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FEATURE ARTICLE

The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act

Andrew P. Lamis

I. Introduction

A century ago, jurisprudence was captive to maxims detached from reality, and “word-magic” had become the “bane and the life of the law.”¹ According to Professor G. Edward White, “[j]udges began their decisions by making verbal distinctions, defining concepts in useful ways. They then pronounced their decisions as axiomatic. From then on it was a rush downward to the result: the axiom was applied to the facts of a case, and certain things ‘inevitably’ followed.”² For example, the Sherman Act was deemed inapplicable


² Charles E. Clark, The Restatement of The Law of Contracts, 42 YALE L. J. 643, 647 (1933); see also Karl Llewellyn, A Realistic Jurisprudence – The Next Step, 30 COLUM. L. REV. 431, 443 (1930) (observing that the “traditional approach is in terms of words; it centers on words; it has the utmost difficulty in getting beyond words”); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY – SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 81 (1973) (“Much of the law was an exercise in painful abstraction and strained syllogism that bore little resemblance to the real world it was supposed to govern.”).
to a corporation manufacturing 90% of the sugar in the country because "manufacture" was adjudged not the same thing as "commerce." Practical methods of legal analysis, grounded in such tools as the authoritative principles of statutory construction, were rendered useless, supplanted by absolutes that precluded reasoning.

Today we see again forms of decisional law that rest on "word-magic." Courts have found that a federal consumer-protection statute regulating private dispute resolution mechanisms in product warranties does not apply to privately devised arbitration procedures. They have done so because arbitration is "of a different nature" than the private dispute resolution described in the statute. Another federal statute, aimed at enforcing voluntary agreements to submit disputes to a nonjudicial third party for decision, is said to apply to wholly involuntary and one-sided transactions because of a "federal policy" found nowhere in the text or legislative history of that statute.

This article will examine the recent judicial treatment of the interaction of two federal statutes, the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act and the Federal Arbitration Act. In this context the article will show how the logic and principles of statutory analysis have been replaced by "word-magic" sheathed in a false approach to construction.

Though the analytical process is today described in traditional terms as an investigation of the text, legislative history and purposes of a statute, it is in fact governed dispositively by a "policy" that is merely a judicial creation, based on nothing that Congress has done or written, grounded solely in a preference of the judiciary. This approach is rooted in an unacknowledged importation of a permissible and well-accepted idea, the idea of how canons of contractual construction can be developed pursuant to federal statutory policy, over into the realm of statutory construction. This has not been questioned by the academic commentators or subjected to critical analysis by the courts. The issue involves the most common "contract" in American society – the consumer product warranties that accompany virtually every mass-produced family and

3 United States v. E. C. Knight Co., 156 U.S. 1 (1895); see also White, supra note 2, at 1001 n.7 (citing Knight, 156 U.S. 1).


household item sold in our country.

The Magnuson-Moss Act, at 15 U.S.C. § 2310(a), makes clear that privately created dispute resolution mechanisms inserted into product warranties cannot ultimately foreclose consumers' access to our courts of law. Courts have nonetheless enforced binding arbitration clauses in product warranties governed by the Act. This article argues that because of the text, legislative history, and purposes of the Act, these courts should have declared such binding arbitration provisions illegal.

Part II provides an overview of the controversy by examining the recent decisions rendered by the Fifth Circuit, the Eleventh Circuit, and the Alabama and Texas Supreme Courts that have enforced binding arbitration clauses in consumer product warranties. Part III considers the general context of the Magnuson-Moss Act and answers the question of what was motivating the Congress to act. Part IV examines the meaning of the key statutory phrase "informal dispute settlement mechanisms" at the time it was introduced at the outset of the legislative process. Part V presents a thorough examination of the legislative history. Part VI closely analyzes the statutory text. Part VII considers whether the arbitration provided for in the Federal Arbitration Act conflicts with the purposes of the Magnuson-Moss Act. In this step-by-step analysis of the legislative history, statutory text, and underlying purposes of the Magnuson-Moss Act, this article studies further the decisions commending binding arbitration rendered by the Fifth and Eleventh Circuits and the Alabama and Texas Supreme Courts, decisions that the author contends are deeply flawed. Though it is unnecessary to the statutory interpretation analysis, Part VIII comments briefly on the principles of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. and its progeny.

15 U.S.C. § 2310(a)(1) encourages warrantors to create "informal dispute settlement mechanisms" to "fairly and expeditiously" resolve consumer warranty disputes. The Act explicitly regulates "any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies." Id. § 2310(a)(2). It provides that the Federal Trade Commission "shall prescribe rules setting forth minimum requirements" for such procedures. Id. Where the mechanism complies with the agency's rules, a consumer may be required to "resort to such procedure before pursuing any legal remedy under this section respecting such warranty." Id. § 2310(a)(3). The consumer remains free to go to court after exhausting the dispute resolution mechanism, though "any decision in such procedure shall be admissible in evidence" in a subsequent court proceeding. Id.

A century ago Learned Hand, then a practicing lawyer in New York, wrote a law review article because he saw the state of the law as imperiled. He found that a series of Supreme Court decisions had encroached into the legislative arena. He could find nothing in the reasoning of the court to justify its self-transformation into "a third camera with a final veto upon legislation with whose economic or political expediency it totally disagrees." At the core of his sharply stated alarm was a sense that fundamental unfairness had been elevated to the level of practically unassailable constitutional doctrine. Speaking of the labor legislation then being struck down by the Nation's highest court, he wrote:

For the state to intervene to make more just and equal the relative strategic advantages of two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force.

The judicial action criticized by Learned Hand, one that thwarts legislative efforts to ensure the fair treatment of parties with inferior bargaining power, is apparent in the current judicial treatment of binding arbitration clauses in consumer product warranties governed by the Magnuson-Moss Act.

II. An Overview of the Controversy

Recently, courts have held that the Magnuson-Moss Warranty Act should be construed to permit the insertion of binding arbitration clauses into those ubiquitous warranties that accompany almost every consumer product sold in America. These courts have departed


9 Hand, supra note 8, at 506; see also GUNTHER, supra note 8, at 123.

from the holdings of other courts, and repudiated the statutory construction of the administrative agency responsible for enforcing the Magnuson-Moss Act. Their decisions rest upon an exercise in statutory interpretation, aimed at discerning the existence of a congressional intent to preclude the waiver of a Magnuson-Moss Act claimant's right to go to court. This analytical process is mandated by the U.S. Supreme Court's decisions concerning the 1925 Federal Arbitration Act ("FAA"). In these decisions, the Court held that the "liberal policy" favoring arbitration purportedly enunciated in the FAA mandates the enforcement of arbitration clauses when a violation of federal statutory rights is at issue. However, if the plaintiff can show that in enacting the statute in question, Congress "did intend to limit or prohibit waiver of a judicial forum for a particular claim," the Court has determined that such an arbitration clause need not be enforced. Such a congressional intent "will be deducible from [the statute's] text or legislative history," or "from


12 In promulgating legislative regulations under the Magnuson-Moss Act, the FTC rejected industry arguments for binding arbitration. It noted, "[s]everal industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration). The Rule does not allow this . . ." 40 Fed. Reg. 60,210 (Dec. 31, 1975); see also 16 C.F.R. § 703.5(j) (2003) ("[d]ecisions of the Mechanism shall not be legally binding on any person").


14 McMahon, 482 U.S. at 227 (quoting Mitsubishi Motors Corp. v. Soler
an inherent conflict between arbitration and the statute’s underlying purposes.”

Unlike the Securities Exchange Act, the Securities Act of 1933, or the Age Discrimination in Employment Act, and every other statute the U.S. Supreme Court has analyzed as to this issue, the Magnuson-Moss Act is unique in that Congress specifically encouraged manufacturers and suppliers to create redress mechanisms that would enable consumers to resolve their claims without time-consuming and expensive litigation. In other words, Congress explicitly legislated regarding that subject matter with which arbitration is concerned.

Congress used the phrase “informal dispute settlement procedure,” “mechanism” and “proceeding” in the Magnuson-Moss Act, and stated that all warrantors were encouraged to incorporate such a procedure into their warranties. In promoting the use of “informal dispute settlement mechanisms” to provide redress for warranty claims, the Act required that such mechanisms be “fair” and comply with Federal Trade Commission rules. When these

Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

15 Id. at 227.


20 See 15 U.S.C. § 2310(a)(1) (“Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.”)

21 See 15 U.S.C. § 2310(a)(2) (commanding the FTC to set “forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies”); id. § 2310(a)(3) (mandating that the warrantor-created mechanism must comply with “the requirements of the Commission’s rules”); id. § 2310(a)(4) (giving the FTC the power to “review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a
mechanisms are in place, the warrantor can require all consumer claims to be initially decided in a designated alternative forum.

Congress intended that the obligation to participate in such a procedure would not foreclose a consumer's opportunity to press a claim for warranty breach in court. Congress stated that "[i]n any civil action arising out of a warranty obligation and related to a matter considered in such a [dispute settlement] procedure, any decision in such procedure shall be admissible in evidence." Congress consistently described the alternative dispute resolution process as a redress mechanism that would be used "before" litigation, while at the same time evincing an intention that the consumer's right to court access be preserved. Congress treated participation in the informal dispute settlement procedure as "a prerequisite to pursuing a legal remedy," rather than a substitute for it.

Of central importance is the meaning of the phrase "informal dispute settlement mechanisms" or "procedures." What exactly was the Congress up to? If the phrase encompasses arbitration mechanisms, then binding clauses of the type encountered last year by the Fifth Circuit in *Walton v. Rose Mobile Homes LLC*, and the Eleventh Circuit in *Davis v. Southern Energy Homes, Inc.*, should have been declared violations of the Magnuson-Moss Act.

The phrase "informal dispute settlement mechanisms" is the linguistic precursor of the modern expression "alternative dispute resolution mechanisms," which encompasses all redress mechanisms other than the formal adjudicative processes of our courts of law, including private arbitrations. This is precisely how the phrase

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23 *Id.* § 2310(a)(3)(C) (describing the requirement that a "consumer resort to such procedure before pursuing any legal remedy") (emphasis added); see *id.* § 2310(a)(3)(C)(i) (no consumer may "commence a civil action . . . unless he initially resorts to such procedure") (emphasis added).


27 *See* BLACK'S LAW DICTIONARY 78 (7th ed. 1999) (defining "alternative
“informal dispute settlement mechanisms” was used during the 1969-1974 preparation of the Magnuson-Moss Warranty Act. During this period, senators, representatives, their staff counsel, and the witnesses who appeared at the five sets of congressional hearings on the warranty legislation, repeatedly referred to “arbitration” procedures as one of the chief forms of “informal dispute settlement mechanisms” that Congress sought to encourage. Congress even commissioned a study on “informal dispute settlement mechanisms” in 1971, specifically asking the body that was to undertake this task,

dispute resolution” as “[a] procedure for settling a dispute by means other than litigation, such as arbitration, mediation, or minitrial”). The phrase “alternative dispute resolution mechanism” is of relatively recent vintage. See 4 AM. JUR. 2D, Alternative Dispute Resolution § 1 (1995) (describing “alternative dispute resolution” as “a relatively new term”). The phrase was not in regular use during the period 1969–1974, when the Magnuson-Moss Warranty Act was being prepared by the Congress. See, e.g., BLACK’S LAW DICTIONARY (Rev’d 4th ed. 1968) (no listing for “alternative dispute resolution”); BLACK’S LAW DICTIONARY (5th ed. 1979) (no listing for “alternative dispute resolution”).

the National Institute for Consumer Justice, to study "arbitration." This also explains why Congress drafted the statute so that it only makes sense if one treats warranty-breach redress mechanisms as falling into one of only two broad categories – either (1) formal adjudicative processes in the courts or (2) "informal dispute settlement procedures," construed to encompass contractual arbitration mechanisms along with all other privately created dispute resolution procedures. Finally, it is why the underlying purpose of the Act, to stand as a protective shield against the involuntary character of modern consumer product warranties and the abuses that emerged therefrom, is served, and not gutted, by the Act's treatment of manufacturer-developed arbitration procedures that could be unilaterally imposed on consumers.

The Fifth Circuit's decision in *Walton v. Rose Mobile Homes LLC* is typical of recent judicial treatment of the Magnuson-Moss Act. In that case, a two-judge majority stated: "We also note that binding arbitration is not normally considered to be an 'informal dispute settlement procedure,' and it therefore seems to fall outside the bounds of the [Act] and the FTC's power to prescribe regulations." This view was not based upon any analysis, and it

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29 When the legislation was reported out of the Senate's Consumer Subcommittee in 1971, Senator Marlow W. Cook offered a floor amendment authorizing the National Institute for Consumer Justice to perform a study on "existing and potential voluntary settlement procedures, including arbitration." S. REP. NO. 92-269, at 63 (1971) (emphasis added). When Senator Robert Dole spoke in support of Senator Cook's amendment on the Senate floor, he said Congress wanted more data on "private dispute settlement techniques, including arbitration in resolving consumer grievances." 117 CONG. REC. 39626 (Nov. 5, 1971) (emphasis added).

30 *Walton*, 298 F.3d at 476.

31 In a conclusory way, the *Walton* majority asserted that binding arbitration "is of a different nature" from "informal dispute settlement procedures," 298 F.3d at 476, and it added that "binding arbitration is not normally considered an informal procedure." *Id.* at 477. The court repeatedly placed emphasis on what is and is not "normal" or "normally" understood or done. For instance, it observed that "the government does not normally participate in private binding arbitration procedures." *Id.* Following this line of thought, one could also conjecture that government does not "normally" delineate precisely how private parties can draft their contracts, but this is exactly what the Magnuson-Moss Act did. Analysis, resting on unelaborated assertions as to what is "normally" the case, can thwart statutory interpretation in a variety of ways, as is discussed infra. Such analysis could be the understandable result of being tasked to define terms that do not have a precise and universally understood meaning. See Wesley A. Sturges, *Arbitration – What Is It?*, 35 N.Y.U. L. REV. 1031, 1047 n.57 (1960)
troubled the dissenting judge who wrote that he was “extremely hesitant to conclude that Congress has directly addressed an apparent statutory ambiguity based on a judicial assumption about what a term ‘normally’ means.”

Decisions like Walton, embracing binding arbitration clauses in the Magnuson-Moss context, suffer from four major analytical flaws. First, the courts have failed to give careful consideration to the meaning of the key statutory phrase. Second, they have not considered the text of the statute as a whole, and have all but ignored the numerous statutory provisions pertaining to these nonjudicial procedures. These provisions would be rendered nonsensical if private arbitration were treated as a species of nonjudicial redress mechanism distinct from “informal dispute settlement procedures.”

Third, having failed to confront the statutory text in a disciplined way, these courts do not give proper consideration to the relevant legislative history. Some have wrongly concluded that there is nothing that can be found in the legislative history to “shed light” on the issue of whether Congress intended to permit binding arbitration clauses to be inserted into consumer product warranties. Or, alternatively, they have rested their legislative history analysis on

("‘Arbitration,’ like other terms and concepts in legal lore, is, of course, ever subject to judicial revision to make the term what the judge may think he should make it mean for the given case."). But, one need not be satisfied with this result since tools of statutory construction enable a more precise analysis.

32 Walton, 298 F.3d at 484 (King, Chief J., dissenting). As is explained below, Chief Judge King was too quick to conclude that the expression “informal dispute settlement procedure” is ambiguous.

33 See, e.g., Walton, 298 F.3d at 476 ("The legislative history does not specifically discuss the availability of arbitration, nor does it define or shed light on the meaning of ‘informal dispute settlement procedure.’"); Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1275 (11th Cir. 2002) (stating that the Act’s legislative history “never directly addresses the role of binding arbitration”), cert. denied, 123 S. Ct. 1633 (Mar. 31, 2003). This failure to consider the legislative history has also marked the scholarly commentary in this field. For example, some commentators have simply assumed without analysis that there is “nothing in the [Magnuson Moss Act’s] text, legislative history, or purposes” that demonstrates an intention to preclude binding arbitration. Katie Wiechens, Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act, 68 UNIV. CHI. L. REV. 1459, 1469 (2001) (emphasis added). Other commentators have apparently looked only at that legislative history that is readily available by its having been reprinted in the permanent edition of the United States Code Congressional and Administrative News ("U.S.C.C.A.N."), even though this represents but a small percentage of the total legislative history of Magnuson-Moss. See infra notes 149–150.
a single ambiguous sentence from a 1970 senate report, probably the least significant of all the senate and house reports because it pertained to Senate Bill 3074, prior to its substantial revision the following Summer in 1971.

34 The Senate Report, pertaining to S. 3074, contained the following language:

Subsection (a) of this section declares that it is Congress's intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation or formal arbitration. This subsection is merely a statement of policy and has no operative effect.

S. REP. NO. 91-876, at 22-23 (1970); see also In re American Homestar of Lancaster, Inc., 50 S.W.3d 480, 488-89 (Tex. 2001) (claiming "this passage," referring solely to the first sentence of the above-quoted passage and omitting mention of the second sentence, "arguably demonstrates that Congress contemplated a consumer's resort to courts or binding arbitration if the informal dispute settlement mechanism did not resolve the dispute"); Davis, 305 F.3d at 1276 (relying on the first sentence in the above-quoted passage, and italicizing the words "or formal arbitration"). Relying on this sliver of legislative history, both Homestar and Davis offered the view that it was Congress's intent to permit binding arbitration provisions in consumer product warranties. The decisions asserted that, at a minimum, there was an "absence of any meaningful legislative history barring binding arbitration." Davis, 305 F.3d at 1276; see also Homestar, 50 S.W.2d at 489. They reached this conclusion, as is discussed infra, both by placing an inaccurate construction upon the ambiguous sentence they quoted and by ignoring most of the relevant legislative history.

35 When S. 3074 was first introduced by Senator Warren G. Magnuson on the floor of the Senate on October 27, 1969, it contained only a generalized statement encouraging "guarantors to establish procedures whereby consumer disputes related to performance guarantees are fairly and expeditious [sic] settled through informal dispute settlement mechanisms." 115 CONG. REC. 31485; see also Consumer Products Guaranty Act Hearings, supra note 28, at 5 (text of S. 3074). The legislation on this point thus originally consisted of an unelaborated statement of policy that had not yet been fully fleshed out. S. 3074 was substantially revised as to this issue the following year, when the second version of S. 986 was reported out of Senator Moss's Committee.

36 Compare Consumer Product Warranties and Improvement Act of 1971: Hearings on S. 986 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 14 (1971) [hereinafter Consumer Product Warranties and Improvement Act Hearings] (text of S. 986, section 110(a), as it was originally drafted), with S. REP. NO. 92-209, at 31, 33-34 (1971) (text of revised S. 986, sections 102(a)(1) and 110(a), transforming the 1970 generalized policy statement into something far more concrete). The transformation was prompted in significant measure by the recommendations of Myles W. Kirkpatrick, the Chairman of the FTC. See Consumer Product Warranties and Improvement Act Hearings, supra note 36, at 34 (statement of Miles W. Kirkpatrick).
Fourth, these courts have not recognized that treating pre-dispute arbitration clauses as binding conflicts with the underlying purposes of the Magnuson-Moss Act, a statute created as a reaction to the inability of consumers to bargain over and meaningfully consent to the terms of a product warranty. The exposition of this conflict leads to an appreciation of the limitations of the teachings in the so-called McMahon line of authority.  

III. The General Context: What Motivated the Congress to Act?

In 1969, Senator Warren G. Magnuson was the Chairman of the Committee of Commerce. His office, and the offices of most of the members of Congress, had been inundated for several years with complaints by citizens that manufacturers and retailers of consumer products were not honoring their "warranties" and "guarantees," often presented on attractive parchment paper with "filigree" borders framing confident promises of "trouble-free" use and "no cost" repairs.  

In 1968, public concern led the Johnson administration to establish the Task Force on Appliance Warranties and Service. The Federal Trade Commission performed a study for the Task Force, analyzing over 200 warranties from 50 major appliance manufacturers. When the Task Force and the FTC reported their findings on January 8, 1969, the results were disturbing. The report concluded that "[t]he majority of major appliance warranties currently in use contain exceptions and exclusions which are unfair to the purchaser and which are unnecessary from the standpoint of protecting the manufacturer from unjustified claims or excessive liability." The report also found that "[t]he consumer does not have a readily available or practical means of compelling the manufacturer

37 See case law cited supra note 13.

38 Consumer Products Guaranty Act Hearings, supra note 28, at 24 (statement of Sen. Philip A. Hart) ("Nobody here in Congress – no Member of the Senate I am sure – has been immune from the plague of complaints from consumers about warranties that don’t live up to promises and promises that are made in big type that are cut to pieces in the small print.").


41 Id. at 28, reprinted in 1974 U.S.C.C.A.N. 7702, 7710.
or the retailer from whom he purchased the appliance or the servicing agency responsible for its maintenance to perform their respective warranty obligations.\textsuperscript{42}

With the introduction of the assembly line and mass marketing techniques, American industry was making available to consumers a continually expanding assortment of goods. But with this desirable development, there arose in the 1950s and 1960s a two-faceted problem that led to what the FTC called the "rising tide" of consumer complaints.\textsuperscript{43}

First, warranties accompanying consumer goods in this era were almost never bargained-for agreements, but adhesion contracts created by the seller with an eye toward protecting itself against liability.\textsuperscript{44} It had become commonplace for manufacturers to carefully craft their warranties to eviscerate all rights that the common law afforded consumers, such as the protections of the implied warranties of merchantability and fitness for a particular purpose.\textsuperscript{45} Second, manufacturers routinely used warranties as

\textsuperscript{42} Id. at 27, reprinted in 1974 U.S.C.C.A.N. 7702, 7710.


\textsuperscript{44} See S. REP. NO. 93-151, 93d Cong., 1st Sess. 6 (1973) (explaining that "the relative bargaining power of those contracting for the purchase of consumer products has changed radically" and "almost all consumer products sold today are typically done so with a contract of adhesion" where "there is no bargaining over contract terms"); Consumer Products Guaranty Act Hearings, supra note 28, at 248 (statement of David A. Swankin, Washington Representative, Consumer Union) (describing the "take it or leave it" nature of warranties as "a very significant factor" in "the chaos that exists today").

\textsuperscript{45} See S. REP. NO. 93-151, 93d Cong., 1st Sess. 7 (1973) (noting that the typical warranty "could be more accurately described as a limitation on liability rather than a warranty"); 119 CONG. REC. 968 (Jan. 12, 1973) (statement of Sen. Magnuson that "the issuance of an express warranty while simultaneously disclaiming the implied warranties is an increasingly common practice which results in many cases in a document which could be more accurately described as a limitation on liability rather than a warranty"). See generally Katherine R. Guerin, Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson-Moss Warranty Act – Will the Consumer Win or Lose?, 13 LOY. CONSUMER L. REV. 4, 9–10 (2001) (citing among the aspects of then-prevailing warranties that prompted legislative action "complex language that rendered warranty terms incomprehensible [and] warranties that appeared to give more protection than they actually did (by provided express warranties combined with disclaimers of all implied warranties and severe limitations of remedies)"). For a study on how the
deceptive marketing tools to solicit consumer purchases, using big, bold type to make the promises to consumers that would convince them to buy, while using tiny type to limit or eliminate those promises later in the “agreement.” As one commentator described the situation:

In short, the express warranty had become an artfully contrived method of eliminating the kinds of warranty protection that all but the most sophisticated buyers would expect to accompany a product touted to perform properly. Many purchasers began to realize that the document with the filigree border emblazoned with “Warranty” or “Guarantee” was often of no greater value than the paper on which it was printed.  

As Senator Magnuson explained when he first introduced the legislation, manufacturers and retailers “hide behind mountains of fine print which negate the very essence of a ‘guaranty.’” Approximately three months later, on January 20, 1970, the first day of congressional hearings, Senator Frank E. Moss began his opening statement with this observation:

problems of “readability and complexity” were not solved by the Magnuson-Moss Act, see F. Kelly Shuptrine & Ellen M. Moore, Even After the Magnuson-Moss Act of 1975, Warranties Are Not Easy to Understand, 14 J. CONSUMER AFF., at 394 (1980).

46 Typical was the warranty of the Baldwin Piano Company. Baldwin sold its pianos with a beautiful piece of parchment paper that would “guarantee” it would repair the piano free of charge, as long as the buyer owned the piano. But in the tiny type at the bottom of the warranty, it revealed that the buyer was expected to pay for the costs of shipping the piano back to Baldwin’s factory if he wanted to take advantage of the free repair service. See 119 CONG. REC. 968 (Jan. 12, 1973) (comments of Sen. Magnuson regarding “[c]onsumer anger” when purchasers discover that “there is full coverage on a piano so long as it is shipped at the purchaser’s expense to the factory”); 120 CONG. REC. 31319 (Sept. 17, 1974) (staff report of the House Subcommittee on Commerce and Finance describing unfairness of transportation and shipping charges routinely inserted in warranties).

47 Christopher Smith, The Magnuson-Moss Warranty Act: Turning The Tables on Caveat Emptor, 13 CAL. WESTERN L. REV. 391, 393 (1977); see also H.R. REP. NO. 93-1107, at 24 (1974), reprinted in 1974 U.S.C.C.A.N. 7705, 7706 (describing the inability to secure manufacturer compliance with warranties and the “developing awareness that the paper with the filigree border bearing the bold caption ‘Warranty’ or ‘Guarantee’ was often of no greater worth that the paper it was printed on”).

48 115 CONG. REC. 31483 (Oct. 27, 1969).
Few, if any, issues plague the consumer more than the one we will discuss today. The artful words in minute print under the bold type declaration of "guarantee" or "warranty" confuse and bewilder even the sophisticated buyer. The so-called guarantee may prove to be a full coverage insurance policy against product failure during the guarantee period, but it is just as likely to be an empty promise and "insure" only the corporation making it — "insure" it, the corporation, of marketing advantages of the word "guarantee" and insure it against having to pay if the product fails to work.49

Two additional circumstances exacerbated this problem, well described by the adage, "what the bold print giveth, the fine print taketh away."50 First, effective government regulation was absent from this field. This is best evidenced by Senator Moss' statement that the FTC had become known in Washington circles as the "sleeping lady of Pennsylvania Avenue."51 Indeed, granting the FTC enhanced powers to regulate the marketplace became such a key feature of this legislation that it became known as the "Magnuson-Moss Warranty – Federal Trade Commission Improvement Act."

The second circumstance that made the problem of meaningless warranties intractable was the absence of a "readily available or practical means" for consumers to achieve redress for their warranty-related grievances.52 The first draft of the warranty

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50 H.R. REP. NO. 93-1107, at 24 (1974), reprinted in 1974 U.S.C.C.A.N. 7705, 7706 (explaining that the saying "the bold print giveth and the fine print taketh away" applied since warranties of the period routinely disclaimed the implied warranties of merchantability and fitness but provided no real warranty protection in their place).

51 Consumer Product Warranties and Improvement Act Hearings, supra note 36, at 2 (explaining that the FTC "finds itself without proper tools to police the marketplace"); see also S. REP. NO. 93-151, at 10 (1973) (describing how in the late 1960s the FTC "had reached its nadir in public esteem and confidence").

52 H.R. REP. NO. 93-1107, at 27 (1974), reprinted in 1974 U.S.C.C.A.N. 7705, 7710. At the time, one was not inclined to commence a lawsuit over a freezer or a stove that did not work properly, and, even if one was, the amount in controversy would make costly litigation a fool's errand. See 119 CONG. REC. 968 (Jan. 12, 1973) (observation of Sen. Magnuson that "enforcement of a warranty through the courts is prohibitively expensive"). In 1975, every consumer in America already had the right to sue for breach of warranty under U.C.C. § 2-313 or the common law of sales, a right that had existed for centuries. See WILLIAM BLACKSTONE,
Congress hereby declares it to be its policy to encourage guarantors to establish procedures whereby consumer disputes related to performance guarantees are fairly and expeditiously settled through informal dispute settlement mechanisms. Such informal dispute settlement procedures should be created by guarantors in cooperation with independent and governmental entities and should be supervised by some governmental or public body.\footnote{53}

IV. The 1969 Meaning of the Phrase “Informal Dispute Settlement Mechanisms”

Senate Bill 3074 did not define the phrase “informal dispute settlement procedures” or “mechanisms.”\footnote{54} Because there is no apparent pre-existing legislative activity to define this phrase, and no readily available means to ascertain the intent of the Chairman of the Senate’s Committee on Commerce at the time this language was drafted, it is useful to explore how this phrase was being used in America in 1969.\footnote{55}

To discern this key phrase’s meaning, we must scrutinize the
historical context, and in particular what was being done at the time in the area of formulating methods of dispute resolution that could serve as an alternative to ordinary litigation in the courts. This was an interesting time, because it directly preceded the explosion of interest in “alternative dispute resolution mechanisms” that occurred in the early 1980s. However, before turning to that historical analysis, it is important to consider generally how the phrase and its component parts were used in and around 1969.

A. The Use of “Informal Dispute Settlement Procedure”

Language at the Relevant Time

Modern courts embracing the foreclosure of court access to Magnuson-Moss claimants have asserted that “arbitration” and “informal dispute settlement procedure” are two distinctly different things. The Walton court asserted cryptically that arbitration is “of a different nature,” and the Davis court found merit in that view. To test the idea that “arbitration” and “informal dispute settlement procedure” are distinct concepts, let us see how arbitration was described during the legislative period. Analyzing the use of the word “arbitration” during the time the Magnuson-Moss Act was drafted shows that “arbitration” was not distinct from “informal dispute settlement procedure.”


The Alternative Dispute Resolution (ADR) movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today, with the rise of public complaints about the inefficiencies and injustices in our traditional court systems, the ADR movement has attracted a bandwagon following of adherents. ADR is no longer shackled with the reputation of a cult movement.

Id. at 668. Though Judge Edwards’ perception that the ADR movement first began in the late 1970s time period is correct, his characterization of the interest in alternative dispute resolution before that time as the cult-like preserve of “offbeat scholars” is not. In the late 1960s and early 1970s, serious scholars were beginning to study the issue, and, most significantly, so was the United States Congress. This era was the dawn of what became, in the 1980s, a broad interest in and a widespread embrace of alternative dispute resolution.

The analysis may begin by noting that the statutory phrase may be thought of as consisting of two components—a nounal phrase, “dispute settlement procedure,” and an adjectival modifier, “informal.” In this sense, it is not unlike the modern phrase “dispute resolution mechanism” modified by the adjective “alternative.” It is clear that the nounal component of the phrase under discussion was used interchangeably with the word “arbitration” during the pertinent time. Seven days before Senator Magnuson introduced S. 3074 on the floor of the Senate, the U.S. Supreme Court justices heard arguments across the street in the case of Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union. The case involved a labor dispute between a railroad and its union. Under the Railway Labor Act of 1926, parties to a railroad labor dispute were required to maintain the status quo while certain dispute resolution procedures set forth in the Act were being exhausted. The Supreme Court explained in its opinion that the “Act established rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation.” The Court then referenced these mechanisms on the next page of the opinion by referring to them together as “dispute settlement procedures.” A review of other Supreme Court decisions from this period shows that it was common for the Justices to refer to arbitration as a “dispute settlement procedure” or “dispute settlement mechanism.” The Court sometimes modified the phrase with an adjective to read “private dispute settlement mechanisms.”

58 The placement of one or more nouns before another noun can suffice to convert the former into adjectival modifiers of the latter, and that is true of our “nounal phrase.” At bottom, there is a procedure or mechanism, and it is used for the settlement of disputes. The phrase is inherently encompassing and broad. It fairly describes all types of dispute resolution, including courts. This makes the separate modifier “informal” important, and it is to emphasize its significance that the phrase has been separated into two components for purposes of analysis.


60 Id. at 143.

61 Id. at 148–49.

62 Id. at 150.

Following the Supreme Court's 1960 landmark "Steelworkers Trilogy" decisions, federal courts were frequently called upon to effectuate the "federal policies favoring peaceable settlement of labor disputes through arbitration."\(^{64}\) During this era, labor arbitration often defined the context in which courts used the word "arbitration" and its synonyms such as "private dispute settlement procedures."\(^{65}\) It is reasonable to conclude that the members of Congress who enacted and supervised the labor laws were accustomed during the relevant time to use "arbitration" and "dispute settlement procedures" interchangeably, just as our courts were.\(^{66}\)

\(^{64}\) 48A A.M. JUR. 2d, Labor and Labor Relations § 3352, at 525 (1994). The Supreme Court's 1960 labor law decisions enforcing arbitration provisions advanced the interests of that party in the labor-management field that had historically lacked equal power. Whereas prior to the enactment of the National Labor Relations Act of 1935, "management, with few exceptions, was able to dominate and exercise unilateral control over most internal plant matters," in the quarter century that followed, labor unions gained power and forged collective bargaining agreements that "contained clauses by which many controversies were submitted to arbitration and the power of the firm waned." Irving Kovarsky, Comment: The Enforcement of Agreements to Arbitrate, 14 VAND. L. REV. 1105 (1961). The reason this is worthy of comment is that the Supreme Court in the last two decades has, in its body of FAA case law, consistently reached results that have advanced the interests of those parties with superior economic power. The Magnuson-Moss/FAA issue confronts a court with the question of whether achieving such a result in this context might not be of great concern since consumers have no power whatsoever to challenge the terms of a product warranty.

\(^{65}\) The interest of the bench and the bar was focused on labor arbitration through the 1950s, and less attention was paid to commercial arbitration. In June 1957, the editors of the Vanderbilt Law Review decided to devote an entire issue to the subject of arbitration. See 10 VAND. L. REV. 649 (1957). They noted that "[t]wenty years ago" even a single "article on arbitration would have been an oddity in a law review." Id. at 649. Most of the articles in that June 1957 issue focused on labor arbitration.

\(^{66}\) We have direct evidence that Congress knew about such decisions as Detroit & Toledo Shore Line Railroad Co. v. United Transp. Union, 396 U.S. 142 (1969). This was a time when a "nationwide cessation of essential rail transportation services" was threatened due to a labor dispute. Railroad Labor-Management Dispute – 1970: Hearings Before House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 3 (1970). The members were fearful that a nationwide strike could cripple the Nation's economy, and were displeased that
As with the judiciary, it was common for legal scholars to treat arbitration as a "dispute settlement procedure" or "mechanism." This was as true of commercial arbitration as it was of labor arbitration. Often rather than using the precise nounal phrase, they would use equivalent verbal formulations like "a method of dispute settlement." This was not only the case with legal scholars, but also with the leading arbitration association, which gave its 1970 dictionary on arbitration this subtitle: "A Concise Encyclopedia of Peaceful Dispute Settlement." Lexicographers of the English language and encyclopedia writers also described arbitration in this way.

The dispute settlement procedures of the Railway Labor Act had failed because of the "public-be-damned attitude" of labor and management. Id. at 27. The Committee on Interstate and Foreign Commerce, which included such congressmen as Rep. John E. Moss who chaired the Subcommittee hearings on the Magnuson-Moss legislation, assessed the efficacy of the dispute settlement procedures in the Railway Labor Act in a series of crucial hearings in March and April of 1970. The hearing transcripts show such cases as Detroit & Toledo Shore Line Railroad Co., then reported at 38 LAW WEEK 4033, were put before the members. See, e.g., id. at 239.

The principal treatise on commercial arbitration was MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1968). Said to be the first "substantial" and "scholarly" treatise on arbitration to be published in 15 years in American Arbitration Association, Readings in Arbitration, 23 ARB. J. 54, 55 (1968), this book described arbitration often as a "method of dispute settlement." See MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 5 (1968) ("nobody should be bound to resort to arbitration unless he has previously agreed to that method of dispute settlement") (emphasis added); see also James A. Dobkin, Arbitrability of Patent Disputes Under The U.S. Arbitration Act, 23 ARB. J. 1, 17 (1968) (describing arbitration as a "common mode of settlement" and advocating its increased use "to settle" patent law disputes); Case Comment, Commercial Arbitration — Sherman Antitrust Act — Antitrust Violation Held Inappropriate for Arbitration, 44 NOTRE DAME LAW. 279, 280 (1968) (noting the "widespread acceptance of arbitration as a means of settling commercial disputes"); Kenneth Cushman, Arbitration and State Law, 23 ARB. J. 162 (1968) ("The use of arbitration as a method for the settlement of disputes has emerged as a major force in the construction industry."); Frank D. Emerson, History of Arbitration Practice and Law, 19 CLEV. ST. L. REV. 155, 164 (1970) (describing arbitration as "a dynamic institution for the peaceful settlement of discord, differences, and disputes").


English language dictionaries defined the word arbitrate as "[t]o submit to settlement or judgment by arbitration," showing that common usage of the term involved the concept of a device used for the "settlement" of disputes. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 87 (1969).
Obviously of great importance here is the adjective "informal." Since the nounal phrase is a broad one that can plainly be read to encompass all methods whereby people resolve, or "settle," their disputes, the statutory phrase necessarily takes much of its meaning from the word "informal." It bears emphasizing that arbitration has consistently been described as an informal procedure by courts, lawyers, and everyone else, including the writers of books for the general public, both during the relevant time and throughout its history. Indeed, the chief virtue of arbitration is its informality, as this is what ensures that it is "much cheaper and much faster than even the simplest litigation."
Because a word like "informal" refers to the relative quality of a thing and does not name a thing, it had in 1969, as it does now, a threshold elasticity of meaning made definite both by what it qualifies and what it distinguishes. The word "informal" was used in "informal dispute settlement procedures" in order to contrast these dispute resolution procedures from courts of law, in the same way "informal" is used to describe one of the prime beneficial and distinguishing features of arbitration — that it is faster, cheaper and less complex than the formal adjudicative processes of the courts.

One might argue that arbitrations can be made either "formal" or "informal," and this is a truism arising from the relative nature of those words. A particular arbitration mechanism may be more formal than another. An arbitration procedure might be constructed to mimic as much as possible the Illinois Code of Civil Procedure, and a relatively "formal" type of arbitration or "dispute settlement procedure" could thereby be created. Apart from the fact that no one likely would intend to thwart the relative speed, inexpensiveness and simplicity of nonjudicial dispute resolution devices in such a way, the essential point here is that even if one attempted to do so, it would be impossible to make any nonjudicial redress mechanism as "formal" as a court of law, which finds both its legitimacy and its power in its constitutional character. As Professor Sturges observed:

Arbitrators, as distinguished from judges, are not appointed by the sovereign, are not paid by it, nor are they sworn to any allegiance. Arbitrators exercise no constitutional jurisdiction or like role in the judicial systems — state or

196 (1967) (quoting Vladick). In the Magnuson-Moss Act, Congress described "informal dispute settlement procedures" as something that would "fairly and expeditiously" resolve disputes. See 15 U.S.C. § 2310(a)(1) (2000). This emphasis on the speed of such procedures makes the phrase one that refers to a mechanism possessing the same characteristic that was routinely attributed to arbitration during the time. See Goldman, supra, at 196 ("[A]rbitration is also a relatively speedy and informal process."); James T. Halverson, Arbitration and Antitrust Remedies, 30 ARB. J. 25, 29 (1975) ("What does arbitration offer as an antitrust remedy? Most important, it is a procedure for the quick, inexpensive resolution of disputes.").

A good example of this is found in Note, Translating Sympathy for Deceived Consumers into Effective Programs for Protection, 114 U. PA. L. REV. 395, 437 (1966), where the author describes small claims courts as "informal" procedures, which they are, relatively speaking, when compared to court mechanisms that apply to ordinary civil actions.

As Judge Learned Hand wrote, the "purpose of arbitration is essentially to escape from judicial trial." Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1005, 1005 (2d Cir. 1933).
Given all of the foregoing it is not surprising that a review of the writings of the legal scholars published during the same year that Senator Magnuson first introduced the phrase on the floor of the Senate uncovers evidence that the phrase "informal dispute settlement mechanisms" was used as a generic expression to encompass "arbitration." The expression was not merely a synonym for arbitration, but rather a phrase that included arbitration within the scope of its meaning. At its essence, like private arbitration mechanisms, "informal dispute settlement mechanisms" described a category of dispute resolution devices distinguished from court processes.

To understand further why this is so, and to answer the question of why Senator Magnuson did not simply use the word "arbitration," we need to examine the state of alternative dispute resolution at the time.

B. Status of Nonjudicial Redress Mechanisms at the Time.

Alternative dispute resolution in 1969 consisted of labor arbitration and commercial arbitration. Efforts to embrace

75 Sturges, supra note 31, at 1046.

76 See, e.g., Alfred W. Blumrosen, Labor Arbitration, EEOC Conciliation, and Discrimination in Employment, 24 ARB. J. 88, 90 (1969) (describing arbitration, mediation, and conciliation as "informal dispute settlement mechanisms"). In the 1970s it was not uncommon in the law journals for persons to use the adjective "informal" to distinguish resolution mechanisms from "conventional judicial dispute resolution," Note, Dispute Resolution, 88 YALE L.J. 905, 909 (1979), and in doing so they would employ phrasing like that employed in the Magnuson-Moss Act to describe the non-judicial mechanisms. See id. at 909 ("What is needed is a set of 'jurisdictional' principles that delimit those areas in which informal dispute-resolution techniques are both workable and permissible. . . . A key consideration, of course, is the extent to which we may add structure, consistency and authority to its resolution in an informal forum."). See also state statutes cited infra note 187 (employing the phrase "informal dispute settlement procedure" and defining it to include "arbitration").

77 The history of commercial arbitration can be briefly traced for these purposes from the 1920s. In 1920, the New York legislature enacted legislation that had been prepared and presented to it by the Chamber of Commerce of the State of New York, working with the New York Bar Association. See Jones, supra note 71, at 248. This bill made "an agreement to arbitrate a controversy arising in the future between the parties to a contract . . . valid, enforceable and irrevocable." Id. at 249. Prior to this time, arbitration had frequently been used in the commercial setting through trade associations that made membership carry with it a duty to arbitrate
alternatives to the customary judicial dispute settlement procedure in certain other areas were in their infancy.\footnote{78}

The effort to encourage non-traditional dispute settlement mechanisms outside the arenas of labor and commercial arbitration, an undertaking that was to become known in the 1980s as the “alternative dispute resolution” or “ADR” movement, essentially embraced two initiatives.\footnote{79} First, there were efforts to use new dispute settlement techniques within the court system. This “court-annexed” or “judicial” arbitration was often used to facilitate resolution of “small claims.”\footnote{80} “Small claims” courts, designed to be

\textit{Id.} at 248. \textit{See also} Katherine Van Wezel Stone, \textit{Rustic Justice: Community and Coercion Under The Federal Arbitration Act}, 77 N. \textit{CAROLINA L. REV.} 931, 935 (1999) (“In the late nineteenth and early twentieth century, arbitration in the United States expanded along with the growth of trade associations.”). But, “the trade associations could make arbitration agreements binding only on their members,” and problems arose “when members of two organizations which had arbitration rules wanted to arbitrate.” Jones, \textit{ supra}, at 248. The New York legislation, the first in the country of its type, was aimed at solving those problems. Groups like the Chamber of Commerce then urged state legislatures to enact laws based on a uniform statute modeled on the New York law, and they sought what became the FAA to ensure the arbitration of disputes arising out of maritime and interstate commerce transactions. \textit{Id.} at 250. By the 1960s about half the states had arbitration statutes in place. \textit{See e.g.}, Goldman, \textit{ supra} note 72, at 193 (noting that “some twenty-odd” states along with Kentucky had adopted statutes patterned on the Uniform Arbitration Act). When the National Institute for Consumer Justice issued a 1973 report that shall be discussed, see \textit{infra} text accompanying notes 133–38, it noted that even at that late date in “some states only agreements made after the dispute has arisen are enforceable.” See \textit{NATIONAL INSTITUTE FOR CONSUMER JUSTICE, REDRESS OF CONSUMER GRIEVANCES – REPORT OF THE NATIONAL INSTITUTE FOR CONSUMER JUSTICE} 9 (1973).


\footnote{79} \textit{Here we shall make a distinction between “ideas” and reality. There were many ideas about how alternative methods of dispute settlement might be extended to new dispute areas at this time. Take as an example the attempt by some to make medical malpractice cases resolvable through arbitration “agreements,” \textit{i.e.}, the forms people sign on admission to the hospital. Stanley D. Henderson, \textit{Arbitration and Medical Services: Securing the Promise to Arbitrate Malpractice}, 28 \textit{ARB. J.} 14 (1973). But, we are more concerned here with what was \textit{happening} and less with what was proposed.}

the “people’s court,” were themselves a form of alternative dispute resolution mechanism in the broad sense because they were alternatives to the judicial processes that had traditionally been used.

A second initiative, related to what was going on in the courts, was in the area of non-judicial dispute settlement for claims of low dollar value that made the costliness of litigation seem problematic. This initiative appears to have involved the actual establishment of only one final product, the development of a “neighborhood justice center” by the American Arbitration Association in Philadelphia in 1969. With funding from the Ford Foundation, the American Arbitration Association (“AAA”) created a “Center for Dispute Settlement” in 1968. The Philadelphia program, which arbitrated small consumer-merchant claims, was its “prototype.” This prototype was a complete failure. Not a single consumer-merchant dispute was successfully arbitrated during the first nine months of the program. According to one commentator, the “major reason for the Center’s dismal lack of success in utilizing the arbitration technique was the frequent unwillingness of merchants to submit themselves to the forum – the one essential prerequisite to

municipal courts in the 1930s).

81 Barbara Yngvesson & Patrica Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 LAW & SOC’Y REV. 219, 268 (1979) (observing that small claims courts were intended to provide a “more effective system of justice for the ‘average’ American citizen”). Often these small claim procedures began with the best of intentions but then failed to realize their promise. See the captivating study of Baltimore’s “rent court” prepared by Professor Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process, 20 HOFSTRA L. REV. 533 (1992).

82 An important program that was started in 1952 and that attracted the attention of legal scholars by the early 1960s was Pennsylvania’s court-annexed program of arbitrating small claims, initially those for not more than $1,000 in claimed damages, and then with a 1957 statutory amendment, those for not more than $2,000. Maurice Rosenberg & Myra Schubin, Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania, 74 HARV. L. REV. 448, 450 (1961).


84 Id.

85 Id. Excepting those cases where consumers were referred to attorneys or service agencies, only forty-five consumer-merchant disputes were finally administered, or “closed,” during the first nine months. Of these, “not one was successfully arbitrated.” Id.
the forum." 86

Various other alternative dispute resolution procedures that were created circa 1969-1971, such as the Major Appliance Consumer Action Panel, 87 were established by industries as a way to avoid the Magnuson-Moss legislation. These programs were also unsuccessful, as is discussed below.

Although writings began to emerge about the possibility of devising non-judicial dispute settlement techniques for consumer claims, 88 the field was inchoate and the ideas as to how new non-judicial redress mechanisms could be developed to handle consumer claims were not fully formed. Indeed, when the National Institute for Consumer Justice issued its 1973 report, it stated "consumer arbitration is basically new and untested." 89 This indeterminacy as to exactly what such alternative procedures for the arbitration of consumer claims would look like, how they would be funded, and how they would be administered, continued for the next decade and a half. 90 This is why Congress elected to use a broad and encompassing

86 Id.

87 This industry-created mechanism for dispute settlement is described in the context of the treatment of the Magnuson-Moss legislative history. See infra note 98.

88 See, e.g., Eovaldi & Gestrin, supra note 83; Mary Gardiner Jones & Barry B. Boyer, Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies, 40 GEO. WASH. L. REV. 357 (1972).

89 NATIONAL INSTITUTE FOR CONSUMER JUSTICE, supra note 77, at 8.

90 See Robben W. Fleming, Reflections on the ADR Movement, 34 CLEV. ST. L. REV. 519, 522 (1986) ("As has already been stated, all the alternatives to litigation lie somewhere along an axis of negotiation through adjudication. The form which a procedure may take is limited only by the imagination of the people involved."). Judge Harry T. Edwards noted:

Because the ADR movement is still in its formative stage, there is much to learn about the feasibility of alternatives to litigation. ADR is, as yet, a highly speculative endeavor. We do not know whether ADR programs can be adequately staffed and funded over the long-term; whether private litigants will use ADR in lieu of or merely in addition to litigation; what effect it may have on our judicial caseload; whether we can avoid problems of 'second class' justice for the poor; and whether we can avoid the improper resolution of public law questions in wholly private fora.

Edwards, supra note 56, at 683 (emphasis added). Even in 1979, Congress was still trying to figure out how to go about developing dispute resolution mechanisms that could be used generally to provide an "expeditious and inexpensive" way to resolve consumer and minor disputes. See Note, Dispute Resolution Act Passed, 35 ARB. J.
phrase, “informal dispute settlement procedures,” because it did not know what precise forms these procedures might eventually take.

V. The Pertinent Legislative History

A. The 1970-1971 Legislative Activity

On January 20, 1970, five days of hearings commenced before the Consumer Subcommittee of the U.S. Senate's Committee on Commerce on Senator Magnuson's Senate Bill 3074.\[91\] Senator Frank E. Moss chaired the Consumer Subcommittee. In his opening remarks on Bill 3074, he explained that one aim of the legislation was to ensure that if a warrantor or guarantor of a consumer product failed to honor its obligations, the consumer would have either a means of redress through the judicial system or a way of securing relief through “informal dispute settlement mechanisms.”\[92\] He stated:

If the guaranteed product or component malfunctions, the guarantor is required to repair, or replace if repair is not possible or cannot be timely made, the malfunctioning component within a reasonable time and without charge. If the maker of the guarantee fails to perform his duties, the consumer has quick and effective means of making the corporation respond either through court action where his attorney's fees are paid for or through informal dispute settlement mechanisms.\[93\]

This bifurcation of remedies into two categories – judicial

\[91\] Consumer Products Guaranty Act Hearings, supra note 28, at 1.

\[92\] Id. at 2.

\[93\] Id. (emphasis added); see also id. at 165. The two modes of relief – formal court actions and informal dispute settlement procedures – were linked to one another in that the potential for a court action was the thing that members of Congress and their counsel believed would prompt industry to create “informal dispute settlement mechanisms.” S. Lynn Sutcliffe, staff counsel to the Committee of Commerce, noted in his statement before the Consumer Subcommittee that manufacturers and retailers would have an “incentive” to “create informal dispute settlement mechanisms” since under S. 3074 “the consumer is given a meaningful right for a lawsuit, because reasonable attorney's fees are awarded him if he is successful.” Consumer Products Guaranty Act Hearings, supra note 28, at 21.
redress mechanisms and "informal dispute settlement mechanisms" – represented a common way of expressing the available forms of relief. It was consistently done throughout the legislative process, as the hearing transcripts and congressional reports show.94

The efforts of the representatives of American industry to convince Congress that businesses could regulate themselves were a prime feature of the hearings that took place over the next four years.95 Representatives of industry appeared before Senator Moss' Subcommittee in January 1970 to assert that Congress should refrain from acting because industry had matters well in hand. For example, A.S. Yohalem, the Director of the Chamber of Commerce of the United States, commented as follows:

In sum, Mr. Chairman, we believe that voluntary progress has been sufficient to warrant a continued extension of the legislative moratorium on warranties and guarantees.... It is not more laws that the consumer wants: it is solutions of his problems. If voluntarism in a competitive marketplace will produce a workable and satisfactory solution to the warranties problems – and we believe it will – then consumers would be less well served by legislative remedies.96

There had been two features to industry's "voluntary

94 See, e.g., Consumer Warranty Protection – 1973 Hearings, supra note 28, at 62–63 (statement of Sen. James T. Broyhill) (explaining that bill aims at ensuring that "these consumer disputes can be settled through more informal dispute settlement procedures, rather than the courts"); see also S. Rep. No. 93-151, at 16 (1973) (explaining that there were two anticipated avenues of redress for the consumer, "informal dispute settlement mechanisms" and "legal remedies made economically feasible because of provision for recovery of reasonable attorney's fees based on actual time expended"); id. at 23 (consumers "may resort to formal adversary proceedings with reasonable attorney's fees available if successful in the litigation (including settlement)"; stating unequivocally that following use of an "informal dispute settlement procedure" consumers "would not be prevented from seeking formal judicial relief following such utilization") (emphasis added); S. Rep. No. 93-1408, at 26–27 (1974).

95 See Consumer Products Guaranty Act Hearings, supra note 28, at 1 (statement of Sen. Moss as to how "[i]ndustry scrambled to put its own house in order"); see also id. at 130 (statement of Winston H. Pickett, Associate counsel, General Electric Co.) (explaining that "the probability of intense and proper concern by Congress with this whole problem was a continuing stimulus" to industry's self-regulation efforts).

progress.” The first was the effort by some groups to teach companies how to make their warranties less unfair and deceptive. The other aspect was to begin devising mechanisms whereby consumers could have their claims of warranty breach resolved without judicial or governmental involvement. Generally speaking, these mechanisms shared three characteristics: they were voluntary (as far as the manufacturers were concerned), they were not subject to any governmental supervision, and they did not require the warrantor to do something that it did not want to do.

In the view of the members of the Nixon administration who appeared before Senator Moss’ Subcommittee in 1970, the efforts by industry had not accomplished very much to solve the warranty problem. Caspar W. Weinberger, Chairman of the FTC, told the senators: “it is apparent that there has been some effort by industry to improve warranties and service in the major appliance field,” but he concluded that “it is unlikely that collective voluntary action will provide an effective solution to warranty abuses.”

The senators on the Consumer Subcommittee heard two very different reactions to the provision in section 16 of Senate Bill 3074 that encouraged the creation of “informal dispute settlement

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97 See, e.g., id. at 76 (1970) (statement of George P. Lamb, General Counsel, Association of Home Appliance Manufacturers).

98 Typical was the “Complaint Exchange” that had been developed by the Association of Home Appliance Manufacturers (“AHAM”). Described by AHAM’s counsel as “the association’s most important action in helping to resolve complaints that arise under warranties,” the “Exchange” apparently served primarily as a place for “transmitting” the complaints of consumers that found their way into the offices of the congressmen, the President, and “whomever.” Consumer Products Guaranty Act Hearings, supra note 28, at 77 (statement of George P. Lamb). The “Exchange” would then follow through, supposedly, to see if it could get the warrantor to solve the problem voluntarily. Later in the year, at House hearings, Mr. Lamb proudly reported on how a successor to the “Exchange,” called the Major Appliance Consumer Action Panel (“MACAP”), had worked to resolve “125” warranty complaints, and how the mechanism had “eight persons who work professionally in consumer-interest fields.” Warranties and Guaranties Hearings, supra note 28, at 130–131, 140. The small number of consumer warranty grievances resolved by MACAP could not have been reassuring to the congressmen whose offices were being inundated with many thousands of angry letters from constituents. Rep. John E. Moss commented that his office alone had received some 1,000 complaints with regard to consumer products. Id. at 143. See generally Jones & Boyer, supra note 88, at 372 (concldng that an “MACAP-type mediation effort” operated by industry “seems inherently incapable of providing a full answer to the consumer grievance problem”).

mechanisms." Industry representatives generally opposed it because it "injected" governmental regulation into the affairs of businesses.\textsuperscript{100} Consumer groups thought the provision did not go far enough, since it did not "mandate" the creation of such mechanisms, but only encouraged them.\textsuperscript{101} Both sides, however, made clear to the Subcommittee that they understood "arbitration" procedures were encompassed by the phrase "informal dispute settlement mechanisms" as used in Senate Bill 3074.\textsuperscript{102}

The Subcommittee on Commerce and Finance of the House of Representatives Committee on Interstate and Foreign Commerce began hearings on warranty legislation in September 1970.\textsuperscript{103} Seven separate warranty bills had been introduced in the House in 1969-1970, two of which were like S. 3074.\textsuperscript{104} Members of the House also had developed three other types of legislation that omitted the

\textsuperscript{100} The industry view on the "informal dispute settlement" component of the legislation was expressed by George P. Lamb of AHAM:

AHAM and other trade associations have repeatedly demonstrated their willingness to cooperate with governmental agencies to advance the consumer's interest. They have demonstrated their willingness to assist in seeing that consumer complaints are answered satisfactorily. To require governmental supervision of our effort, and the efforts of all independent organizations that undertake to provide procedures for arbitrating consumer claims would delay and inhibit their work. What governmental agency could undertake to carry out with dispatch the supervision of voluntary procedures that might be established by the industries that now supply the consumer goods with which S. 3074 is concerned? We think none.

\textit{Consumer Products Guaranty Act Hearings, supra} note 28, at 79 (emphasis added).

\textsuperscript{101} In his prepared statement, David A Swankin, the Washington Representative of the Consumers Union, wrote:

The bill as written merely encourages, as a matter of policy, that informal dispute settlement procedures be created. Why should the Congress stop at that? . . . We can hardly realistically expect consumers to flood the courts with law suits [sic] to make this law work. That is why we put so much importance in mandating a system of negotiation and arbitration.

\textit{Consumer Products Guaranty Act Hearings, supra} note 28, at 259 (emphasis added).

\textsuperscript{102} See \textit{supra} notes 100 and 101.

\textsuperscript{103} \textit{Warranties and Guaranties Hearings, supra} note 28.

\textsuperscript{104} Id. at 44 (describing H.R. 18758, H.R. 19293, and S. 3074 as "similar").
provisions on "informal dispute settlement mechanisms," including H.R. 10690.\textsuperscript{105}

The FTC strongly opposed the failure of these bills to encourage creation of informal dispute settlement mechanisms. Directing his comments to the "Buyer's Remedies" section of H.R. 10690, Miles W. Kirkpatrick, who had succeeded Caspar Weinberger as Chairman of the FTC, criticized the bill's omission of a non-judicial remedy for consumers. He explained that given the costs of formal litigation, an "arbitration" procedure should be included in the bill. Noting that an arbitration remedy could be "formulated and administered in a variety of ways," he urged delegating to the "administering agency" the power "to lay down the standards to which this arbitration remedy must conform."\textsuperscript{106}

In March 1971, Congress held more hearings on warranty legislation. Senator Frank E. Moss' Subcommittee received testimony on S. 986, which contained as "Title I" a bill that was almost identical to S. 3074 passed without a dissenting vote in the Senate on July 1, 1970.\textsuperscript{107} Section 110(a) of S. 986 contained the policy statement favoring the establishment of "informal dispute settlement mechanisms."\textsuperscript{108} In his questioning of FTC Chairman Kirkpatrick, Senator Moss distinguished between consumer lawsuits and FTC administrative actions to enforce warranties, on the one hand, and informal dispute settlement procedures, on the other. The former were described as "formal dispute settlement mechanisms," and they were, according to Senator Moss aimed at "encourag[ing] industry to develop workable informal settlement procedures."\textsuperscript{109} The FTC Chairman concurred with Chairman Moss' view, expressing the

\textsuperscript{105} Id. at 16–43 (text of H.R. 10690). H.R. 10690 was identical to H.R. 12656 and H.R. 16782. Id. at 16.

\textsuperscript{106} Warranties and Guaranties Hearings, supra note 28, at 64 (emphasis added).

\textsuperscript{107} Consumer Product Warranties and Improvement Act Hearings, supra note 36, at 1–2.

\textsuperscript{108} Id. at 14 (text of S. 986).

\textsuperscript{109} Id. at 44. It is noteworthy that Sen. Moss used the phrase "dispute settlement mechanisms" to refer to FTC enforcement actions and private lawsuits, revealing that the phrase "dispute settlement procedure" or "mechanism" was used to describe any dispute resolution mechanism, and that, just as today's phrase is modified by the word "alternative" to distinguish certain procedures from legal actions, the phrase "dispute settlement procedure" circa 1971 was modified by the word "informal" to distinguish certain procedures from the adjudicative processes in courts of law.
belief that industry would be motivated to create informal dispute settlement mechanisms, "rather than permitting the matter to go into the courts."

This Senate Subcommittee hearing demonstrates the Magnuson-Moss Act's treatment of "informal dispute settlement mechanisms" and their meaning. S. 986 as it was originally drafted, like its predecessor S. 3074, contained the language that such mechanisms were "encourage[d]" by Congress and that they "should be created by suppliers in cooperation with independent and governmental entities and should be supervised by some governmental or other impartial body." But, there was nothing in S. 3074 or in S. 986, as it was first drafted, that provided for the FTC to create rules as to informal dispute settlement procedures. In their original 1970 form, these bills contained what was really a policy statement that had not yet been fully fleshed out.

At the March 9, 1971 hearing before Sen. Moss' Subcommittee, the process of adding meat to the bones of this aspect of the Senate bill began. The FTC Chairman, in his statement to the subcommittee, suggested that Section 110(a) of S. 986 be changed to permit the FTC to prescribe rules for such dispute settlement mechanisms.

When Senator Moss' Subcommittee revised Senate Bill 986, it transformed the provision on "informal dispute settlement procedures" from a statement of policy into something far more concrete. The bill, as reported, differed from the version of S. 986 that had been before the Consumer Subcommittee during the March 1971 hearings. Section 102(a)(10), which had required disclosure in warranties pursuant to FTC regulations of "[t]he availability of any informal dispute settlement procedure," now read: "The availability of any informal dispute settlement procedure offered by the warrantor and a recital that the purchaser must resort to such procedure before

110 *Id.* at 45.

111 *Compare id.* at 14 (text of S. 986, section 110(a), as it was originally drafted), with Consumer Products Guaranty Act Hearings, *supra* note 28, at 5 (text of S. 3074, section 16).

112 Consumer Product Warranties and Improvement Act Hearings, *supra* note 36, at 34 (statement of Miles W. Kirkpatrick).

113 Following the hearings before the Consumer Subcommittee, on July 16, 1971, the Senate Committee on Commerce published its report on S. 986. *See* S. REP. NO. 92-269 (1971).
pursuing any legal remedies in the courts.” 14 Adopting FTC Chairman Kirkpatrick’s recommendation that the FTC be given authority over informal dispute settlement procedures, Section 110(a) was added, stating:

Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. Such informal dispute settlement procedures should be created by suppliers in cooperation with independent and governmental entities pursuant to guidelines established by the Commission. If a supplier incorporates any such informal dispute settlement procedure in any written warranty or service contract, such dispute procedure shall initially be used by any consumer to resolve any complaint arising under such warranty or service contract. The bona fide operation of any such dispute procedure shall be subject to review by the Commission on its own initiative or upon written complaint filed by any injured party. 15

In tandem with the proposal that the FTC’s rule-making power be enhanced, several senators and Nixon administration representatives recommended that a formal analysis of the available mechanisms of dispute settlement be conducted. President Nixon had first called for such a study in February 1971. 16

The most important voice on the Subcommittee on this issue was that of Senator Marlow W. Cook. 17 Senator Cook announced his

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14 Id. at 31. Thus, the concept of informal dispute settlement procedures as the alternative to the judicial redress mechanism became more fixed.

15 Id. at 33–34. These provisions became part of the enacted legislation. See 15 U.S.C. §§ 2302(a)(8), 2310(a)(1) & (2).

16 See NATIONAL INSTITUTE FOR CONSUMER JUSTICE, supra note 77, at xi, where it stated:

The National Institute for Consumer Justice grew out of the President’s consumer address made on February 24, 1971, which called upon “interested private citizens to undertake a thorough study of the adequacy of existing procedures for the resolution of disputes arising out of consumer transactions.” The Institute commenced operations in the summer of 1971 and concluded its work in March of 1973.

intention to offer “on the floor as an amendment to S. 986” a third section to the bill requiring a “Consumer Remedies Study.” Senator Cook made clear his view that “arbitration” was one form of “informal dispute settlement mechanism,” when he stated in his amendment that it would authorize the Director of the Office of Consumer Affairs, with the assistance of the Attorney General, to contact “the National Institute for Consumer Justice” to “conduct a study or studies of means of improving the grievance-solving mechanisms and legal remedies of consumers,” taking account of “existing and potential voluntary settlement procedures, including arbitration.” The word “arbitration” was used to mean a sub-category of “voluntary settlement procedures.”

S. 986 was brought up for a vote on the floor of the U.S. Senate on November 8, 1971, and Senator Cook offered his amendment. When S. 986 was passed by a vote of 76 to 2, with 22 not voting, it included the “Consumer Remedies Study.” Senator Dole spoke in favor of the amendment, explaining:

At the present time, we have insufficient data on the nature and frequency of consumer disputes and on the effectiveness of existing procedures such as small claims courts, class actions, and private dispute settlement techniques, including arbitration in resolving consumer grievances.

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118 Id. at 63.
119 Id. (emphasis added).
120 117 CONG. REC. 39852–53 (Nov. 8, 1971).
121 Id. at 39876, 39880.
122 Id. at 39626 (emphasis added). Senator Dole mentioned class actions in his comment. At this time, hearings were also being conducted by the Senate’s Consumer Subcommittee on the topic of consumer class actions. Consumer Class Action: Hearings on S. 984, S. 1222, and S. 1378 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 1 (1971). Industry representatives opposed this legislation, and in doing so recommended instead “informal dispute settlement procedures” like arbitration procedures. For example, Eugene A. Keeney, President of the American Retail Federation, praised the “National Center for Dispute Settlement of the American Arbitration Association,” which had set up the “Pennsylvania Consumer Arbitration Service Pilot Program” in 1971. Id. at 163–66. See supra text accompanying notes 83–86 (discussing the same). Before the Subcommittee, Mr. Keeney repeatedly described the pilot arbitration program as an “informal dispute settlement mechanism.” See id. at 158, 161 (commending the “use of such informal dispute settlement mechanisms”).
B. A Consideration of the Early Senate Report upon Which the Cases Supporting Arbitration Have Relied

It is now appropriate to discuss the earlier Senate Report, one sentence of which certain court decisions have treated as the only relevant legislative history pertaining to this topic. The review thus far has provided a context in which to consider this report in an informed way. When S. 3074 was reported back in 1970, it lacked anything other than a general statement of policy on informal mechanisms. A 1970 report referring to that early bill stated:

Subsection (a) of this section declares that it is Congress' [s] intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without aid of litigation or formal arbitration. This subsection is merely a statement of policy and has no operative effect.123

As previously discussed, the adjective "formal," and its adjectival counterpoint "informal," were the terms commonly used by our legislators and their staff counsel during the 1970 deliberations on the Magnuson-Moss Act, as a way of distinguishing judicial proceedings from private procedures.124 "Formal arbitration" in the sentence at issue from S. Rep. No. 91-876 can be properly read to refer to judicial, or court-supervised, arbitration as opposed to private contractual arbitration. Grouping "formal arbitration" and "litigation" in 1969 would be appropriate where referring to judicial arbitration.125 Judicial arbitration was beginning to be put into wide use about a decade before 1969.126 It was applied to precisely the sort of "small claims" Magnuson-Moss was concerned about.

This appears to be the only reasonable interpretation. It is the


124 See, e.g., Consumer Products Guaranty Act Hearings, supra note 28, at 2 (statement of Sen. Moss treating as the only two forms of relief "informal dispute settlement mechanisms" and "court action"); id. at 21 (statement of S. Lynn Sutcliffe); id. at 25 (statement of Sen. Philip A. Hart).

125 See BLACK'S LAW DICTIONARY 134–35 (rev. 4th ed. 1968); see also generally 4 AM. JUR. 2D, Alternative Dispute Resolution § 8, at 73–74 (1994) ("There are two different forms of arbitration: private, or contractual, and judicial arbitration.").

126 See, e.g., Rosenberg & Schubin, supra note 82, at 450.
only reading that squares with all of the other things Congress and its administrative agency were saying at the time about "arbitrations" being an "informal dispute settlement procedure," such as the above-quoted comments of Senators Cook and Dole, and the statements of the FTC Chairman Miles W. Kirkpatrick who advocated Congress delegating to his agency the power "to lay down the standards to which this arbitration remedy must conform."  It is also the only reading that is consistent with the other language of Senate Report 91-876.

Elsewhere in the Report the author wrote about how the "consumer should be protected" from warrantors who pretend to be giving the consumer protections but who are really deceiving the consumer by using fine print and thereby "taking rights away from him." Why, if Congress was so concerned about protecting consumers from one-sided and unfair warranty drafting practices that would divest consumers of rights, and if it was so committed to ensuring an avenue for legal redress through court action, would the drafter of this 1970 Senate Report have allowed warrantors to unilaterally rob consumers of court access through a contractual provision that provides for a private binding arbitration procedure? The Southern cases' reading of this sentence cannot be squared with the fact that no congressman, no senator, no representative of the federal regulatory agencies, no witnesses from industry or from the consumer interest groups ever breathed a word suggesting that private contractual arbitration could be used to shut off completely the consumer's right to sue. They all viewed contractual arbitration

127  See supra note 106, at 64.

128  The Report explained that in the event of warranty breach, the "purchaser who is affected by that breach may pursue his existing legal remedies in any court of competent jurisdiction." S. REP. NO. 91-876, at 2. Similarly, the version of S. 3074 contained in this Report stated that "[a]ny person damaged by the failure of a supplier to comply with any obligations assumed under an express or implied warranty . . . may bring suit" in a court of competent jurisdiction. Id. at 15. These statements would not be true statements were it possible for the right to sue in a court of law to be entirely shut off by a warrantor placing a binding arbitration clause in its written warranty (in its adhesion contract). Congress clearly would not have said several pages before the sentence at issue that a consumer could go to court, if that right was subject to the permission of a warrantor who elects to refrain from drafting its warranty so as to preclude court action. The sentences on pages two and fifteen would be true, however, and would be consistent with the sentence in question, if "formal arbitration" on page twenty-three is understood to mean judicial arbitration as opposed to private contractual arbitration.

129  S. REP. NO. 91-876, at 4-5.
as a form of informal dispute settlement procedure that served as an alternative to the "formal" processes of our courts of law, including court-supervised and controlled judicial arbitration.\textsuperscript{130}

An additional reason to reject the Fifth and Eleventh Circuit's interpretation of this sentence is that a year later the Consumer Subcommittee amended S. 986, the first draft of which had been modeled on S. 3074, and in its report on the amended bill, the Subcommittee made clear that its understanding of the word "formal" was as an adjective to refer to court proceedings. Any ambiguity assertedly flowing from the single sentence the recent courts have cited is surely clarified in this later report. In describing the remedies available to the consumer under section 110 of the revised bill, the Committee drew a distinction between "formal" dispute settlement mechanisms and "informal" dispute settlement mechanisms. The former were described as "litigation," and the meaning of the latter, given the context, was private, nonjudicial dispute resolution procedures.\textsuperscript{131}

C. The National Institute for Consumer Justice Findings

In 1971 the National Institute for Consumer Justice ("NICJ" or the "Institute") was created to research mechanisms for redressing consumer grievances. Because it needed time to do its work, the Magnuson-Moss legislation did not progress in 1972 and early 1973.\textsuperscript{132}

The NICJ's staff recognized that private arbitrations were

\textsuperscript{130} Note that Senate Report No. 91-876 contains the objections of James T. Lynn, the General Counsel for the Department of Commerce, at 31–34. Mr. Lynn argued that the fee-shifting provision of S. 3074 "would lead to a substantial clogging of already overburdened courts and encourage unjustified claims." \textit{Id.} at 33. He argued that "informal dispute settlement procedures" should be used instead, and that court action should not be permitted. \textit{Id.} Why would he have gone to this trouble, if the sentence on pages 22–23 of the Report on S. 3074 was to be understood to mean that "formal arbitration" could at any time be invoked by the warrantor to prohibit court action?

\textsuperscript{131} \textsc{S. Rep. No. 92-269}, at 20 (1971) (discussing the right to resort to "formal adversary proceedings with reasonable attorney's fees available after successful litigation" and differentiating the "litigation" redress mechanism from "informal dispute settlement procedures established by suppliers"; explaining that after using the informal procedures, the consumer could resort to "formal legal action") (emphasis supplied); \textit{see also} 117 \textsc{Cong. Rec.} 39818 (comments of Sen. Moss, introducing bill on Senate floor on Nov. 8, 1971).

\textsuperscript{132} \textit{See generally} 119 \textsc{Cong. Rec.} 967 (Jan. 12, 1973).
"informal" proceedings. The staff's report observed: "The informality of the arbitration process is in stark contrast to the formal, legalistic tenor of a court proceeding." The relative informality of such procedures would, the NICJ staff wrote, "make it possible for an individual party, such as a consumer, to present his or her own case to the arbitrator without the intervention of an attorney."

But there was a problem with the use of "private voluntary arbitration programs." The Institute's staff studied some "arbitration programs" that "private trade associations" were then proposing in response to Congress's work. It was concerned that these programs be subject to close governmental oversight so that they would be fair and impartial and low cost.

The Institute's members issued a report containing the NICJ's recommendations on consumer redress mechanisms. It encouraged arbitration, but stated that it had to be subject to oversight to ensure its fairness and practical use by consumers: "Making arbitration 'available' would include setting up the machinery for an arbitration process providing for, inter alia, arbitrators, a convenient method for initiating arbitration, a fair set of procedures, a location for the arbitration, incentives to arbitrate, and perhaps most importantly, a method for funding the arbitration process so that it is not prohibitively expensive for the litigants."

Congress waited for the Institute's recommendations for two years, and considered them when they were published. Since the

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133 NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STUDIES VOL. I-II (1973).
134 Id. at 64.
135 Id. at 133.
136 Id. The NICJ staff's "Recommendations" on how arbitration mechanisms should be made to work for consumers, found at NICJ, Studies Vol. I-II, at 133 (1973), read in part:

THAT PRIVATE VOLUNTARY ARBITRATION PROGRAMS BE ENCOURAGED AND EXPANDED. The arbitration programs proposed by . . . private trade associations, are, for the most part, just beginning to get underway. These efforts will prove to be worthwhile if they meet uniform standards of impartiality, modest cost, and the like.

NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STUDIES, at 133 (1973) (emphasis added).

137 See NATIONAL INSTITUTE FOR CONSUMER JUSTICE, supra note 77.
138 Id. at 10.
139 See 120 CONG. REC. 55 (Jan. 21, 1974); CURTIS R. REITZ, CONSUMER
Institute unequivocally advocated the need for governmental surveillance of private arbitration mechanisms, it is hard to believe that Congress intended for certain types of dispute settlement mechanisms to be subject to FTC oversight to ensure fairness, but also wanted arbitration dispute settlement procedures to operate outside the Magnuson-Moss regulatory framework.

D. The 1973-1974 Legislative Activity

On January 12, 1973, when Senator Magnuson appeared on the floor of the U. S. Senate to re-introduce the warranty bill, he said what all members present knew: that the bill was “not new” and that he and the Subcommittees of the House and the Senate had been working on it “for a number of years.”\textsuperscript{140} The legislative history from this period is especially important to the task of determining Congress’s intent in five principal respects. First, the members of Congress, their staff counsel and the witnesses continued during this period to speak of “arbitration” as something they viewed as an “informal dispute settlement procedure.”\textsuperscript{141} Second, members of Congress continued to treat the redress mechanisms available as consisting of only two types: legal remedies to be secured through court action and informal dispute settlement procedures.\textsuperscript{142} Third, paying heed to the warnings from the National Institute for Consumer Justice, Congress continued to be preoccupied with the “fairness” of these privately created mechanisms.\textsuperscript{143}

Fourth, the 1973-1974 legislative history makes clear that the provision in the statute for court access had a critical two-part function, the second aspect of which makes a reading of the statute to permit binding arbitration untenable. The first aim was to let consumers have a means of redress, and the senators and congressman worked hard to determine (given, for example, the jurisdictional requirements in the federal courts) how this could


\textsuperscript{141} \textit{See, e.g., Consumer Warranty Protection – 1973 Hearings, supra} note 28, at 120–121 (Prof. Leary discussing need for “a truly independent arbitration”).

\textsuperscript{142} \textit{See, e.g.,} statement and Senate Reports cited \textit{supra} note 94.

\textsuperscript{143} \textit{See, e.g.,} S. REP. NO. 93-1408, at 26–27 (1974).
practically be done.\textsuperscript{144}

The second aim was to create a means of “penalizing” warrantors engaging in sharp commercial practices. On January 12, 1973, Senator Magnuson made this clear on the floor:

If warrantors who did not perform their promises suffered direct economic detriment, they would have strong incentives to perform. Therefore there is a need to insure warrantor performance by monetarily penalizing the warrantor for non-performance – and awarding that penalty to the consumer for his loss. \textit{One way to effectively meet this need is by providing for reasonable attorney’s fees and court costs to successful consumer litigants, thus making consumer resort to the courts feasible.}\textsuperscript{145}

By making warrantors shoulder the costs of litigation and potentially face paying for all the consumers’ attorney’s fees, the court access feature of the legislation would financially disincentivize warrantors from breaching their promises.\textsuperscript{146}

This demonstrates why \textit{binding} arbitration is directly counter to what Congress intended. The point appears to raise an interest that is diametrically opposed to another more obvious congressional aim. Clearly, the legislative body intended for both consumers and manufacturers to have a low-cost and speedy alternative dispute resolution mechanism available to them. In this regard, one could advance the idea that binding arbitration is consistent with this aim. Arbitration procedures are generally less expensive and time-consuming than court processes.

In what appears superficially to be a position inconsistent with its desire for low-cost and speedy redress mechanisms, Congress sought to deter egregious warrantor conduct by embracing the costly and time-consuming nature of formal litigation, by using it as a club

\textsuperscript{144} See, e.g., \textit{Consumer Warranty Protection – 1973 Hearings}, supra note 28, at 110 (statement of Sen. Bob Eckhardt on how the then existing $10,000 jurisdictional limit would mean federal court access would be limited “to a Cadillac with a built-in pipe organ sold to the shahs of foreign countries”; Professor Leary suggesting “[t]here is a Mercedes on the market that would meet that, and a Rolls-Royce”).

\textsuperscript{145} 119 CONG. REC. 968 (Jan. 12, 1973) (emphasis added).

\textsuperscript{146} This view was restated in the congressional reports. See, e.g., S. REP. NO. 93-151, at 7 (1973) (explaining how the potential for an award of court costs and attorney’s fees to the consumer will meet the “need to insure warrantor performance by monetarily [sic] penalizing the warrantor for non-performance”).
that would hang over the heads of companies pursuing disreputable business practices. The club could easily be wielded because of the statute’s fee-shifting provision that would enable lawyers to be compensated for the reasonable fees incurred in pursuing such business concerns on behalf of consumers.

The fifth aspect of the 1973-1974 legislative history that makes clear the error of imputing to Congress an intent to permit a warrantor’s unilateral elimination of court access is the explicit iteration in Congress’s reports that the inequality in bargaining power in the field of consumer product warranties was a major concern. Senate Report 93-151, for example, described the “needs” for the legislation this way:

When the use of a warranty in conjunction with the sale of a product first became commonplace, it was typically a concept that the contracting parties understood and bargained for, usually at arms length. One could decide whether or not to purchase a product with a warranty, and bargain for that warranty accordingly. Since then, the relative bargaining power of those contracting for the purchase of consumer products has changed radically.... Typically, a consumer today cannot bargain with consumer product manufacturers to obtain a warranty or to adjust the terms of a warranty voluntarily offered. Since almost all consumer products sold today are typically done so with a contract of adhesion, there is no bargaining over contract terms. S. 386 attempts to remedy some of the defects resulting from this gross inequality in bargaining power, and return the sense of fair play to the warranty field that has been lost through the years as the organizational structure of our society has evolved.\footnote{S. REP. NO. 93-151, at 6 (1973).}

Their work done, the Senators and Congressmen who for years had toiled to protect the rights of America’s consumers sent their Magnuson-Moss Warranty Act to the President, who signed it into law on January 4, 1975.\footnote{Pub. L. No. 93-637, 88 Stat. 2183 (codified at 15 U.S.C. §§ 2301-12 (1994)).}
E. Case Law and Scholarly Commentary Ignore the Relevant Legislative History

Neither the courts nor the legal commentators have ever closely analyzed the foregoing legislative history to determine whether Congress intended to preserve for Magnuson-Moss claimants access to the judicial forum in the face of a binding arbitration clause.  Why did this happen?

The omission in any reported case and in any law review article to analyze the legislative history could be attributed to the fact that it is not a simple task to secure and review the material. The legislative history spans five separate sets of congressional hearings, consists of numerous floor debates, and involved many Senate and

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149 See case law cited supra note 10. As for the commentators, see, e.g., Wiechens, supra note 33, at 1464, 1469, 1474–75 (asserting in a conclusory way that the legislative history does not demonstrate that “informal dispute settlement procedures” and arbitration are the same thing, while ignoring the legislative history of the statute save for one sentence that is “analyzed” through a conjecture); Note, Arbitration – Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation, 116 Harv. L. Rev. 1201, 1207 (2003) (uncritically assuming that the FTC’s interpretation of the Act is “at odds with the legislative history” without considering the legislative history); Katherine R. Guerin, Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson-Moss Act – Will the Consumer Win or Lose?, 13 Loy. Consumer L. Rev. 4 (2001) (omitting an in-depth analysis of legislative history); Mace E. Gunter, Note, Can Warrantors Make An End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties, 34 Ga. L. Rev. 1483, 1486–92, 1494–96, 1506 (2000) (arguing against binding arbitration, but relying exclusively on legislative history reprinted in the United States Code Congressional and Administrative News and certain comments recorded in 1973 Congressional Record).

150 There are no computerized legal research services that facilitate review of congressional hearings, floor debates and reports during the 1969–1974 time period. The tendency among those few persons who have elected to look at the legislative history at all has, therefore, been to rely on those parts of it that are readily available through their having been reprinted in the permanent edition of the United States Code Congressional and Administrative News (“U.S.C.C.A.N.”), even though they represent but a small percentage of the total legislative history of Magnuson-Moss. See, e.g., Gunter, supra note 149. In Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470, 478–79 (5th Cir. 2002), the court stated that “[binding] arbitration is simply not a part of these [congressional] reports.” In Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1275 (11th Cir. 2002), the court wrote that the Act’s legislative history “never directly addresses the role of binding arbitration.” By these comments, relating to certain “congressional reports” reprinted in U.S.C.C.A.N., the courts were referring to a tiny fraction of the complete legislative history.
House reports. One must go to a federal depository and spend several days to conduct the review. But standing alone this seems an unsatisfactory explanation.

A second, and far more important, reason is that, notwithstanding the Supreme Court’s direction that the FAA issue be assessed by considering a statute’s text, purposes and legislative history, there may be something operative in the minds of the jurists and legal commentators that makes the earnest and disciplined pursuit of this analytical process — and it is nothing other than the well-known analytical process of statutory interpretation — seem unimportant. What could that something be?

Courts and commentators have elected to construe Supreme Court precedents like *McMahon*\(^{151}\) to enunciate a policy favoring the enforcement of arbitration clauses, and while this may be an undeniable conclusion, they have gone further and assumed that the policy should strongly influence any analysis of a subsequent act of Congress. This flawed approach invariably begins with an assertion such as, “[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA.”\(^{152}\) Then the actual statutory interpretation is informed by references to the policy “favoring arbitration.” This is why, for example, the Eleventh Circuit could not simply perform an analysis of the legislative history of the Magnuson-Moss Act by focusing on that subject matter. It instead had to inject into the analytical process a “policy” interest that was explicitly deemed to be influential to that analysis. The court wrote: “Therefore, given the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring arbitration, we conclude that Congress did not express a clear intent in the [Act’s] legislative history to bar binding arbitration agreements in written warranties.”\(^{153}\)

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\(^{152}\) *Walton*, 293 F.3d at 474. *See also* the Harvard Law Review Note, *supra* note 149, at 1208, where the author asserted that “it is highly improbable that the Supreme Court would uphold the FTC’s interpretation, given its rejection of similar attempts by lower courts and even by Congress itself.”

\(^{153}\) *Davis*, 305 F.3d at 1276 (emphasis added). *See also* Southern Energy
This form of “statutory interpretation” that treats the analytical process as one influenced (and perhaps determined) by what the Alabama Supreme Court called a need for “pro-arbitration interpretation,” is troubling. Exactly how this is supposed to work in practice is unclear. Supreme Court cases such as McMahon state that the “burden is on the party opposing arbitration” to demonstrate that a subsequent act of Congress has overridden the FAA’s pronouncement that arbitration agreements “shall be valid, irrevocable, and enforceable.” The opponent of arbitration must demonstrate that the statute’s text, legislative history and purposes show “Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” The test, as it was formulated in McMahon, says nothing about the burden including the duty to overcome also a “pro-arbitration policy.” Inserting such an added burden raises the question of whether analysis of text, history and purposes must go beyond merely demonstrating that Congress intended to preclude a waiver of the ability to enforce statutory rights in court. It also raises the question of whether the McMahon test is illusory, and instead masks a judicial preference for arbitration that

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154 See Justice See’s comment supra note 153.


156 Id. at 227.
subordinates the interest in effectuating the statutory rights of subsequent acts of Congress.

Since there is nothing in the McMahon decision itself to suggest that the statutory analysis is to be influenced by the insertion of a preference for the perceived FAA pro-arbitration policy, why did the Eleventh Circuit and the Alabama Supreme Court decide to conduct the analytical inquiry by embracing what the latter court called a “pro-arbitration interpretation”? The answer lies in a decision rendered four years after McMahon, the case of Gilmer v. Interstate/Johnson Lane Corp.\textsuperscript{157} To understand what the Supreme Court did in Gilmer we must first discuss “canons of contractual construction.”

Canons of contractual construction are “merely statements of judicial preference for the resolution of a particular problem” arising out of an agreement where what the parties intended is unclear.\textsuperscript{158} A familiar canon is the principle that when ambiguous a contract “should be construed less favorably to that party that selected the contractual language.”\textsuperscript{159} Canons of contractual construction are sometimes derived from statutes. The preference of the legislative body expressed in its enactment becomes a judicial preference for the resolution of disputes over arguably ambiguous agreements in a certain way. The best example of this in the field of arbitration is the canon of construction adopted as to arbitration provisions of collective bargaining agreements in United Steelworkers v. Warrior


[Often, the canons are based] on common human experience and are designed to achieve what the court believes to be the ‘normal’ result for the problem under consideration. Thus, their purpose is not to ascertain the intent of the parties to the transaction. Rather, it is to resolve a dispute when it is otherwise impossible to ascertain the parties’ intent.


\textsuperscript{159} United States v. Seckinger, 397 U.S. 203, 216 (1970). This canon has often been applied to insurance policies. \textit{See, e.g.}, American Surety Co. v. Pauly, 170 U.S. 133, 144 (1898).
There the court stated that arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and cautioned that "[i]n the absence of any express provision excluding a particular grievance from arbitration... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

Something directly analogous to what the Court was doing in the Steelworkers case can be found in the FAA case law. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., one of the issues was whether certain disputes between a hospital and a construction company were arbitrable under the specific contract at hand. A problem of contractual construction was confronted. The court stated that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" and added that "the policy of the Arbitration Act requires a liberal reading of arbitration agreements" such that these contracts should be construed to mandate arbitration of even defenses to arbitrability like waiver and delay. The court cited a series of lower federal court decisions that applied the pro-arbitration policy of the FAA to construe broadly the scope of parties' contractual commitment to arbitrate.

As a matter of public policy, adopting a canon of statutory

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161 Id. at 584. In reference to this Steelworkers case, Professor Harry H. Wellington correctly stated that the court engaged in an act of "erect[ing] a canon of construction that strongly favors arbitration" and that rests "upon public policy." See Harry H. Wellington, Judicial Review of The Promise to Arbitrate, 37 N.Y.U. L. REV. 471, 476 (1962).
163 Id. at 24.
164 Id. at 22 n.27.
165 Id. at 24.
166 See, e.g., Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 643 (7th Cir. 1981) (invoking "the established federal policy that, when construing arbitration agreements, every doubt is to be resolved in favor of arbitration"); Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979) (stating that "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted"); see also Moses H. Cone Mem'l Hosp., 460 U.S. at 25 n.31 (citing Dickinson, 661 F.2d 643; Wick, 605 F.2d 168).
construction on the basis of a purported policy found in one act of Congress and applying it to every other statute that the Congress enacts presents a different activity from that seen in the Steelworkers case and that referenced in the Moses H. Cone Memorial Hospital case. It is also not comparable to trying to harmonize two potentially conflicting statutes. Instead, it is an act of giving preference to one statute, and regarding all others as being of diminished authority in the event of conflict (or alleged conflict). Yet, the Supreme Court has often observed that “courts are not at liberty to pick and choose among congressional enactments.”67 The preferential “canon” is at odds with the fundamental canons of statutory construction, which mandate discerning Congress’s intent in a particular act without preconceptions that would obscure a fair inquiry into the meaning of the statute, or subvert its judicial enforcement. If this were not the case, then in that vast realm where tension (or asserted tension) exists between statutes, courts could arrogate to themselves the legislative function of choosing from among the conflicting statutes those they would like to enforce and those they would decline to enforce.

Unfortunate language in a U.S. Supreme Court case decided subsequent to Moses H. Cone Memorial Hospital, has contributed to this problem. In Gilmer v. Interstate/Johnson Lane Corp.,168 the court wrote that “[t]hroughout such an inquiry [referring to the inquiry into the subsequent statute’s text, history and purposes], it should be kept in mind that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” The Gilmer court was quoting the Moses H. Cone Memorial Hospital case, but the phrase “questions of arbitrability. . .” in Moses referred to the issue of whether certain disputes between the hospital and the construction company were arbitrable under the specific arbitration contract of the parties. It was a reference to a question of contractual and not statutory interpretation. It was a contractual interpretation resting on “a body of federal substantive law of arbitrability,”169 a law that gives us a canon of contractual construction that is based on a “liberal federal policy favoring arbitration.”170 But, our Nation’s highest Court, this author respectfully maintains, erred in lifting the concept discussed in the Moses case and inserting it into a very different subject matter – the issue of statutory interpretation – in the

170 Id.
The error results in advocates arguing to a court by pointing to cases like *McMahon* and *Gilmer* and saying, “[l]ook at the result that was reached, it is a result favoring arbitration. This is the result you must reach.” Though those cases involved statutes that were entirely different from the Magnuson-Moss Act, and, more importantly, though in those cases the United States Supreme Court mandated the employment of an analytical process, one that entails an examination of the statute’s text, its history and its purposes, a court is told that there is really only one result permissible. The idea is advanced that the Supreme Court really did not mean what it said about conducting a statutory interpretation analysis.

This is the most deeply flawed argument that an advocate can make to a court. When our Nation’s courts interpret statutes, they aim to do so in a careful, lawyerly, and disciplined way, to achieve one purpose and one purpose only. And, that is not to reach a result that the court likes, it is rather to adopt a construction of the statute that is faithful to the intent of the legislative body.  

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171 Of course, the Supreme Court often employs canons of statutory construction, but it has consistently refused to apply such canons “when application would be tantamount to a formalistic disregard of congressional intent.” *Rice v. Rehner*, 463 U.S. 713, 732 (1983). *See also* *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) (“A canon of construction is not a license to disregard clear expressions of . . . congressional intent.”).

172 It is beyond the scope of this article to fully discuss Justice Scalia’s criticism of the use of legislative history. *See, e.g.*, United States v. Thompson/Center Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring in judgment) (upbraiding the majority for “resort[ing] to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1986) (Scalia, J., concurring in judgment); *see* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369 (1999). One must note, however, that the case law called into question here is an excellent example of how legislative history analysis can go awry. A lawyer several years ago went through the thousands of pages of legislative history of the Magnuson-Moss Act and located the single ambiguous sentence from the 1970 Senate Report discussed above. This then became the focus of the analysis of legislative history in a series of cases. It helped to change the law in this field, and to facilitate the judicial repudiation of an administrative agency’s interpretation of a
VI. The Statutory Text

In examining the text of a statute one should consider the language as a whole. It is also proper to keep in mind the objectives of the statute. Coexisting with the above principles, statutory language is to be given its plain meaning where this is readily discernible. Whether one is an "interpretivist," "intentionalist" or "textualist" in one's philosophy of statutory construction, the aim of all judges is to effectuate the intent of the legislative body.

statute that it had adhered to for twenty-five years. It provided assistance in imposing a judicial construction on a statute that is very much at odds with the statute's text and the clearly expressed intent of the legislative body. But, the fact that legislative history has been used improperly is not an adequate reason that it should always be disregarded. The reality is that context does matter, and that an assessment of how a piece of legislation came about, what the concerns were that motivated the legislative body to act, and what choices were made and how they were made, facilitates an effective and faithful reading of the text. If the examination of legislative history is conducted properly, as an aid to one's careful consideration of the statutory text, then it is a useful and legitimate undertaking, one fully consistent with the textualist commitment to effectuating the expressed intent of the institution that is vested with policy-making power. It is an approach that adheres to the mandate that judges not make "themselves into what is really a legislative body with a veto." GUNTHER, supra note 8, at 51 (quoting Judge Learned Hand).

173 See Deal v. United States, 508 U.S. 129, 132 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").


175 See generally Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417 (1899). Justice Holmes' article includes this statement: "We do not inquire what the legislature meant; we ask only what the statute means." Id. at 419. This comment has sometimes been cited to claim investigative forays into legislative intent that are not confined solely to the text are suspect. However, Holmes was writing about the "general theory of construction" for written instruments, and explained that "[w]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to this end of answering the last
A. The Courts’ Failure to Give the Statute’s Provisions as to Informal Dispute Settlement Procedures Any Meaning While Treating Much of the Statutory Language as Incomplete or Unnecessary

Walton, Davis, American Home of Lancaster, and Arda, leave something out when they conduct the analysis of statutory text. While asserting in a way that is conclusory that there is nothing in the statute that deals with binding arbitration, they omit to explain what the statute does mean. They are satisfied with saying only what it does not mean. Analysis that gainsays an offered construction, but that leaves the subject alone after doing so, is unsatisfactory. Congress writes the provisions for its statutes with a purpose.

What then could “informal dispute settlement procedure,” “mechanism” or “proceeding” possibly mean if the construction being advanced here is incorrect. If “informal dispute settlement mechanism” is not a generic phrase encompassing all redress mechanisms other than the formal adjudicative processes of our courts of law, then what is it?

One possibility is that Congress meant to convey a transaction of an “informal” nature that would take place between the consumer and the manufacturer (or supplier) that issued the warranty. The transaction would be in the nature of an initiative by the consumer to secure warranty compliance and the warrantor’s response thereto. Such a bilateral transaction can obviously have “procedural” steps, in that a warrantor may have created a process whereby the consumer’s complaint as to warranty breach could be channeled to it for responsive action. Such a consumer-warrantor interchange could be quite simple; it could consist of nothing more than the transmittal of a letter or the placing of a telephone call that alerts the warrantor to the nature of the grievance and the consumer’s desired response to the problem.

But, in advancing this theory of the meaning of the statute’s numerous provisions as to “informal dispute settlement procedures,” there is a problem. Congress described just such a bilateral transaction in its statute, and distinguished it from an “informal dispute settlement procedure.” In specifying the various aspects of a question that we let in evidence as to what the circumstances were.” Id. at 417–18 (emphasis added). Holmes also observed that courts “do not deal differently” with text from a statute “from our way of dealing with a contract.” Id. at 419. The circumstances matter as one assesses “what those words would mean” in the context of a statute. See generally Heydon’s Case, 76 Eng. Rep. 637 (Ex. 1584).

176 See cases cited supra note 10.
warranty, the full and conspicuous disclosure of which could be mandated pursuant to the rules to be created by the FTC, Congress listed the following item in subsection (7) of 15 U.S.C. § 2302(a):

The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

In the next subsection, 15 U.S.C. § 2302(a)(8), Congress then separately listed a different item disclosure of which could be mandated:

Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

If “informal dispute settlement procedure” was the same thing as a “procedure” whereby a consumer would attempt to secure warranty compliance through a bilateral transaction with the warrantor, Congress would not have described it in a separate section, and clearly treated it as something distinct. The only conclusion is that the “informal dispute settlement procedure” involved something more than a consumer-warrantor transaction where the two parties interact with the aim of settling their dispute.

What could that something more be? Another provision in the statute, found at 15 U.S.C. § 2310(a)(3), makes the answer clear. There, Congress stated that in the event of a lawsuit, “any decision in such [informal dispute settlement] procedure shall be admissible in evidence.” Congress evinced an intent that the procedure would sometimes involve a “decision” by a third party. This suffices to show that Congress was describing “arbitration” as at least one of the forms of informal dispute settlement procedure that would be used. As was stated a century ago, “[m]ediation recommends. Arbitration decides.”

Essential to the very nature of arbitration is the idea of a “decision” by a third party. As Judge Weinstein once

177 Note that Congress did not say “the decision” but instead said “any decision” and thus implied that a “decision” might or might not be the outcome of the informal dispute settlement procedure.

178 7 MOORE, DIGEST OF INTERNATIONAL LAW 25 (1906).
One possible counter-argument is that the concept of "decision" is not confined to a determination by a third party. For example, when a warrantor chooses not to repair a defective product that it has sold to a consumer, having been requested to take remedial action to cure the defect and thus to bring the product into compliance with the warranty, then it has made a "decision." But it makes no sense to construe the language from 15 U.S.C. § 2310(a)(3) to refer to that unilateral decision of the warrantor because Congress would not have said that such a decision would be "admissible in evidence." That type of "decision" inheres in the very nature of a cognizable claim for breach of warranty. It always must be admissible in evidence.

It is fair to observe generally that given the way consumer product warranties are written in our society, no consumer can ever recover on a breach of warranty claim without, as a threshold matter, proving that he alerted the warrantor that there was a problem with the product.

There are essentially two types of consumer product warranties: "full" warranties, as defined by the Act at 15 U.S.C. § 2303(a)(1), and "limited" warranties, which are recognized in the Act, and which are drafted pursuant to Uniform Commercial Code § 2-719(1). As for the latter, which are the most common types of

179 AMF v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985). See also Goldman, supra note 72, at 197 ("Most generally, arbitration involves the voluntary submission of a dispute for final determination by someone other than a judge after an informal presentation of evidence and argument."); Jones, supra note 71, at 243 ("Arbitration is the submission of some disputed matter to selected persons and the substitution of their decision or award for the judgment of the established tribunals of justice.") (quoting Castle-Curtis Arbitration, 30 Atl. 769 (1894)); Leon A. Kovin, Uninsured Motorist Arbitration Under the Illinois Statute, 21 ARB. J. 229 (1966) (describing arbitration as a "voluntary proceeding whereby the parties by agreement submit their controversy to either an impartial panel of arbitrators, or one neutral person, who upon hearing of evidence and argument render a decision"). One author has explained that the root of the word "arbiter" is found in the Oscan Umbrian word "arputrati," which can be translated as "one who goes to something in order to see or hear it." John J. Savage, On the Meaning of the Term "Arbitration", 7 ARB. J. 99 (1952). The word arbitration includes at its core the concept of a third party decisionmaker.

180 For example, a provision of the Illinois U.C.C., 810 ILL. COMP. STAT. § 5/2-719(1)(a) (2002), permits the seller to craft an agreement "limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts." In the Magnuson-Moss Act,
warranties, known as “standard materials and workmanship warranties” or “limited repair or replace warranties,” the consumer cannot keep secret the fact that the product is malfunctioning and then suddenly commence a lawsuit.

The consumer must give the warrantor notice of the defect, and an opportunity to repair or replace. The chief avenue for securing damages for breach of an express materials and workmanship warranty is proving within the meaning of UCC § 2-719(2) that the limited remedy “failed of its essential purpose,” in the sense that the warrantor was given the opportunity to effect repairs (and to thus render the product non-defective and in compliance with the warranty) but failed to do so within a reasonable period of time.182

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182 The Official Comment to Illinois U.C.C. § 2-719 states: “[I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. . . . [U]nder subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its essential purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.” 810 ILL. COMP. STAT. ANN. 5/2-719, Uniform Commercial Code Comment 1, at 488 (Smith-Hurd 1993) (emphasis added); see also Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc., 315 Ill. App. 3d 248, 257, 733 N.E.2d 718, 725 (Ill. App. Ct. 2000); Lara v. Hyundai Motor Am., 331 Ill. App. 3d 53, 62, 770 N.E.2d 721, 728-29 (Ill. App. Ct. 2002) (a limited automobile “repair or replace” warranty “fails of its essential purpose when a seller . . . is unsuccessful in correcting the defects within a reasonable time” and when this occurs, the warranty’s limitations and exclusions will have “no effect” and “damages will be available to plaintiff pursuant to the [U.C.C.]”); Dynamic
Thus, at the essence of the *prima facie* case is proof that the consumer sought from the warrantor action that was not forthcoming. There is normally proof in a case alleging breach of warranty of an interaction between the consumer and the warrantor whereby the latter might be said to "decide" whether it shall elect to comply with the warranty. Interpreting the language "any decision in such procedure shall be admissible in evidence" as referring to a "decision" of this type means adopting a construction that says where breach of a limited warranty is at issue, the conduct of the warrantor that is alleged to constitute the breach "shall be admissible." In other words, in treating "decision" as a warrantor's unilateral act of responding to a request for compliance, Congress added nothing to the reality of how a breach of limited warranty case is tried.

Recycling Servs., Inc. v. Shred Pax Corp., 210 Ill. App. 3d 602, 614, 569 N.E.2d 570, 577 (Ill. App. Ct. 1991) ("Dynamic was entitled to expect Shred Pax [the warrantor] to repair or replace within a reasonable amount of time after Shred Pax became aware that the shredder did not conform to the contract."); Custom Automated Mach. v. Penda Corp., 537 F. Supp. 77, 83 (N.D. Ill. 1982) (remedy limitation failed of its essential purpose when the seller "did not correct the defects [within its product] within a reasonable time. Therefore, the limitation of remedy clause fails of its essential purpose and full UCC remedies are available to [plaintiff]").

183 15 U.S.C. § 2310(a)(3) (2000). The same is true of "full" warranties. To demonstrate a breach of 15 U.S.C. § 2304(a)(4), which requires the warrantor to "permit the consumer to elect" either refund or replacement of the product in the event it fails to remedy the defects within "a reasonable number of attempts," the consumer must again introduce into evidence the transaction with the warrantor taking place after a defect has manifested itself. It adds nothing for Congress to state that the warrantor's responsive action (its "decision") may be admissible in evidence. There is no way such subject matter could not be admissible if the consumer is to be allowed to try her case. "Full" warranties are rarely issued by American manufacturers. See Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 613 (1985) ("In the case of automobiles, the warranties did not change dramatically after passage of the Act. Only American Motors currently provides a full warranty to car purchasers."). This is an example of how Congress's aspirations for how manufacturers would conduct themselves after passage of the Act were not realized. The failure of the vast majority of companies to create informal dispute settlement procedures that comply with the Act and the Federal Trade Commission's regulations is another example.

184 A trial lawyer, after reading the foregoing discussion, would quickly recognize the implications of the provision in 15 U.S.C. § 2310(a)(3). He would view this provision allowing for the introduction into evidence of the mechanism's decision as being potentially extraordinarily prejudicial. In the event the consumer lost his cause before the dispute settlement mechanism, no attorney representing a manufacturer would omit to begin his opening statement to the jury in the
The position that "decision" equals nothing more than the warrantor’s response to a complaint has another overarching flaw. Such a line of analysis, which treats informal dispute settlement procedures solely as the arena for the warrantor’s unilateral response to a complaint of warranty noncompliance, cannot be squared with the legislative inclusion of words like “proceeding” to describe the informal resolution mechanism.\footnote{See 15 U.S.C. § 2304(b)(1) (using the language “informal dispute settlement proceeding”).} For example, when one returns an automobile to the manufacturer’s designated dealership because its transmission proves defective, and forces a “decision” on whether or not the warranty grievance shall be resolved, one does not think of the transaction that follows as a “proceeding.”\footnote{See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 929 (10th ed. 1995) (listing as first definition of proceeding “legal action”). When an ordinary person...} Nor does one who subsequent court trial with these words: “The plaintiff here already had his claim heard at an arbitration proceeding, one whose operation is supervised by an agency called the Federal Trade Commission. The evidence in this case will show that the arbitrator determined the plaintiff’s claim had no merit.” The defendant’s counsel might pause, allow his words to resonate for a bit, and then resume his seat. He would surely begin his cross-examination of the plaintiff by bringing up the adverse decision, and he would no doubt publish the dispute settlement mechanism’s decision in his case in chief. In other contexts, evidence of such a type would be excluded by most trial judges who would be concerned as to how the probative value would ever justify the introduction into evidence of facts of such a highly prejudicial character. This was the whole point of the provision. Congress really did intend to encourage the resolution of most consumer claims through the speedy, inexpensive and fair alternative mechanism they were directing warrantors to create. They inserted this provision to make sure the alternative dispute resolution mechanism would be viewed as a means to secure resolution of claims, rather than as merely a procedural hurdle on the way to court. Some state court systems, like that of Illinois, use various rules aimed at ensuring good faith participation in judicial arbitration mechanisms. See ILL. SUP. CT. R. 91(b) (rule providing that where a party fails “to participate in the arbitration hearing in good faith and in a meaningful manner” an “order debarring that party from rejecting the award” may be entered by the court). Were the Illinois Supreme Court to fashion a rule like the one Congress created in 15 U.S.C. § 2310(a)(3), constitutional concerns would fairly be raised. But, this is not true of Congress’s statute. Remember that Congress was creating a statutory right of action, and thus it was within its powers when it circumscribed how its right of action could proceed in a court of law. This is also one of the grand ironies of the Magnuson-Moss/FAA issue. Congress carefully balanced the interests of manufacturers and consumers in this statute. It created a means by which most consumer claims would, as a practical matter, never go to court. All that the warrantors have to do is comply with the statute and its implementing regulations, and they would likely find that the purported objectives underlying their litigation assaults on this statute would in the main be better served by acting within the law, instead of in defiance of it.

\footnote{185 See 15 U.S.C. § 2304(b)(1) (using the language “informal dispute settlement proceeding”).}  
\footnote{186 See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 929 (10th ed. 1995) (listing as first definition of proceeding “legal action”). When an ordinary person...}
telephones a warrantor’s “consumer hotline” think of the interaction that takes place as a “proceeding.” Congress’s use of the word “proceeding” to describe these informal dispute resolution processes should make clear to anyone that Congress was speaking of a dispute resolution process, i.e., something in the nature of an arbitration. This at its core is nothing other than a structured mechanism featuring presentations by both the consumer and the warrantor before a third party who is tasked with deciding the dispute.

Analysis of the plain meaning of the text of the statute thus leads to the conclusion that Congress intended to legislate regarding dispute resolution mechanisms involving third party decisionmakers who would resolve the controversy between buyer and seller. Congress intended its Act and the federal regulations to apply to arbitration procedures.187

hears the word “proceeding,” she is indeed likely to think of something like a legal proceeding. This is certainly the way lawyers use it. It is the way members of our legislative bodies use it. The public knows this and they have come to use it that way too. Some dictionaries, in defining “proceeding,” list “legal action” or “litigation” after they list more generalized formulations of the meaning of the word “proceeding.” See RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1075 (Newly rev. and updated ed. 1995) (initially defining it as “a particular action, or course or manner of action”). It is a commonplace in lexicography to place first emphasis on defining words with elastic and broad phrases so that the dictionary covers all of the word’s possible uses. Typically the broad formulations of the concept represented by a word are listed first, and then a specific and highly contextual meaning is given, as is the case with the second-cited dictionary treatment of the word “proceeding.” When a court looks to a dictionary, it must remain mindful that it is seeking to import a descriptive account taken from a unique context – one marked by the lexicographer’s duty to encompass, which frequently involves, at least initially, a process of diminishing specific contextual meaning.

The analysis should not end there, however. There are a number of other provisions pertaining to informal dispute settlement mechanisms that must be examined. Each sheds light on Congress's intent. One appears at § 2304(b)(1), where Congress guarded against certain warrantors (those issuing "full" warranties, within the meaning of §§ 2303(a)(1) and 2304) imposing "any duty other than notification" on consumers "as a condition of securing [a] remedy" when a consumer product malfunctions, by requiring that warrantors prove "such a duty is reasonable." 188 Congress said no such duty could be imposed unless "the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such duty is reasonable." 189 By this provision, it is reasonable to conclude that Congress understood (leaving aside FTC administrative proceedings) that there would only be two fora where warranty disputes would be decided — courts of law and "informal dispute settlement proceedings."

An opposing argument might posit that arbitration is a "substitute for litigation in the courts." 190 Therefore when judicial enforcement proceedings were referenced in § 2304(b)(1), it was understood that arbitration proceedings would be encompassed in such reference.

However, the idea that arbitration is a substitute for formal litigation raises a question that cannot be answered satisfactorily or consistent with construing the statute's language as being irrelevant to arbitration. To state that arbitration is a "substitute" says nothing more than that the same claim that might be resolved in a formal adjudicative process will be decided in an alternative procedure substituted for the court process. This carries with it the notion that the same claim will be decided pursuant to the same legal principles that would be applied in a formal trial. By the same token, informal dispute settlement mechanisms, within the meaning of the statute, though they would obviously not entail the structure, formality, costs, and time of a formal trial in a court of law, would have to, at a

189 Id.
190 Sturges, supra note 31, at 1032.
minimum, apply the same law to resolve claims. What would be the point of any resolution mechanism that did not attempt to effectuate the consumer’s rights according to the law?

Thus, in the context of § 2304(b)(1) the mention of “informal dispute settlement proceeding[s]” was no more necessary than a reference to arbitration. Like arbitration, an informal dispute settlement proceeding is a “substitute” for judicial claim resolution.191 We are left with the conclusion that the reference in 2304(b)(1) was borne of the drafter’s intention to delineate all of the fora where issues about warrantor-imposed duties would be resolved.

The provision in § 2310(d), where Congress provided for attorney’s fees, also clarifies the meaning of the statute. Note that the section says those fees are to be awarded only by “the court.” This made sense because an “informal dispute settlement procedure” would be a process that is fair, easy to understand, and easy to use, and would not require substantial, if any, attorney’s fees.192 Further, these procedures would be subject to FTC oversight.193 Consumers could then in most instances use them without the need to hire an attorney. But if, as some courts have asserted, arbitration is such a “formal” thing, so very different from the procedures Congress had in mind and so very similar to judicial processes, Congress would have said in § 2310(d) “the court or an arbitrator,” instead of merely “the court.”194

Ultimately, the statutory interpretation analysis requires an effort to grasp the overall intent of Congress as to informal dispute

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191 The argument that the arbitration-as-distinct-settlement-mechanism camp might assert here that binding arbitration is a permanent substitution, while informal dispute settlement proceedings is not necessarily binding, does not alter this result. The informal dispute settlement mechanism has the same purpose – to resolve the claim, and though it might not do so with finality, this does not alter the fact that, despite its non-binding and hence non-final nature, it is intended to resolve the very same legal controversy pursuant to the very same legal principles. Again, what would be the point of actively encouraging the development of alternative dispute settlement procedures if the legislative body was not really trying to have them act as an effective (though not ultimately preclusive) substitute for litigation?

192 It is important to stress that under 15 U.S.C. § 2302(a), all the terms of a written warranty were required, subject to the discretion of the FTC, to be “fully and conspicuously” disclosed in “simple and readily understood language” that would not “mislead a reasonable, average consumer.” See 15 U.S.C. § 2303(a), (a)(13).


194 Id.
settlement procedures. When we undertake this analysis we find the position argued for by proponents of the legality of binding arbitration clauses makes the specific features just described, features that are troubling since they tend to make the language used in precise provisions of the statute seem either incomplete or unnecessary, but a foreshadowing of a more unacceptable reality – the imputation to Congress of the intent to draft a statute that is absurd.

B. The Magnuson-Moss Act Has Been Construed to Render It Absurd

"Informal dispute settlement procedure" is not defined in the statute in an explicit way, but rather by (1) its breadth, (2) its explicitly stated context, i.e., as something created by the warrantor and inserted into its warranty, and (3) its use in the statute.

The word "any" describes the dispute settlement procedures in the Magnuson-Moss Act, when they are first referenced. The word ‘any’ has an expansive meaning, that is ‘one or some indiscriminately of whatever kind.’ Despite the breadth of such phrasing, the legislature did not render this text indeterminate because the specific context of “informal dispute settlement procedures,” “mechanisms” and “proceedings” was very clear. Congress was dealing with a dispute settlement procedure created by a warrantor and placed inside its warranty. Congress dealt with these procedures by carefully regulating them in a variety of ways. The use of the phrase was at all times part of a process to protect the interests of consumers in these privately created dispute resolution mechanisms.

It is impossible from a reading of the statute’s text for a court not to conclude that Congress delineated the specific operational characteristics of some species of private dispute resolution procedures (“informal dispute settlement procedures”) incorporated in written warranties. As to these procedures, Congress mandated:

195 See Id. § 2302(a)(8) (“any informal dispute settlement procedure”) (emphasis added).


197 The full text of the statute makes it plain that this is what Congress meant. See, e.g., 15 U.S.C. § 2302(a)(8) (procedures “offered by the warrantor” and placed in the “warranty”); Id. § 2310(a)(2) (procedure “incorporated into the terms of a written warranty to which any provision of this chapter applies”).
• how they would be created (by the manufacturer),\textsuperscript{198}

• how they would be disclosed to consumers ("fully and conspicuously" in "readily understood language" that would not "mislead a reasonable, average consumer"),\textsuperscript{199}

• who would participate in such procedures ("independent or governmental entities"),\textsuperscript{200}

• who would supervise them ("[t]he Commission"),\textsuperscript{201}

• how that agency would supervise them (by "setting forth minimum requirements"),\textsuperscript{202}

• how the courts would supervise them before FTC regulations were promulgated (by determining that such procedure is not "unfair"),\textsuperscript{203}

• how duties imposed on consumers by warrantors would be deemed enforceable in them (by showing "any duty other than notification" is "reasonable"),\textsuperscript{204}

• who would participate in them in the context of aggregative litigation (only the "named plaintiffs"),\textsuperscript{205} and

• how the mechanism's decision would be used on conclusion of the procedure ("shall be admissible in


\textsuperscript{199} Id. §§ 2302(a), 2302(a)(13).

\textsuperscript{200} Id. § 2310(a)(2).

\textsuperscript{201} Id. § 2310(a)(2), (3)–(4).

\textsuperscript{202} Id. § 2310(a)(2), (3)–(4).


\textsuperscript{204} Id. § 2304(b)(1).

\textsuperscript{205} Id. § 2310(a)(3).
Congress delineated every aspect of the process of these private "dispute settlement mechanisms" placed in warranties. According to the construction of the statute by the Southern courts, Congress simultaneously allowed that any and all of the aforementioned provisions could be ignored whenever a manufacturer or retailer simply elects to denominate the dispute settlement procedure in its warranty an "arbitration."

Purportedly, Congress's statute mandated that certain warrantor-created dispute resolution mechanisms would at all times be under the vigilant supervision of the FTC that would "review the bona fide operation of any dispute settlement procedure," and that would promulgate rules "setting forth minimum requirements for any" such procedure to ensure fairness in every single step of the process. But, Congress also wrote its law so that it would completely liberate manufacturers and retailers from any FTC oversight and any FTC rules if they simply denominated their privately created procedures "arbitration" procedures. Thus, warrantors are free to charge a high fee to use the procedure, they are at liberty to select an inconvenient situs for the arbitration, and they are free to structure the mechanism's operation so as to elevate the potential for it to be biased in their favor. Most importantly, warrantors are provided with

206 Id. § 2310(a)(3).

the right to make the mechanism, however unfair its procedural aspects might be, binding so as to foreclose any other avenue of relief to the consumer. This interpretation renders the Magnuson-Moss Act absurd. If Congress was so keenly interested in making the non-binding alternative dispute resolution procedures it was legislating entirely fair, then surely it must have had at least as great a concern in ensuring that every step of a binding alternative dispute resolution mechanism was also fair.

C. Why Has the Statutory Text Been in Large Measure Ignored in the Case Law and Scholarly Commentary?

There is no detailed textual analysis of the type just supplied in any of the reported cases. In those cases enforcing the statute in accordance with the FTC’s interpretation, perhaps it is understandable that the statutory language was not analyzed that closely. The courts were sure of themselves in applying the administrative agency’s interpretation, something that our courts

\[\text{[Note 208]}\]

One scholar has described the principle that statutes should be construed to avoid absurdity as “the Golden Rule.” T. I. McLeod, Principles of Statutory Interpretation ¶ 1-14 to 1-17 (1984); see also Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 466 n.222 (1989) (citing McLeod). Judge Learned Hand was a prime expositor of this view. See, e.g., Borella v. Borden Co., 145 F.2d 63, 65 (2d Cir. 1944), aff’d, 325 U.S. 679 (1945) (“We can conjure up no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest.”). The U.S. Supreme Court also cautions against constructions that would render the legislative body’s act an absurdity. See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 507-11 (1989) (refusing to adopt a statutory construction that “makes no sense whatsoever”; quoting dissenting lower court judge); Pub. Citizen v. United States, 491 U.S. 440, 467 (1989) (same); Garcia v. United States, 469 U.S. 70, 74 (1984). There are two forms of the “absurdity” limitation. There is the one used by Learned Hand where the judge attempts to avoid in every stage of analysis doing something that would make the legislative body’s enactment look rather stupid. Then there is the one that has sometimes been used of late as a final stage of analysis. This latter use of the “absurdity” limitation, often associated with initially focusing exclusively upon a simple dictionary definition of key statutory language, is analogous to someone trying to paint a portrait in the dark, and then upon completion snapping on the light to see if the person’s image was captured in such a deficient way that the portrait cannot be handed over to the patron who commissioned it.

\[\text{[Note 209]}\]

See case law cited supra note 10. Legal scholars and commentators have not scrutinized the language carefully either. See law review commentaries cited supra notes 33 and 149.
generally strive to show deference towards. But, this says nothing of the cases repudiating the FTC view. They omit to confront the language in any meaningful way as well.

The courts have erred in following a purportedly unassailable policy proposition, one that favors “finding” a way to construe all subsequent statutes to enforce binding arbitration clauses, no matter the context. This is not justified. Such a reading imputes to the U.S. Supreme Court the attempt to convert into a needless exercise the application of such fundamental principles as the importance of textual analysis aimed at effectuating the intent of the legislative body.

VII. The Statute’s Purposes

A. Framing the Statutory “Purposes” Inquiry

“[C]onstruction and application are intellectually impossible except with reference to some reason and theory of purpose.”\(^210\) To determine whether there is an “inherent conflict between arbitration and the statute’s underlying purposes,”\(^211\) we have to undertake a two-step analysis. The first step is to define clearly the Supreme Court’s test, and the latter step is to apply it.

The test must be carefully defined because as usually stated it admits of only one answer. If arbitration is considered a relatively low cost and efficient alternative to the expense and time of formal legal process, then the interest in embracing it would never be in conflict with statutory rights. Leaving aside the causes for skepticism among the members of the plaintiff’s bar, a skepticism not without a measure of validity as to certain points,\(^212\) and assuming that

\(^{210}\) Collection of Karl Llewellyn Papers, J, VII, I, e, at 5 (1944) (available in University of Chicago Law Library); see also Chris Williams, The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC, 52 GEO. WASH. L. REV. 67, 100 n.176 (1983) (quoting from the Collection).


\(^{212}\) The complaints focus on the potential for arbitrator bias, see supra note 207. There are also important concerns about the lack of certain judicial rules, like rules permitting meaningful discovery and the evidentiary rules. See, e.g., Paul Bland, Resisting Corporate Efforts To Impose Mandatory Arbitration On Consumers, 2 TEX. J. OF CONSUMER L. 94, 95 (1999) (stating that “[a]rbitrators need not follow rules of evidence and may consider hearsay evidence”); Davis v. Prudential Securities, 59 F.3d 1186, 1190 (11th Cir. 1995) (arbitrators not bound by
arbitration were to function as a fair process involving a neutral third party decisionmaker, then it seems generally better to allow a citizen with a statutory claim to have that claim decided faster and cheaper in an arbitration. In this sense, requiring that a plaintiff prove that the purposes of a statute are in direct conflict with the FAA’s mandate to treat arbitration contracts as enforceable is asking the impossible.

To be more than an exercise in futility, the “purpose” test must rest on a recognition that FAA arbitration has a specific meaning. FAA arbitration is voluntary at its core. It is an undertaking whereby parties have knowingly and willfully entered into an agreement to have their disputes decided in an alternative forum. When the U.S. Supreme Court states that the party opposing arbitration has the burden of showing that Congress “intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute,”213 the “waiver” it is speaking of is this truly voluntary waiver.

Furthermore, the “policy” to be tested against it, i.e., the policy of the subsequent statute, is not merely the legislature’s most obvious policy as described by the interest in creating a statutory right that one may predicate a suit upon, but rather it is found in the character of the transactions between citizens which Congress has elected to legislate. The issue is whether the voluntary relinquishment of the right to go to court is in conflict with the legislative body’s assessment of the voluntary or involuntary character of the terms of the transactions that are the subject of the subsequent statute. One of

judicial rules of evidence); Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 SUP. CT. REV. 331, 348 (“While discovery may be regarded as a mixed blessing at best, because of its costs, it cannot be doubted that the availability of discovery assures that courts in general are more effective than arbitral tribunals in detecting wrongdoing and enforcing the rights of victims. . . .”) An additional concern arises from the fact that arbitrators often “favor ‘bare awards’ without explanation of any sort, in the belief that such awards are the least likely to be challenged and overturned by a court,” BERTHOLD H. HOENIGER, COMMERCIAL ARBITRATION HANDBOOK A3-25 (1st ed. 1991), and from the reality that 9 U.S.C. § 10 limits review to a few specific grounds, and those grounds do not include legal error. Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991); Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990); see also Stephen J. Ware, “Opt-In” For Judicial Review Of Errors Of Law Under The Revised Uniform Arbitration Act, 8 AM. REV. INT’L Arb. 263, 264 (1997) (“[E]rror of law’ . . . is not listed in the FAA as a ground for vacating the arbitrator’s award.”).

the chief means of assessing the conflict would be to examine whether Congress, through a statutory restructuring of the relationships among the citizenry, evidenced a recognition that involuntariness and/or a practical absence of bargaining power chiefly characterized the statutorily protected citizens’ submission to the transaction terms at issue.

B. Whether FAA Arbitration Is in Conflict with Another Statutory Policy

Demosthenes stated Athenian law on arbitration this way:

If the parties have a dispute with each other respecting their private obligations, and desire to choose an arbiter, be it lawful to them to select whomsoever they will. But when they have mutually selected an arbiter, let them stand fast by his decision and by no means carry on appeal from him to another tribunal; but let the arbiter’s sentence be supreme.214

Arbitration “begins with and depends upon an agreement between the parties to submit their claims to one or more persons chosen by them to serve as their arbitrator.”215 One of the more influential figures in the field of arbitration was Frances Kellor, the First Vice President of AAA from 1926 to 1952. She was adamant that the nonjudicial alternative of arbitration always be based on voluntariness:

Arbitration is wholly voluntary in character.... The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another.216

This central idea, that parties should be free to enter into

214 DEMOSTHENES, EX RECENSIONE GUILIELMI DINDORFII 572 (emphasis added); see also Jones, supra note 71, at 243 (quoting Demosthenes).


216 FRANCES KELLOR, ARBITRATION IN ACTION 7, 8 (1941); see also Morris Stone, A Paradox in the Theory of Commercial Arbitration, 21 ARB J. 156 (1966) (quoting Kellor).
agreements where they relinquish their rights to sue in a court of law in favor of a less formal dispute settlement mechanism that shall finally decide any dispute between them, is premised on both parties having entered into a voluntary agreement.\textsuperscript{217} When Justice Arthur J. Goldberg addressed the American Arbitration Association at its annual meeting on March 17, 1965, he gave voice to this:

Voluntary arbitration must be voluntary in a real and genuine sense. There can be little concern that it is genuinely voluntary, when arbitration is agreed upon in collective bargaining between unions and employers possessing an equality, more or less, of bargaining power. The same is true of commercial arbitrations between business concerns which enter into arbitration agreements knowingly and advisedly. The situation may be different, however, where an arbitration clause appears as “boiler plate” in an installment sales contract, a lease or other document where bargaining power may be unequal.\ldots. The courts have shown understandable reluctance to hold parties to agreements which would have the effect of adjudicating their rights without protections in a court of law, where the important elements of voluntariness are, in fact, absent.\textsuperscript{218}

Nothing in the text or the legislative history of the FAA alters the fundamental principle that no arbitration provision should be enforced in the absence of a knowing and voluntary agreement to

\textsuperscript{217} This point has always been emphasized as indispensable and essential to arbitration. See, e.g., Kovin, supra note 179, at 230 (1966) (describing arbitration as “a voluntary proceeding whereby the parties by agreement submit their controversy” to a third party); Editorial, The Dilemma of Multiple Grievances in a Single Arbitration, 17 ARB. J. 193 (1962) (“Voluntary arbitration is supposed to rest upon the agreement of the parties.”); Wellington, supra note 161, at 476 (stating that the “whole movement towards arbitration as a means of dispute settlement stems in part from an acceptance of the proposition that it is wise policy to encourage regulation that is formulated by the subjects of the regulation”) (emphasis added); Stanley D. Henderson, Arbitration and Medical Services: Securing the Promise to Arbitrate Malpractice, 28 ARB. J. 14 (1973) (“Arbitration begins with and depends upon voluntary agreement.”); Harrison F. Blades, Inc. v. Jarman Mem’l Hosp. Bldg. Fund, Inc., 109 Ill. App. 2d 224, 226, 248 N.E.2d 289, 290 (Ill. App. Ct. 1969) (stating that the consensual basis for arbitration must remain “unextended and unenlarged either by construction or implication”).

\textsuperscript{218} Arthur J. Goldberg, A Supreme Court Justice Looks at Arbitration, 20 ARB. J. 13, 16 (1965).
arbitrate. When Justice Hugo Black reviewed the legislative history of the FAA in the *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* case\(^{219}\) he drew attention to this point by describing the legislative hearings this way:

Mr. Cohen, the American Bar Association’s draftsman of the bill, assured the members of Congress that the Act would not impair the right to a jury trial, because it deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit certain disputes to arbitration. . . . The members of Congress revealed an acute awareness of this problem. On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts “are really not voluntarily [sic] things at all” because “there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court. . . .” *He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.*\(^{220}\)

Having considered what FAA arbitration is, a *voluntary* arbitration, we can now inquire into whether it conflicts with the Magnuson-Moss Act’s purposes.

C. The Conflict Between FAA Arbitration and the Magnuson-Moss Act’s Purposes

The central animating idea of the Magnuson-Moss Act was that warrantors created warranties that were contracts in name only. They were in reality nothing other than pieces of paper written by the warrantors to suit their own interests and to subvert the interests of consumers to whom they sold their products.\(^{221}\) The purpose of the


\(^{220}\) *Id.* at 413–14 (citations and footnotes omitted).

statute on the most fundamental level was to respond to the completely involuntary nature of the modern consumer product warranty. Since the warranty could be invoked by the warrantor, and treated as an enforceable agreement in a court of law, Congress acted, in effect, by standing in the shoes of America’s consumers and legislatively re-writing all such warranties. Most of the provisions in the Act are aimed at exactly this, from the provision declaring illegal the disclaimer of implied warranties, to the provision barring the imposition of unreasonable duties beyond notification in the context of full warranties, and ultimately to the detailed provisions on what types of privately created dispute settlement mechanisms a warrantor could put in its warranty. The “purpose” of the Act was to address, not just the inequality in bargaining power between consumers and warrantors, but the absence of it. The very essence of the statute was tied up with the legislative recognition that consumers were involuntarily

(1976) (noting that Senate Report No. 93-151 recognized the “the powerlessness of the modern consumer to set the terms of his/her purchase”); see also Gunter, supra note 149, at 1508 n.122 (quoting Rothschild); see supra notes 44-50.

222 It bears emphasizing that the law of sales has long been moved by this very concern. An example of this is found in U.C.C. § 2-316, which aims at preventing the buyer from being surprised by unclear or inconspicuous language that assertedly disclaims warranties. The official text of the Uniform Commercial Code, at Comment 1 of Section 2-316, reads thus:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with the language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.


224 See id. § 2304(b)(1).
subjected to the terms of a warranty. Congress's most basic purpose was to enact legislation in reaction to that reality.

There is never a voluntary agreement when it comes to a consumer product warranty that accompanies family and household items. Of course, we could live without refrigerators, microwaves, ovens, air conditioners, and the like, if we did not want to submit to manufacturer warranties. But, this is hardly realistic, and the imputation of voluntary consent to the terms of a product warranty is a fiction. The courts should be reluctant to embrace such fictions as these, ones that ordinary citizens would readily see as untrue.

The courts have erroneously asserted that there is no inherent conflict between the concept of voluntary and knowing arbitration agreements enunciated in the FAA and the principle that consumer product warranties are adhesion contracts marked by a complete absence of voluntariness. They have ignored the nature of the product warranty and the chief purpose of the Congress. They have kept the Congress from protecting consumers.

VIII. Brief Comment on Chevron

The statute's text, history and purposes are clear. The statute as written does not allow for binding dispute settlement procedures like arbitration mechanisms to be inserted into a consumer product warranty, obviating the need to reach the FTC's regulations. However, this is not widely accepted, and so it is appropriate to consider briefly the Chevron body of law. 

Commentators and courts advocating binding arbitration in this context have bypassed a reasoned and careful statutory analysis, only to focus their attention on whether the FTC's interpretation of the federal statute it is entrusted to enforce is a problem. It is

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225 Note that the Act is limited to consumer products "used for personal, family, or household purposes." Id. § 2301(1).


227 In promulgating legislative regulations under the Magnuson-Moss Act, the FTC rejected industry arguments for binding arbitration. It noted, "[s]everal industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration). The Rule does not allow this . . . ." 40 Fed. Reg. 60210 (Dec. 31, 1975). See also 64 Fed. Reg. 19708 (April 22, 1999) (discussing earlier decision on "the legality and the merits of mandatory binding arbitration clauses in consumer products warranties"). The FTC based its 1975 decision in part on the fact that "Congressional intent was that decisions of Section 110 Mechanisms not
understandable that the principles of Chevron and its progeny give them pause. It is no easy thing for a court these days to simply repudiate an administrative agency’s interpretation of a statute. We know that when legislative regulations are promulgated pursuant to an express grant of formal rulemaking authority by the United States Congress, as was done here, they are entitled to a high level of deference. When those regulations are promulgated

be legally binding.” 40 Fed. Reg. 60210 (Dec. 31, 1975). The agency thus surely considered the evidence of legislative intent set forth herein. The FTC also found that it could not structure a system allowing for binding arbitration under the Act that would “ensure sufficient protections for consumers.” 40 Fed. Reg. 60210. Under the regulations adopted, “[d]ecisions of the Mechanism shall not be legally binding on any person.” 16 C.F.R. § 703.5(j) (2000) (emphasis added). See also 16 C.F.R. § 703.5 (g) (mandating that the “Mechanism shall inform the consumer . . . that: (1) If he or she is dissatisfied with its decision or warrantor’s intended actions, or eventual performance, legal remedies, including use of small claims courts, may be pursued; (2) The Mechanism’s decision is admissible in evidence as provided in section 110(a)(3) of the Act.”). The FTC regulations defined a “mechanism” as “an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies.” Id. § 703.1(e). The FTC adopted the position that “informal dispute settlement procedures,” “mechanisms” and “proceedings,” as such terms are used in the statute, must be read to encompass all non-judicial dispute resolution procedures, including arbitration. See, e.g., 40 Fed. Reg. 60210 (Dec. 31, 1975) (characterizing binding arbitration as a type of “mechanism[ ] whose decisions would be legally binding”). Binding arbitration is thus precluded by the regulations’ plain language specifying that mechanisms must “not be legally binding” on any party. 16 C.F.R. § 703.5(j).

228 The FTC’s legislative regulations (issued in 1975) should be distinguished from its interpretive regulations (issued in 1977). The former, found at 16 C.F.R. §§ 701–703, see supra note 227, were promulgated pursuant to an express delegation of rulemaking authority in 15 U.S.C. §§ 2309–2310. They were created following the rulemaking procedure Congress established, a careful and formal one involving a high level of public participation. See 15 U.S.C. § 2309 (noting that to properly prescribe a rule under the Act, the FTC must “give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions”). The interpretive regulations, found at 16 C.F.R. § 700, also bar binding arbitration. See 16 C.F.R. § 700.8. They are not entitled to the same level of Chevron deference. See Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 157 (1991). They are “entitled to respect,” provided they have the “power to persuade,” as stated in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), which they do have here. See also Christensen v. Harris County, 529 U.S. 576, 587 (2000) (citing Skidmore).

229 As the Supreme Court has explained, “express congressional authorizations to engage in the process of rulemaking” are “a very good indicator of delegation meriting Chevron treatment.” United States v. Mead Corp., 533 U.S. 218, 229 (2001); see also id. at 230 (“It is fair to assume generally that Congress
contemporaneously, as they were here by an agency that worked for years shoulder to shoulder with the Congress, deference is particularly appropriate. We know that when the regulations set forth an interpretation of the statute that has been adhered to consistently over time, courts are especially reluctant to give the agency’s interpretation no deference. This is the case here where having promulgated its legislative regulations in 1975 the agency reaffirmed them as recently as 1999. When an agency has expertise

230 It is important to remember just how important this legislation was to the FTC, an agency that had become known as the “sleeping lady of Pennsylvania Avenue” at a time when there was a pervasive consumer protection problem in our Nation. See supra note 51.

231 An administrative interpretation “has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.” Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (quoting Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933)). The detailed analysis of the legislative history in this article shows that from the very outset of the legislative process the FTC’s Chairmen Caspar Weinberger and later Miles Kirkpatrick and their staff were intimately involved with the development of Magnuson-Moss. See Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 368 (1986) (deference to contemporaneous agency interpretation justified in part by the fact that “[t]he agency that enforces a statute may have had a hand in drafting its provisions” and that the agency “may possess an internal history in the form of documents or ‘handed-down oral tradition’ that casts light on the meaning of a difficult phrase or provision”).

232 While agency interpretations that are revised over time are certainly entitled to Chevron deference, see Rust v. Sullivan, 500 U.S. 173, 186 (1991), longstanding and consistent agency interpretations carry special weight. See Nat’l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 274–75 (1974) (“[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration.”); see also Smiley v. Citibank (South Dakota), 517 U.S. 735, 740 (1996) (observing that “agency interpretations that are of long standing come before us with a certain ‘credential of reasonableness’ since it is rare that error would long persist”).

in the subject matter at issue, courts also take this into consideration in deciding whether to defer to their statutory interpretations.\textsuperscript{234}

The principles of the entire \textit{Chevron} body of law are no different from the authoritative precepts of statutory construction. They are not to be applied or not applied at will. They commend an approach that is legitimate, one that ensures the will of the legislative body is effectuated by our courts.

\textbf{IX. Is the Legal Order Grounded in Reason?}

The lower federal court and the state supreme court decisions legislative rules, the FTC explained that it requested comments on its rules and guides interpreting and implementing the Magnuson-Moss Act "as part of its regulatory review program, under which it reviews rules and guides periodically in order to obtain information about the costs and benefits of the rules and guides under review, as well as their regulatory and economic impact." 64 Fed. Reg. 19700 (Apr. 22, 1999). "After careful review of the comments received in response" to its request, the FTC decided to retain the interpretations and rules without change. The FTC wrote:

\begin{quote}
[T]he Commission determined that 'reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act.' The Commission believes that this interpretation continues to be correct. Therefore, the Commission has determined not to amend 16 C.F.R. § 703.5(j) to allow for binding arbitration. Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.
\end{quote}

64 Fed. Reg. 19708–19709. The FTC indicated, as the court in \textit{Wilson v. Waverlee} did, that it was troubled by a statutory construction that "would enable warrantors and the retailers selling their products to avoid the requirements of the Warranty Act simply by inserting binding arbitration clauses in their sales contracts." 64 Fed. Reg. 19709 & n.72. It is also appropriate to note that the FTC's policy has consistently been that "warrantors are not precluded from offering a binding arbitration option to consumers \textit{after} a warranty dispute has arisen." 64 Fed. Reg. 19708 & n.70 (Apr. 22, 1999). The FTC understands the distinction between the involuntariness of warranty terms tendered at the time of sale, and post-sale transactions where there can be a meaningful choice exercised by a consumer as to whether he wants to waive his rights.

\textsuperscript{234} See United States v. Mead Corp., 533 U.S. 218, 228 (2001). One need only consider the provisions in the United States Code pertaining to the Federal Trade Commission Act and its scores of amendments to realize that the FTC is the federal government's "expert" in the arena of consumer protection. But apart from its general consumer protection expertise, the FTC was entrusted by Congress and the President with the task of performing a comprehensive study of the issues in this precise area – consumer protection in product warranties. Because of this study, its "expertness" in this particular subject matter is undeniable.
questioned here are decisions that rest on “word-magic” and a disregard of reality. The word “arbitration” was not used in the statute, it is said. If Congress had intended to displace the arbitration made permissible under the FAA, then Congress, which had enacted the federal arbitration statute but a half-century before, would have mentioned it. That it did not, clearly shows Magnuson-Moss claims are subject to pre-dispute binding arbitration clauses inserted into consumer product warranties. What of all those provisions about “informal dispute settlement mechanisms” inserted into warranties? They are “of a different nature” because the word “arbitration” was not used.

The analysis is both simple and incorrect. Yet it is adhered to on the suspect ground that there is a “liberal policy” that favors the enforcement of arbitration clauses in all contexts. The Magnuson-Moss Warranty Act cannot be ignored. Courts must engage in the analytical process of statutory interpretation and assess the text, legislative history, and purposes of the Act. It appears that a number of courts have really not done that, unduly influenced by a poorly drafted United States Supreme Court decision in Gilmer. Gilmer suggested that the statutory interpretation analysis, while it should be invoked, is to be affected, perhaps dispositively, by a canon of statutory construction. This has gone unchallenged, and unnoticed. Even in some of our Nation’s leading law journals, these realities have not been specifically confronted.

Legal rules and principles are devices used by those participants in our court system who each day drive the development of our law, who work to make it responsive to the needs of our society. They are instruments that time has proven facilitate reason,

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235 In the 1970s, FAA-governed arbitration was not in use as a means of resolving consumer claims. Van Wezel Stone, supra note 77, at 935. It was only within the last eighteen years that the Supreme Court of the United States began interpreting the FAA more broadly so as to promote its use in all forms of contractual relationships. Id. at 935–36, 943–54. See also Southland Corp. v. Keating, 465 U.S. 1, 10–16 (1984); Perry v. Thomas, 482 U.S. 483, 490–91 (1987). Courts that have placed emphasis on the fact that FAA arbitration was not mentioned in the Magnuson-Moss Act, and that have drawn therefrom the conclusion that Congress did not intend to interfere with the FAA when it enacted Magnuson-Moss, have failed to grasp this essential point. Indeed, when learned attorneys like Antonin Scalia, a future Justice of the U.S. Supreme Court, and Robert Braucher, then an Associate Justice of the Supreme Judicial Court of Massachusetts, issued in 1973 the National Institute for Consumer Justice’s final report, Redress of Consumer Grievances, they did not focus on arbitration under the Federal Arbitration Act as a mechanism under which consumer warranty claims could be resolved.
the vehicle for justice. Artificial forms of judicial analysis that abandon the rigorous and faithful application of such authoritative precepts as the principles of statutory construction must be avoided. They remove from our grasp the tools that are the bulwark against a jurisprudence that adheres to fictions and shields injustice from scrutiny.

X. Conclusion

For the past fifteen years there has been a polarized discourse on the subject of arbitration. The plaintiffs come into court again and again and make the tired argument that arbitration is either inherently unconscionable or a violation of the very statutory rights that the claimant aims to enforce. These arguments have met with limited success. The defendants, for their part, fashion some of the most complex, costly and difficult to use procedures they can possibly devise. They seek to create alternative procedures that will discourage any effort at securing redress.

One day these two polar extremes will hear what our Nation’s judges have been telling us for a decade and a half. Arbitration is a good thing, arbitration must be embraced.

We do not have unlimited judicial resources in our society, and even if we did, the court processes are formal, and they are structured, and they are costly, and they are time-consuming. We must work together to find alternative redress mechanisms to solve many of the grievances in our society, and this author submits that the Magnuson-Moss Act sets forth an ideal legislative model for how arbitration can best work in many of the arenas of our society.

To understand the statute, one need only look directly at it. Think about what the Congress did here. It encouraged manufacturers and suppliers throughout the country to work to develop nonjudicial methods of dispute settlement. Such arbitration procedures do not spring to life like Athena from the head of Zeus. Someone has to undertake the effort to put them into being and someone has to pay for them. The Congress encouraged the country’s sellers of consumer products to do just that. But, Congress said they have to be fair, and they have to comply with our administrative agency’s rules designed to ensure the even-handed treatment of consumers. If this is done, Congress said, then all consumer claims can be channeled into these low-cost and expeditious procedures.

Though consumers always retain the right to go to court, most of the claims will be resolved without that necessity. This is obvious when we consider what else Congress provided in its statute.
Congress stated that all the terms and conditions of a warranty — and there is no more important term than how you go about enforcing the warranty — must be set forth "fully and conspicuously" in "simple" language, language that is readily understandable. Not readily understandable to a lawyer, but readily understandable to a "reasonable, average" consumer. So in most instances, the consumer could read his warranty and readily understand that a procedure is available and that he can use it himself, without even hiring a lawyer. It would be reasonable for him to do this, as the fairness of the procedure would be under the supervision of a federal regulatory agency with the power to ensure things are done right.

Through five long years of diligent effort, the United States Congress set in place a legislative scheme that balanced the interests of consumers and manufacturers, and advanced the interests of society as a whole. Indeed, the only interests that are not served by this scheme would be the interests of the lawyers. But this author suspects, he truly does believe, that society would be willing to live with that.

The Magnuson-Moss Act sets forth an ideal legislative model for how arbitration can best work in our society. The courts are called upon here. Embrace it, and enforce it.