Common Law in the Age of Arbitration

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Date : September 23, 2016

Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 **U. Ill. L. Rev.** 371 (2016).

Judge-made law is dynamic. Rules adapt to innovations in technology, trends in human behavior and markets, and nascent theories that unsettle previously entrenched approaches to a problem. Even when a rule's basic elements are stable, the accretion of new decisions can lead to subtly different formulations, caveats, and corollaries. Observers might therefore assume that doctrine in any given field will evolve for as long as affected actors are creative and litigious.

But even litigious actors cannot instigate changes to judge-made rules if litigation cannot lead to new judicial opinions. Myriam Gilles proposes a thought experiment to illustrate this possibility in her new article. Suppose that all cases in field *X* were suddenly shunted to arbitration, such that courts had no further opportunity to write opinions expounding on the law of *X*. Further suppose that choice-of-law provisions required arbitrators to apply judge-made rules governing *X* and that arbitrators would not write detailed opinions explaining their decisions (or that their opinions would be inaccessible to nonparties). In this hypothetical regime, the common law of *X* would stagnate. Doctrine would remain on the books as a source of guidance for arbitrators addressing the idiosyncrasies of individual cases. But those idiosyncrasies would no longer be catalysts for refining the publicly articulated rules that arbitrators apply. Judge-made law would shape outcomes, yet outcomes would not reshape the law.

Gilles' article offers the game of musical chairs as a metaphor for the doctrinal stagnation that can arise when arbitration supplants public adjudication. When the music stops, players are locked into the arrangement of chairs at that moment. Each player's position relative to the fixed chairs influences who wins and who loses. Likewise, when arbitrators who do not publish opinions begin deciding all cases in a particular field, litigants are stuck with the formulation of judge-made rules at the time judges were displaced. Given that doctrine is constantly evolving, any muting of public adjudication (the music in this metaphor) will occur after one innovation and before the next innovation. A normative assessment of whether the music has stopped at an appropriate time therefore requires considering both the content of current rules and the lost opportunity for those rules to develop. More generally, if one thinks that the common law process improves doctrine over the long term, then stopping the music at any point in a rule's evolution may require a compelling justification.

Gilles develops her argument in three steps. First, she discusses several historical trends that coalesced into a movement away from public adjudication. For example, Gilles argues that the Reagan, Bush I, and Bush II administrations invoked the prospect of frivolous suits and burdensome litigation costs to justify making adjudication of a claim's merits less likely and less effective. Gilles contends that even though legislative initiatives largely fizzled, judicial appointees from these eras successfully implemented what she describes as an "anti-lawsuit agenda." At roughly the same time, the Supreme Court expanded the scope of the Federal Arbitration Act (FAA) to encompass federal statutory claims. This innovation empowered potential defendants to draft contractual arbitration provisions that circumvented courts in an increasingly wide range of cases, including putative class actions.

Second, Gilles considers the potential consequences of privatizing adjudication in three fields: antitrust,

consumer protection, and employment discrimination. Each field features an active common law process in which judge-made doctrines elaborate on sparse statutory language. Each also implicates statutory claims that would arguably be immune from arbitration if the Court retreated from its expansive interpretation of the FAA.

Gilles uses these three fields as grist for a fascinating counterfactual question: How would the substantive law have developed differently if arbitration had been more widely available in the past? Her review of recent antitrust, consumer protection, and employment discrimination cases concludes that many share two characteristics: The parties had a contract, and the court's opinion meaningfully altered or refined doctrine. These observations suggest that if the contracts had included an enforceable arbitration clause, then many important opinions never would have been written. Modern doctrine in this counterfactual world would include elements that were destined to change, but that persisted because of the shift from public to private adjudication.

The case studies provide a concrete illustration of how arbitration can "freeze" doctrine. If the Supreme Court interprets the FAA to allow arbitration of a particular claim, and if actors draft arbitration clauses that encompass such claims, then courts will lose opportunities to modify judge-made rules. The rules will persist, but they will not evolve. Of course, evolution in an adversarial system is not always for the best; any given change will have supporters and opponents. The prospect of doctrinal stagnation is nevertheless interesting even if its normative implications are not always apparent.

Third, Gilles notes that arbitrators can mitigate stagnation by publishing reasoned opinions. But she contends that arbitrators have little incentive to replace courts as public expositors of law because arbitration thrives on confidentiality and streamlined procedures. Courts could create such an incentive by refusing to confirm arbitral awards without a reasoned opinion, but that is not a path that FAA jurisprudence has taken.

Gilles's analysis has several interesting implications. As she acknowledges, her thesis builds on earlier work by Owen Fiss exploring the risk that settlements pose for the explication of public law. Fiss was concerned about cases dropping out of the judicial system before a final decision, while Gilles is concerned about cases never reaching the judicial system. Both issues require assessing the value of judicial opinion-writing and weighing that value against the potential benefits of using private agreements to streamline dispute resolution.

Gilles's argument also suggests that certain kinds of claims may be more susceptible to doctrinal stagnation than others. For example, suppose that claim *Y* arises exclusively in a context where the parties have a contract and one party has leverage to compel arbitration. In contrast, claim *Z* arises roughly equally in cases with and without contracts. Applying the FAA to claim *Y* would remove from the judicial system all or most cases raising *Y*, while applying the FAA to claim *Z* would leave courts free to adjudicate the subset of *Z* claims that do not involve a contract. Enforcement of arbitration clauses might therefore be more troubling in the *Y* context than in the *Z* context if the stagnation of doctrine is a legitimate factor to consider when allocating claims between public and private fora.

Another intriguing question arises from Gilles' implicit assumption that reducing the number of judicial opinions in a field reduces innovation. A decline in the number of cases that courts adjudicate does not necessarily mean that rules will stagnate. What matters is whether the remaining cases provide a sufficient foundation for innovation. There is no obvious way to determine how deep the pool of justiciable cases needs to be, which complicates any effort to determine if arbitration has excessively drained it. Scholars might therefore consider how to identify the minimum number and variety of cases that courts must adjudicate in a given field to ensure that rules remain sufficiently dynamic.

Finally, lawyers will presumably engage in strategic behavior as they encounter the risks that Gilles identifies. The article focuses on scenarios where judges can no longer rule on an entire category of claims, such that the law becomes completely frozen. These scenarios illustrate the article's theoretical point, but in practice may be outliers. Contracts are not ubiquitous in many areas of law, some contracts will not contain an enforceable arbitration clause, judicial review of arbitral awards may provide an opportunity to expound on rules applied by arbitrators, and government agencies may be able to file enforcement actions even if individual plaintiffs lack a right to sue.

The possibility that public adjudication will persist alongside arbitration means that the relevant ice metaphor is not that doctrines will entirely freeze. Instead, the pace of evolution might become relatively glacial. A lingering window for judicial decisionmaking will create opportunities for strategic behavior designed to induce doctrinal change. For example, government lawyers may bring enforcement actions that they hope will result in new judicial precedent for arbitrators to follow, public interest lawyers may look for test cases in which arbitration is not an obstacle to adjudication, and defense lawyers may seek opportunities to reshape rules with which their clients disagree. Stagnation of legal doctrine is therefore not an inevitable consequence of sending more cases to arbitration, but rather a risk that well-informed actors may attempt to avoid or exploit. The strategies that actors might employ would be an interesting topic for further study.

Gilles has creatively explored a difficult problem with a thought-provoking counterfactual experiment. Her analysis is an illuminating addition to the literature about the relative merits of public and private adjudication.

Cite as: Allan Erbsen, *Common Law in the Age of Arbitration*, JOTWELL (September 23, 2016) (reviewing Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 **U. Ill. L. Rev.** 371 (2016)), https://courtslaw.jotwell.com/common-law-in-the-age-of-arbitration/.