (*cert. granted*).

131. This strategy was certainly not unique to the Chamber, as other interest groups had sought out the greener pastures of state courts beginning a decade earlier. See, e.g., *An End Run Around the High Court: Advocacy Groups Are Finding State Courts Potent Agents of Change*, BUSINESSWEEK, May 11, 1992, at 58.

132. See, e.g., *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003) (Posner, J.) (listing reasons for denying amicus participation, including that “the filing of an amicus brief is

that many states impose on amicus filings give some hint of disapproval¹³³ (and the NCLC certainly met with multiple denials in its efforts to participate as amici in state courts¹³⁴). Despite these headwinds, researchers have chronicled dramatic increases in amicus filings in both federal appellate and state supreme courts from 1960 to 2000.¹³⁵ For its part, between 2003–2010, the NCLC filed six amicus briefs arguing for FAA preemption in federal appellate courts¹³⁶ and eleven in state supreme courts.¹³⁷

The number of filings reveals the Center’s unwavering focus on FAA preemption, but it isn’t clear that efforts directed at the federal appellate and state supreme courts did much to advance this theory. Indeed, by 2011, there was a long line of state and federal cases invalidating class banning-arbitration clauses on unconscionability grounds—revealing that the NCLC’s amicus efforts had done little to

often an attempt to inject interest group politics into the federal appeals process”) (citing *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)).

133. See, e.g., Victor E. Flango et al., *Amicus Curiae Briefs: The Court’s Perspective*, 27 *JUST. SYS. J.* 180, 182 (2006) (noting that “state appellate courts are historically more likely . . . to limit amicus participation in appeals”).

134. For instance, the Illinois Supreme Court twice denied the NCLC’s efforts to participate as amicus in *Kinkel v. Cingular Wireless*, 857 N.E.2d 250 (Ill. 2006).

135. See, e.g., Sarah F. Corbally et al., *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000*, 25 *JUST. SYS. J.* 39, 44 (2004) (observing a steady increase in state court amicus filings from 1960 to 1990, a slight decrease from 1990–2000, and signs that “amicus filings . . . seem to be increasing again”).

136. The NCLC maintains a website that details its filings in every arbitration case since 1991. See, e.g., Brief for COC as Amici Curiae Supporting Defendants, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (No. 04-14462); Brief for COC as Amicus Curiae Supporting Appellants, *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88 (2d Cir. 2006) (No. 06-3047); Brief for COC as Amicus Curiae Supporting Defendant, *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2009) (No. 08-16080); Brief for COC as Amici Curiae Supporting Appellee, *Litman v. Cellco P’ship*, 655 F.3d 225 (3d Cir. 2009) (No. 08-4103); Brief for COC as Amici Curiae Supporting Defendant, *Jock v. Sterling Jewelers Inc.*, 738 F. Supp. 2d 445 (2d Cir. 2010) (No. 10-3247).

137. See, e.g., Brief for COC as Amicus Curiae, *Adler v. Fred Lind Manor Corp.*, 153 Wn.2d 331 (Wash. 2004) (No. 74701-6); Brief for COC as Amicus Curiae Supporting Defendants, *Aguilard v. Auction Mgmt. Corp.*, 908 So.2d 1 (La. 2005) (Nos. 2004-C-2804, 2857); Brief for COC as Amicus Curiae Supporting Respondent, *Delta Funding Corp. v. Harris*, 189 N.J. 28 (N.J. 2006) (No. 04-1951); Brief for COC as Amicus Curiae Supporting Respondents, *Muhammad v. Cnty. Bank of Rehoboth*, 189 N.J. 1 (N.J. 2006) (No. 58,430); Brief for COC as Amici Curiae Supporting Respondent, *Scott v. Cingular Wireless*, 160 Wash.2d 843 (Wash. 2006) (No. 77406-4); Brief for COC as Amici Curiae Supporting Appellee, *Salley v. Option One Mortg. Corp.*, 592 Pa. 323 (Pa. 2007) (No. 50 EAP 2005); Brief for COC as Amici Curiae Supporting Respondent, *Gentry v. Super. Ct.*, 42 Cal.4th 433 (Cal. 2007) (No. S141502); Brief for COC as Amici Curiae Supporting Respondent, *Gentry v. Super. Ct.*, 42 Cal.4th 433 (Cal. 2007) (No. S141502); Brief for COC as Amicus Curiae Supporting Respondent, *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295 (Cal. 2009) (No. S153846); Brief for COC as Amicus Curiae, *Brown Fam. Trust v. Wells Fargo*, 85 Cal.Rptr.3d 817 (Cal. Ct. App. 2008) (No. B196258); Brief for COC as Amicus Curiae Supporting Appellees, *Pendergrast v. Sprint Nextel, Inc.*, 97 So.3d 824 (Fla. 2012) (No. SC10-19).

convince these courts that the Supremacy Clause denied them discretion to determine the fairness of an arbitration clause.¹³⁸ Still, one advantage of the full-court press is that it afforded the NCLC a birds-eye view of arbitration cases as they wound through the state or federal court systems. This information, in turn, allowed the organization to carefully groom cases in search of the strongest vehicles to get before the Supreme Court. As Aaron-Andrew Bruhl observed, the Court was in dire need of this assistance because, by this point, the Justices had already “picked most of the low-hanging anti-arbitration fruit,” having struck down a number state statutes that blatantly disadvantaged arbitration.¹³⁹ As state courts “retreated to more opaque rulings such as unconscionability, noncompliant decisions” became more difficult for the Court “to detect” and remedy.¹⁴⁰ With the NCLC’s help, the ideal case vehicle for disciplining these lower courts would present itself in *AT&T Mobility v. Concepcion*.

Even the story of *Concepcion*’s tortured path to the Supreme Court reveals the Chamber’s influence over both the evolution of arbitration provisions and the high court’s docket. Liza and Vincent Concepcion’s original cell phone contract was provided by Cingular Wireless, which in 2005 merged with AT&T to create a new company renamed AT&T Mobility. For a number of years prior to this merger, AT&T had been experimenting with different versions of its arbitration clause.¹⁴¹ A paradigmatic repeat player, AT&T had the luxury of unilaterally amending its arbitration provisions when they were struck down by courts to “soften the language and try again.”¹⁴² Indeed, the company and its counsel, Mayer Brown, were at the forefront of developing an arbitration clause meant to overcome unconscionability challenges by offering consumers extraordinary benefits and deal sweeteners—so, by the time of the merger, AT&T had hit upon the most consumer-friendly arbitration provisions in the industry.¹⁴³ When giving notice

138. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 633 n.33 (2012) (listing cases).

139. Bruhl, *supra* note 111, at 1467 (citing *Southland v. Keating*, 465 U.S. 1 (1984)).

140. *Id.*

141. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 654–55 (2010) (reporting, for example, that in 2001, “AT&T unilaterally inserted an arbitration clause that prohibited class actions and included several other remedy-stripping provisions, including one that eliminated any right the plaintiff might have to recover attorney’s fees”).

142. *Id.* at 656.

143. *Id.* at 655 (reporting that AT&T “unilaterally removed the remedy-stripping terms,” “overhauled its class arbitration waiver [by] disclaiming its own right to recover attorneys’ fees,” allowed “plaintiffs to attend the arbitration in person, by phone, or to waive a hearing,” and provided “a bounty of \$5000 and double attorneys’ fees for any plaintiff who recover[ed] more than AT&T’s last written settlement offer”) (citing AT&T Mobility’s Brief in Support of Motion

to customers of the Cingular-AT&T merger, AT&T Mobility took the opportunity to unilaterally modify “the clause in the *Concepcions*’ original cellular phone agreement” to add its sparkling new arbitration clause, hoping to take it for a test drive all the way up to the Supreme Court.¹⁴⁴ Accordingly, the arbitration provision upheld in *Concepcion* was the *not* the provision that the plaintiff-consumers had signed and it contained elements they had never even seen; instead, the arbitration clause that Justice Scalia held up as supremely “generous” and “pro-consumer” had been engineered over a number of years by a powerful corporation and its savvy outside counsel with the specific intention of presenting to the Court the strongest possible case for preemption.¹⁴⁵

Needless to say, this long-range plan paid off handsomely. In 2011, the Supreme Court upheld a class-banning forced arbitration clause imposed in AT&T Mobility’s standard-form cell phone contract, finding California law to the contrary preempted by the FAA.¹⁴⁶ And in the intervening decade, the conservative Justices have repeatedly reminded lower courts of the object lesson that is FAA preemption, striking down numerous efforts to interpose state law or policy as grounds for denying legal effect to an arbitration provision.¹⁴⁷

For its part, the Chamber (through the NCLC) has continued to file amicus briefs in post-*Concepcion* cases—and each victory has further solidified its status as a major player in conservative legal politics.¹⁴⁸ Along the way, it has recruited gold-plated legal talent from famed D.C. appellate practices—Mayer Brown, Jones Day, Wilmer Cutler, Ballard Spahr—as outside counsel to supplement the NCLC. Over the

to Compel Arbitration and to Dismiss Action at 3, *Francis v. AT&T Mobility, L.L.C.* (No. 2:07-cv-14921), (E.D. Mich. Jan. 25, 2008), 2008 WL 393982).

144. *Id.* (observing that new iteration of AT&T’s arbitration provision was imposed on consumers via unilateral amendments or modifications to their existing cell phone agreements).

145. *Id.* at 655–56 (observing that “AT&T did not write [the arbitration provision] in an attempt to convince shoppers to switch to or stay with AT&T” because “the elaborate, 1,600-word, three-page, single-spaced provision is likely unintelligible to most consumers”; rather, AT&T aimed this provision “squarely at the one constituency that really matters: courts”).

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

147. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam) (finding the FAA preempts a state-law rule that would invalidate an arbitration clause in a nursing home contract on public policy grounds); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 594 (2013); *DirectTV, Inc., v. Imburgia*, 577 U.S. 47 (2015); *Kindred Nursing Ctrs. v. Clark*, 581 U.S. 246 (2017) (preempting application of the state’s “clear statement” rule in nursing home admissions contracts).

148. *See, e.g.*, Brief for COC as Amicus Curiae Supporting Petitioners & Respondents, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018) (No. 16-285, 300, 307); Brief for COC as Amicus Curiae Supporting Petitioners, *Lamps Plus Inc., v. Varela*, 139 S.Ct. 1407 (2018) (No. 17-988); Brief for COC as Amicus Curiae Supporting Petitioners, *Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (No. 17-1272).

course of working for the Chamber, some of these lawyers have themselves become die-hard advocates of forced arbitration beyond the courtroom, testifying in Congress and writing policy pieces touting the supposed benefits of these provisions.¹⁴⁹ Through its outside counsel and other experts, the Chamber has also vigorously opposed federal and state legislation aimed at undoing the Court's pro-arbitration decisions.

Through these concerted efforts, the Chamber has piloted corporate America to the promised land of lawsuit immunity. Given the newly-discovered judicial solicitude for arbitration, companies have now implemented these provisions on a massive scale by unilaterally amending existing service agreements, employment contracts, and other contractual arrangements. For instance, a 2018 study found that seventy-eight companies listed in the Fortune 100 impose arbitration on their consumers and workers.¹⁵⁰ A 2015 study by the Consumer Financial Protection Bureau similarly revealed that class-banning arbitration provisions have permeated every corner of the consumer financial marketplace.¹⁵¹ Today, there is scarcely any means of avoiding these provisions; whether we know it or not, forced arbitration stands between us and every amenity of modern life.

The effect of this large-scale operation has worked out precisely as the Chamber hoped: many legal claims, rendered ineligible for aggregation, have simply been abandoned.¹⁵² Take, again, *AT&T Mobility*,

149. For example, Alan Kaplinsky—a partner at Ballard Spahr who has represented the Chamber in a number of arbitration cases—has repeatedly testified before Congress on these issues and writes a regular blog touting the benefits of arbitration on his firm's website. Andy Pincus, a partner at Mayer Brown who argued *AT&T v. Concepcion*, has also worked to defend the Chamber's position on mandatory arbitration in courts, legislatures, academia and the media.

150. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019) (also reporting that almost two-thirds of American households are covered by broad consumer arbitration agreements and that over 60% of U.S. e-commerce sales are governed by these agreements).

151. CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 10* (2015) [hereinafter CFPB STUDY] (“Across each product market, 85–100% of the contracts with arbitration clauses—covering close to 100% of market share subject to arbitration in the six product markets studied—include such no-class arbitration provisions.”).

152. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (“Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.”). See also CFPB STUDY, *supra*, note 151, at 5 n.6 (reporting that, as a consequence of class-banning mandatory arbitration, only 400 consumers brought individual arbitrations during the relevant period, despite the many mil-

which pioneered these provisions: Prof. Judith Resnik reports that between 2009 and 2014, only 134 individual arbitrations were filed against the company—despite the fact that it boasts over 120 million wireless customers and was the subject of numerous investigations and public enforcement actions for violations of consumer laws.¹⁵³ More recently, journalist Alison Frankel examined data provided by the largest arbitration provider in the country, the American Arbitration Association (AAA), which revealed that in the first quarter of 2019, it had resolved only 895 consumer arbitrations—despite being the designated provider for tens of thousands of companies.¹⁵⁴ As one observer concludes, the near-complete absence of individual arbitrations suggests that companies have found “a mechanism that effectively reduces their chance of being subject to any liability” for legal violations—in other words, corporate immunity for vast categories of claims has become a reality.¹⁵⁵

To be clear: none of the Chamber’s efforts to enforce class-action banning forced arbitration provisions is particularly surprising or dastardly. Indeed, it would be more surprising if the Chamber *hadn’t* fought for mandatory arbitration as a pathway to corporate immunity. Nor can any fault be placed on the Chamber’s lawyers—either staff attorneys at the NCLC or outside counsel—for making creative, conservative arguments to a group of Justices that happen to share their worldview (and hold a majority position on the Supreme Court).

But nor do the Chamber’s efforts evidence a public-minded, apolitical organization intent on providing “enlightened economic policymaking advice . . . for the benefit of the nation.” Today’s Chamber has moved a great distance from that early vision of beneficence and cooperation; indeed, to arrive at this point in our collective legal history—where mandatory arbitration clauses prevent millions of ordinary citizens from accessing our public courts—the Chamber had to reinvent itself as a partisan player in the broader corporate rights

lions of consumer disputes with banks, credit card companies, payday loans and other financial institutions).

153. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2804 (2015). Professor Resnik notes: “[t]he result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so – rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.”

154. Alison Frankel, *Consumer Arbitration is on the Rise But Numbers are Still Puny*, *REUTERS* (May 9, 2019), <https://www.reuters.com/article/us-otc-arbitrationdata/consumer-arbitration-is-on-the-rise-but-numbers-are-puny>.

155. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, *ECON. POL’Y INST.* (September 27, 2017), www.epi.org/publication/the-growing-use-of-mandatory-arbitration.

movement. In doing so, the organization has relentlessly demonized a cornerstone of our democracy—the civil justice system—along with the lawyers and judges who operate within its confines. It has “stir[red] ideological passions among [its] membership”—inventing an us-against-them narrative that pits companies against the people they purport to serve.¹⁵⁶ And the Chamber has—perhaps irrevocably—compromised our reliance on private litigation to help enforce public rights, degrading the ability of individual plaintiffs and their lawyers to identify and potentially remedy widespread harms through the law.

156. Katz, *supra* note 5, at 44.