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Arbitration and Rule Production

Christopher R. Drahozal

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ARBITRATION AND RULE PRODUCTION

Christopher R. Drahozal[†]

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INTRODUCTION

Like settlement,¹ arbitration has been criticized as displacing cases from the public courts and thereby reducing the production of court

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I served as a consultant to the Consumer Financial Protection Bureau (CFPB) on its arbitration study discussed in this Article. The views stated here are my own and not those of the CFPB or the United States.

1. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (“A settlement will . . . deprive a court of the occasion, and perhaps even the ability, to render [an authoritative] interpretation [of law].”); see also Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL’Y 102, 104, 114–15 (1986) (asserting that settlements might result in the “[u]nderproduction of public goods”—“[o]pinions and precedents . . . [that] are sources of information about the things that can and cannot

precedent. For example, Richard Alderman has contended that “[a]rbitration eliminates litigation in a public forum, precedent-establishing decisions, and stare decisis.”² Myriam Gilles has argued that “[f]or the entire categories of cases that are ushered into this [arbitration] vault—from consumer law, to employment law, to much of antitrust law—common law doctrinal development will cease.”³ Charles Knapp has stated more broadly—and more colorfully—that “[i]f all contract disputes which the parties could not settle between themselves had to be submitted to arbitration for resolution, rather than to a court of law, the common law of contract . . . would become merely an historical relic, a legal King Tut in its elaborately detailed Restatement (Second) sarcophagus.”⁴ I call this the “displacement hypothesis.”⁵

Concerns about the displacement of court precedent by arbitration are not limited to academics. Judge Jennifer Walker Elrod of the United States Court of Appeals for the Fifth Circuit, for example, has asserted: “We have a common law system that is enriched by progression and development of law through cases later resolved on appeal. Such development only happens if cases are tried in public in courts of law [rather than in arbitration]. . . . Without cases, our common law will stagnate”⁶ Nor are the concerns limited to the United States. Lord Neuberger, the now-retired President of the Supreme Court of the United Kingdom, has stated: “One of the disadvantages of an increase

lawfully be done in a society”); David Luban, *Settlements and the Erosion of the Public Realm*, 82 GEO. L.J. 2619, 2623 (1995) (“[A]djudication may often prove superior to settlement for securing the peace because the former, unlike the latter, creates rules and precedents.”).

2. Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003); see also *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Richard M. Alderman, Director, Center for Consumer Law, University of Houston Law Center), <https://www.judiciary.senate.gov/imo/media/doc/Alderman%20Testimony%20121207.pdf> [https://perma.cc/TK9A-5R5J] (arguing that arbitration will “essentially freez[e] the common law of consumer transactions, denying courts the ability to develop and adapt the law”).
3. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 377.
4. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 786 (2002).
5. Cf. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 24–25 (considering whether the “vanishing trial” is due to “displacement” of trials from public courts to other “trial-like events,” including “arbitration proceedings”).
6. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 324 (2012) (footnote omitted).

in [arbitration] awards and a concomitant decrease in judgments, particularly in the common law world, is that the law does not develop, that it becomes ossified.”⁷

Arbitration differs from settlement in that the result of the arbitration proceeding—an arbitral award—might itself produce legal rules and substitute for court precedent. But the standard view is that arbitrators have little incentive to issue awards that produce legal rules. In their classic article, *Adjudication as a Private Good*, William Landes and Richard A. Posner argue:

[B]ecause of the difficulty of establishing property rights in a precedent, private judges have little incentive to produce precedents. They will strive for a fair result between the parties in order to preserve a reputation for impartiality, but why should they make any effort to explain the result in a way that would provide guidance for future parties? To do so would be to confer an external, an uncompensated, benefit not only on future parties but also on competing judges.⁸

In other words, rule production (as opposed to dispute resolution) results in positive externalities—benefits conferred on nonparties to the dispute. Because the parties to the dispute do not receive the full benefit of a rule-producing award, they will not pay the arbitrator enough to issue such awards. As a result, the argument goes, a system of

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7. David Neuberger, President, Sup. Ct. of the U.K., Keynote Speech at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong: Arbitration and the Rule of Law para. 24 (Mar. 20, 2015), www.supremecourt.uk/docs/speech-150320.pdf [<https://perma.cc/8XCV-9292>]; *see also* John Thomas, Lord C.J. of Eng. and Wales, Fourth BAILII Lecture: Developing Commercial Law Through the Courts; Rebalancing the Relationship Between the Courts and Arbitration para. 5 (Mar. 9, 2016) [hereinafter BAILII Lecture 2016], <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> [<https://perma.cc/Y8HM-2GU4>] (“As arbitration clauses are widespread in some sectors of economic activity, there has been a serious impediment to the development of the common law by courts in the UK”); Giuditta Cordero-Moss & Daniel Behn, *Arbitration and the Development of Law*, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Andrea K. Bjorklund, Franco Ferrari, & Stefan Kröll eds.) (forthcoming 2021) (manuscript § 4.2 n.119, at 28) (on file with authors) (“The then Chief Justice of the Norwegian Supreme Court, Carsten Smith, expressed similar concern already in the early 1990s, *see* C. Smith, ‘Voldgift – Domstolenes Konkurrent og Hjelper’, *Tidsskrift for Rettsvitenskap*, 5 (1993), 474.”).
 8. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979); *see also* IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 543 (7th Cir. 1998) (Posner, C.J.) (“[Arbitrators’] decisions, which in the case of commercial as distinct from labor arbitration are rarely even accompanied by an opinion, are more like jury verdicts than like the decisions of courts, and jury verdicts are not given any weight as precedents.”).

arbitration will produce too little precedent.⁹ Other commentators, such as Professors Gilles¹⁰ and Alderman,¹¹ have echoed this analysis.¹² I call this the “positive externalities hypothesis.”

This Article critically examines both the displacement hypothesis and the positive externalities hypothesis; it analyzes both the likelihood that arbitration will displace court precedent and the incentive of arbitrators to produce awards that can substitute for court precedent.¹³ In so doing, the Article offers new theoretical and empirical insights that provide the groundwork for a comprehensive account of arbitration and rule production. Its central insights are the following:

First, the Article considers the underlying factual predicate for the displacement hypothesis: the extent to which arbitration is used to resolve disputes in the relevant contracting market. I define the “relevant contracting market” as the type or types of contracts likely to give rise to disputes raising legal issues in a particular field of law

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9. Landes & Posner, *supra* note 8, at 248 (“[A]rbitration awards are not a source of rules or precedents. This is understandable in the case of general commercial arbitration because of the public-good character of precedent.”).
 10. Gilles, *supra* note 3, at 410 (“[A]rbitrators are simply not expected or paid to write precedential decisions—and if they were, the expense of arbitration would grow exponentially.”).
 11. Alderman, *supra* note 2, at 12 n.52 (“Because their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public.”).
 12. See also, e.g., Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 635 (2020) (“When dispute resolution is privatized so that no published legal rulings ensue, this process of creating law as a public good is potentially arrested.”); David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1007 (2017) (noting that, “[i]nsofar as arbitration is ‘private and confidential,’ it generates none of these public goods,” such as “contribut[ing] to a working system of precedent” (footnotes omitted)) (quoting Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 372 (2013)); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 705 (2004) (“Movement of cases from the courts to the arbitration forum, which lacks written opinions, precludes creation of the body of precedent necessary to develop and articulate any generally accepted interpretation of the statute.”).
 13. My focus here is on the relationship between arbitration and rule production in a common-law system. How the use of arbitration clauses affects compliance with legal obligations is a separate issue and one I do not address. For one perspective on that issue, see J. Maria Glover, *Disappearing Claims and the Erosion of the Substantive Law*, 124 YALE L.J. 3052, 3091 (2015) (“The Supreme Court’s recent arbitration revolution, and its decision in *Italian Colors* in particular, is troubling insofar as it permits and creates an incentive for entities to self-deregulate through private contract.”).

and in a particular jurisdiction. Determining the relevant contracting market is analogous to determining the relevant market for antitrust merger analysis: it requires consideration of both the relevant product market (the field of law at issue) and the relevant geographic market (the jurisdiction in which the law is applicable).¹⁴ This analysis has two implications for understanding arbitration and rule production: (1) the relevant field of law typically is not “contract law” or the “common law,” but instead “employment law” or “franchise law” or even narrower fields of law; and (2) jurisdictions with less use of arbitration might produce court decisions that can serve as (at least persuasive) precedent for jurisdictions with more use of arbitration.

Second, once the relevant contracting market is defined, the next question is what proportion of disputes in that contracting market are resolved in court and what proportion are resolved in arbitration. Some commentators have argued that sufficient cases will continue to be resolved in court so that fears about the displacement hypothesis are unwarranted.¹⁵ According to Rick Bales, for example, “there will always be some employees . . . with the bargaining power to refuse [arbitration] agreements, and there will be some jobs . . . for which employers will prefer the barriers to access of litigation over arbitration. Thus, there will still be plenty of employment cases and judicial opinions.”¹⁶ Other

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14. See U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 4, at 8 (2010) (explaining that “a relevant market . . . has both a product and a geographic dimension”), www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [<https://perma.cc/XBC2-DZMS>].
 15. Indeed, the U.S. Supreme Court so concluded in *Gilmer v. Interstate/Johnson Lane Corp.* when it rejected the argument that arbitration will “stifl[e] . . . the development of the law” as a basis for finding claims under the Age Discrimination in Employment Act nonarbitrable. 500 U.S. 20, 31–32 (1991) (reasoning that “judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements”).
 16. Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceañera*, 81 TUL. L. REV. 331, 366 (2006); see also James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1711 (2017) (“There will likely always be some consumer contracts that do not include arbitration clauses, even if the number dwindles over time. Some decisions will inevitably result from disputes involving those contracts, and the common law will move forward.” (footnote omitted)); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 182 (2019) (“[E]ven if many employees are required to arbitrate their claims, presumably at least some precedent will continue to exist, because not all employers mandate arbitration of all claims by all employees.”); Mark R. Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN’S L. REV.

commentators, however, have predicted that all businesses are likely to switch to arbitration clauses in their standard form contracts with employees and consumers. As Professor Brian Fitzpatrick has stated: “[Arbitration clauses with class-action] waivers are tantamount to insulating businesses altogether from liability for the small-stakes injuries they cause. Why wouldn’t every business want such insulation? I think every business would.”¹⁷ In response to Professor Fitzpatrick’s question, this Article offers several possible reasons businesses might not use arbitration clauses and presents anecdotal and empirical evidence consistent with those reasons. Moreover, widespread use of arbitration clauses alone is not enough to make a contracting market “arbitration-only”—i.e., one in which all disputes are resolved in arbitration. In addition, the arbitration clauses must not carve out relevant disputes from arbitration, parties must not opt out of the obligation to arbitrate, and parties must invoke arbitration clauses in the relevant disputes.

Third, the Article examines the effect of arbitration on rule production by courts in a partial-arbitration market—that is, a contracting market with some, but not all, disputes resolved in arbitration. Some commentators, accepting a simple version of the displacement hypothesis, assume an inverse, perhaps even linear, relationship between the use of arbitration and production of court

1, 18 (1987) (“[T]he fewer published opinions prediction is unlikely to come true [C]ompelling arbitration [of antitrust claims] . . . would probably not cause an appreciable decline in the rate at which antitrust opinions would be published.”); John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 241 (1986) (“It seems totally implausible, however, that the number would be so reduced that private antitrust suits would cease to provide an important vehicle for the development and refinement of antitrust precedent.”).

17. Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 190 (2015); see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005) (“I regard it as inevitable that firms will ultimately act in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class action liability. Why wouldn’t they?”); Ian Millhiser, *Supreme Court Nukes Consumers’ Rights in Most Pro-Corporate Decision Since Citizens United*, THINKPROGRESS (Apr. 27, 2011, 7:40 PM), archive.thinkprogress.org/supreme-court-nukes-consumers-rights-in-most-pro-corporate-decision-since-citizens-united-c0a08ace6995/ [<https://perma.cc/N9CK-MM4D>] (“After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action.”).

precedent.¹⁸ On this view, more arbitration means less court precedent. Others recognize that the relationship may not be so simple. Professor Knapp, for example, acknowledges that “the widespread use of arbitration by willing parties” has not been and is not “likely to be fatal to the common law of contract.”¹⁹ “After all,” according to Knapp, “disputants who choose to arbitrate might instead have simply chosen to settle their disputes on their own, without resort to any external decision-maker.”²⁰ This Article extends the analysis in Marc Galanter’s *Why the “Haves” Come out Ahead* to explain how businesses might use arbitration clauses (instead of settlements) to avoid the creation of unfavorable court precedent.²¹ One implication of this analysis is that, as suggested by Knapp, increased use of arbitration might displace settlements (of cases otherwise likely to create unfavorable law) rather than reducing the production of court precedent.²²

Finally, the Article reevaluates the positive externalities hypothesis by considering rule production in an arbitration-only market. While the positive externalities hypothesis is widely accepted, Mark Weidemaier and others have demonstrated that arbitrators do, in fact, rely on rules created by arbitral precedent in a variety of settings.²³ This Article builds on the work of these commentators by squaring this empirical reality with the theory underlying the positive externalities

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18. *E.g.*, Neuberger, *supra* note 7, para. 24; *see, e.g.*, Lee, *supra* note 16, at 15–16 (“The ‘fewer published opinions’ prediction rests on the following chain of logic: compelling the arbitration of antitrust claims would slow the rate at which such claims would be resolved—wholly or partially—through standard litigation; that slowdown would in turn slow the rate at which antitrust opinions would be published and hence precedent produced . . .”).
 19. Knapp, *supra* note 4, at 785.
 20. *Id.* at 785, 789 (distinguishing between willing parties and parties to adhesion contracts).
 21. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 101–02 (1974).
 22. *See* Knapp, *supra* note 4, at 786.
 23. *See* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1100 (2012) [hereinafter Weidemaier, *Judging-Lite*] (presenting a “more nuanced picture” of precedent in arbitration); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1905 (2010) [hereinafter Weidemaier, *Precedent in Arbitration*] (“[P]arties often do pay arbitrators to produce reasoned awards, and these awards are often made available to the public.” (footnote omitted)). *See generally* CHRISTOPHER R. DRAHOZAL, *Empirical Findings on International Arbitration: An Overview*, in THE OXFORD HANDBOOK ON INTERNATIONAL ARBITRATION § 27.7 (Thomas Schultz & Federico Ortino eds., 2020) (survey of literature on citation of arbitral awards by international arbitrators).

hypothesis.²⁴ The positive externalities hypothesis incorrectly focuses on the incentives of arbitrators, rather than the incentives of the parties to the dispute, and overlooks the role of arbitral institutions in the arbitration process.²⁵ On this expanded view, there is good reason to believe that arbitrators will often issue reasoned awards and that at least some portion of those awards will be made public.²⁶ Indeed, current practice in consumer, employment, and international arbitration belies claims to the contrary.²⁷

Part I of this Article addresses the need to define the relevant contracting market, explains why the widespread use of arbitration clauses is a necessary but not sufficient condition for a contracting market to be arbitration-only, and presents empirical evidence on the use of arbitration clauses in various contracting markets. Part II examines the effect of arbitration on rule production by courts in partial-arbitration markets. In particular, it provides a theoretical explanation for why arbitration might displace settlements rather than precedent-producing court cases. Part III considers rule production in arbitration-only markets and offers a critique of the positive externalities hypothesis. The Article concludes by identifying other questions, both positive and normative, to be considered in evaluating arbitration and rule production.

I. THE USE OF ARBITRATION IN RELEVANT CONTRACTING MARKETS

The starting point for examining the effect of arbitration on rule production is with its factual predicate: the extent to which arbitration has displaced litigation for resolving particular types of disputes. This Part critically examines three common assumptions about the relationship between the use of arbitration and the production of court precedent that are central to the displacement hypothesis.

First, commentators sometimes assert that arbitration will interfere with the production of consumer law, contract law, or even the common law as a whole. This Part argues that such a focus is too broad. Instead, the appropriate benchmark is the type or types of contracts likely to give rise to disputes that raise legal issues in a particular field and in a

24. See W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 853 n.37 (2008) (“For many defendants, an adverse court judgment not only will impose direct financial costs but also may create a precedent with reputational or future legal consequences. Under these conditions, some theories predict both relatively higher settlement rates and relatively higher defendant win-rates.”).

25. See *infra* notes 159–61, 168–71 and accompanying text.

26. See *infra* notes 162–67, 172–75 and accompanying text.

27. See *infra* notes 177–90 and accompanying text.

particular jurisdiction. Second, commentators often assume that widespread use of arbitration clauses in a relevant contracting market is sufficient to prevent disputes from being resolved in court. But while a necessary condition, widespread use of arbitration clauses is not a sufficient condition for a market to be “arbitration-only.” In addition, the arbitration clause must not carve out relevant disputes from arbitration, the parties must not opt out of the obligation to arbitrate, and the parties must invoke the arbitration clause in a sufficient number of cases. Third, some commentators have predicted that, following the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*,²⁸ all businesses are likely to switch to arbitration clauses in their standard form contracts with consumers and employees. This Part concludes by examining reasons why some businesses might not use arbitration clauses and presents empirical evidence testing the prediction that all will.

A. Defining the Relevant Contracting Market

Commentators have asserted at times that arbitration will freeze development of “consumer law,”²⁹ “contract law,”³⁰ or even the “common law” as a whole.³¹ Such assertions are unduly imprecise and likely claim too much. For arbitration to freeze the development of contract law generally, it would have to be used widely to resolve all types of contract disputes. For arbitration to freeze development of the common law, the types of disputes consistently resolved in arbitration would have to be even broader.³²

Instead, evaluating the effect of arbitration on the production of court precedent typically requires a more particularized analysis of individual fields of law, not assertions about the effect of arbitration on precedent generally. So viewed, the extent to which arbitration is likely to displace court precedent depends on the “relevant contracting market” for the field of law at issue. By “relevant contracting market,” I mean the type or types of contracts likely to give rise to disputes that raise legal issues in a particular field and in a particular jurisdiction.

The inquiry is conceptually similar to the definition of the relevant market in antitrust-law merger analysis, which requires defining both

28. 563 U.S. 333, 352 (2011).

29. *E.g.*, Gilles, *supra* note 3, at 377.

30. *E.g.*, Knapp, *supra* note 4, at 786.

31. *E.g.*, BAILII Lecture 2016, *supra* note 7, at para. 5.

32. See Peter B. Rutledge, *Who Can Be Against Fairness?: The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 275 (2008) (arguing that the criticism of arbitration as resulting in the “diminution of public law” “implicitly depends on another empirical assumption about the prevalence of arbitration clauses”).

the relevant product market and the relevant geographic market.³³ The analogue to defining the relevant product market is identifying the type or types of contracts likely to give rise to the particular legal issues of interest. The analogue to defining the relevant geographic market is identifying the jurisdiction in which the legal issues are likely to arise (e.g., either a particular country or countries, or state or states).

Defining the relevant contracting market first requires identifying the field of law at issue. For example, the Truth-in-Lending Act (TILA) protects consumer credit card users from liability for the unauthorized use of their credit card.³⁴ Disputes raising issues about these statutory provisions only arise out of the use of consumer credit cards.³⁵ Accordingly, in determining whether arbitration might displace court precedent concerning the TILA protections, the relevant contracting market is consumer credit-card agreements.³⁶ The use of arbitration clauses in other types of contracts is not relevant.

By comparison, if the legal field at issue is the unauthorized-use protections for consumers set out in the Electronic Fund Transfer Act (EFTA),³⁷ the relevant contracting market is the market for “electronic fund transfers.”³⁸ This contracting market includes payment mechanisms such as debit cards, automated clearing-house transactions, and prepaid accounts, but not credit cards.³⁹ Because the EFTA does not apply to credit cards,⁴⁰ the extent to which arbitration clauses are

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33. *E.g.*, U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 14, § 4, at 8; *see also* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, VERTICAL MERGER GUIDELINES § 3, at 3 (2020), www.justice.gov/atr/page/file/1290686/download [<https://perma.cc/3HMQ-FHV5>]. *See generally* David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293 (2020).
34. 15 U.S.C. § 1643(a), (d) (2019).
35. *Id.* § 1602(1), (n).
36. Richard Alderman seems to recognize this point, at least implicitly. Alderman, *supra* note 2, at 16 (“As things currently stand, it is extremely unlikely that any of the legal issues surrounding the use of credit cards and credit card agreements will again see the inside of a courtroom.”).
37. 15 U.S.C. § 1693g(a), (e) (2019).
38. *Id.* § 1693a(7).
39. *See* 12 C.F.R. §§ 1005.3(b), 1005.18(a) (2021); *Comment for 1005.3 Coverage*, CFPB (last visited Nov. 26, 2021), <https://www.consumerfinance.gov/rules-policy/regulations/1005/interp-3/> [<https://perma.cc/2T5A-VC58>].
40. *See* Sanford v. MemberWorks, Inc., 625 F.3d 550, 560 (9th Cir. 2010) (“[EFTA] does not apply to credit-based transactions.”); Farrish v. Navy Fed. Credit Union, No. DKC 16–1429, 2017 WL 4418416, *4 (D. Md. Oct. 5, 2017) (“Importantly, because [the] EFTA deals with electronic funds transferred directly from bank accounts, it applies to debit cards, but not credit cards.” (alteration in original) (quoting White v. Chase Bank USA, N.A., No. 5:16–cv–00176–BR, 2017 WL 1131898, *5 (E.D.N.C. Mar. 24, 2017))), *aff’d*, 711 F. App’x 189 (4th Cir. 2018).

used in credit-card agreements is irrelevant. The relevant contracting market is contracts governing electronic fund transfers within the meaning of the statute.

As to some legal issues, however, the field of law at issue could in fact be contract law generally. If so, the relevant contracting market would comprise all types of contracts and contract provisions—possibly including arbitration clauses themselves. For example, a significant number of unconscionability cases in recent years involved challenges to provisions in arbitration clauses, at least some of which (like damages waivers and class waivers) have non-arbitration counterparts.⁴¹ In those cases, the use of arbitration clauses might have contributed (to some extent at least) to the production of court precedent rather than displacing it.⁴²

Of course, the separability doctrine generally limits courts to deciding challenges to the enforceability of the arbitration agreement itself (unless the parties agree otherwise), rather than challenges directed at the enforceability of the main contract.⁴³ So some contract law issues in cases subject to arbitration typically will not be resolved

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41. Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 776 (2014) (study of 20 state courts between 1980 and 2012 finding that 237 of 460 (51.52%) cases with unconscionability challenges involved arbitration clauses); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009) (study of reported case law on unconscionability from 1990 through 2008 finding: “The number of unconscionability cases involving issues other than arbitration remained fairly constant over the period we reviewed The annual number of arbitration clause cases, however, expanded rather dramatically—from 1 or 2 at most through 1996, up to an average of 38 from the years 2003 through 2007, and to 115 in 2008.”).
 42. In *Concepcion*, the Supreme Court held that the FAA preempted California’s application of unconscionability doctrine to invalidate a class waiver in an arbitration clause. *See* AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 344 (2011). But courts generally have not applied *Concepcion* to preclude unconscionability challenges to other provisions in arbitration clauses. *See* RESTATEMENT OF THE U.S. L. OF INT’L COM. & INV.-STATE ARB. § 1.6 reporter’s note (b)(ii) to cmt. b, at 115–16 (AM. L. INST., Proposed Final Draft 2019).
 43. *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 404 (1967) (“[I]n passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.”); *see* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”); *see also* RESTATEMENT OF THE U.S. L. OF INT’L COM. & INV.-STATE ARB. § 2.7 cmts. a–b, at 189–91 (AM. L. INST., Proposed Final Draft 2019).

in court.⁴⁴ Moreover, the Supreme Court's decision in *Rent-A-Center West v. Jackson* permits parties to delegate many challenges to the enforceability of arbitration clauses, including unconscionability, to the arbitrators to decide.⁴⁵ Accordingly, since *Rent-A-Center*, courts are less likely than they used to be to address unconscionability and other challenges to the enforceability of arbitration agreements.⁴⁶

But even under the separability doctrine, issues of contract formation—whether directed at the main contract or at the arbitration clause—remain for courts to decide.⁴⁷ And that is so even when the parties' arbitration agreement includes a delegation clause.⁴⁸ Accordingly, courts have issued numerous opinions on contract-formation issues in cases involving challenges to the enforceability of arbitration agreements.⁴⁹

For example, roughly 40% of a sample of cases analyzing the formation of clickwrap contracts, collected by the Reporters for the *Restatement of Consumer Contracts* as the basis of an empirical study for the Restatement, involved challenges to the enforceability of arbitration clauses.⁵⁰ A significant percentage of the browsewrap and

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44. Unless, of course, the parties waive the right to arbitrate. *See infra* text accompanying notes 85–88.
45. *See* *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010); RESTATEMENT OF THE U.S. L. OF INT'L COM. & INV.-STATE ARB. § 2.8 reporters' note (b)(ii) to cmt. b, at 206 (AM. L. INST., Proposed Final Draft 2019).
46. Nehf, *supra* note 16, at 1707.
47. *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 295–97 (2010) (stating that it is “well settled” that courts generally decide disputes about the formation of arbitration agreements); *see* RESTATEMENT OF THE U.S. L. OF INT'L COM. & INV.-STATE ARB. § 2.13(a), at 242 (AM. L. INST., Proposed Final Draft 2019).
48. *See, e.g., Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019) (“[P]arties may not delegate to the arbitrator the fundamental question of whether they formed the agreement to arbitrate in the first place.”); *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018) (“Arguments that an agreement to arbitrate was never formed . . . are to be heard by the court even where a delegation clause exists.”); *see also* RESTATEMENT OF THE U.S. L. OF INT'L COM. & INV.-STATE ARB. § 2.13(b), at 242 (AM. L. INST., Proposed Final Draft 2019).
49. Nehf, *supra* note 16, at 1711 (“Even if arbitration clauses are included in the overwhelming majority of consumer contracts, some common law will develop regarding the arbitration clause itself. Courts will still be called upon to decide whether the consumer agreed to the arbitration provision in the first place.”).
50. Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REGUL. 447, 460, 463 & n.69 (2019) (critiquing

shrinkwrap cases identified by the Reporters likewise involved arbitration clauses.⁵¹ More recent online consumer contract-formation cases have been even more likely to arise out of challenges to the enforceability of arbitration clauses.⁵² In other words, cases involving contract-formation issues continue to give rise to court precedent even when the parties' contract includes an arbitration clause.⁵³

Critics of the Reporters' empirical study have asserted that “[c]ases involving arbitration clause enforcement are substantively different from regular contract disputes because they are decided in the context of a federal statute and the resulting policy that strongly favors enforcement of arbitration clauses.”⁵⁴ As a legal matter, that statement is incorrect for cases involving contract-formation issues. The U.S. Supreme Court has made clear that the federal policy in support of arbitration and the corresponding “presumption of arbitrability” apply only *after* a court finds that an arbitration agreement has been formed.⁵⁵

a sample for including cases involving the enforceability of arbitration agreements) (noting that 38 of 98, or 39%, of cases addressing clickwrap contracts “involved attempts to enforce arbitration agreements”); *see also id.* at 458 n.44 (“69 of the 88 cases listed in the modification database[— a sample of cases involving modification of standard form terms, also collected by the Reporters—](78% of the cases) involved enforcement of agreements to arbitrate.”).

51. Based on data supplied by Florencia Marotta-Wurgler from the Restatement empirical study, 12 of 19 (or 63%) of the sample of browsewrap cases involved enforcement of arbitration clauses; of the sample of clickwrap cases, 42 of 69 (or 61%) involved enforcement of arbitration clauses. For further description of the Restatement data, see RESTATEMENT OF THE L.: CONSUMER CONTS. § 2 reporters' notes, at 46–50 (AM. L. INST., Tentative Draft 2019).
52. The Restatement sample was limited to cases decided before 2015. Levitin et al., *supra* note 50, at 464. From 2015 to the present, 15 of 17 (88%) consumer contract-formation cases, with published opinions from U.S. courts of appeals and state supreme courts, involved the enforceability of arbitration agreements. The cases were collected by reviewing cases that cited the cases in the Restatement sample, as well as Westlaw word searches. For a list of the cases, see the Appendix.
53. As such, these data appear inconsistent with the “surmise” of Professors Samuel Issacharoff and Florencia Marotta-Wurgler that “[e]lectronic contracts are . . . impoverished in terms of nuanced case law” at least in part due to “the rise of mandatory arbitration.” Issacharoff & Marotta-Wurgler, *supra* note 12, at 635, 607–08. If anything, the data seem to suggest the contrary.
54. Levitin et al., *supra* note 50, at 458.
55. *See Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 301–02 (2010) (stating, in a labor arbitration case, that courts discharge their duty to determine whether the parties intended to arbitrate grievances by “applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about

The “policy that strongly favors enforcement of arbitration clauses” does not apply when courts are deciding whether a contract that includes an arbitration clause (or a freestanding arbitration agreement) is formed.

To be clear, I am not arguing that court cases addressing the enforceability of arbitration clauses fully substitute for contract-law cases decided in arbitration. Many common-law contract doctrines can apply differently to different types of transactions or provisions, and the separability doctrine and delegation clauses limit the issues courts can decide when the parties have agreed to arbitrate.⁵⁶ Moreover, the fact that a case deals with the enforceability of an arbitration clause might as a practical matter influence how the court applies contract-law doctrine, either expanding or contracting application of the doctrine depending on the court’s view of arbitration.⁵⁷ Instead, my point is simply to illustrate further the importance of properly defining the relevant contracting market when evaluating the displacement hypothesis.

Finally, there also is a geographic component to defining the relevant contracting market. The use of arbitration clauses in at least some types of contracts can vary systematically across jurisdictions.⁵⁸ To the extent this is so, jurisdictions in which arbitration use is less common might still produce court precedent that can be used (albeit only persuasively) in a jurisdiction in which arbitration use is more common. Take, for example, Article 2 of the Uniform Commercial Code as applied to the sale of motor vehicles. If car dealers are less likely to

whether it covers the dispute at hand”); *see also* *Jaludi v. Citigroup*, 933 F.3d 246, 255 (3d Cir. 2019) (“In applying state law . . . [to decide whether an arbitration agreement was formed], we do *not* invoke the presumption of arbitrability.”); *Citigroup Glob. Mkts. Inc. v. Abbar*, 761 F.3d 268, 274 (2d Cir. 2014) (“Because the parties here are disputing the existence of an obligation to arbitrate, not the scope of an arbitration clause, the general presumption in favor of arbitration does not apply.”); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 743 (9th Cir.), *cert. denied*, 574 U.S. 991 (2014) (“Goldman thus contests the *existence*, rather than the *scope*, of an arbitration agreement, and, therefore, the presumption in favor of arbitrability does not apply in this case.”).

56. *See supra* text accompanying notes 43–46.
57. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 665–80 (1999) (study of Alabama Supreme Court cases finding that “[b]usiness-funded justices” ruled in favor of enforcing arbitration clauses and “plaintiffs’-lawyer-funded justices” ruled against enforcing arbitration clauses).
58. Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 560 (2012) (finding that credit card “[i]ssuers located in states in which courts had held class arbitration waivers unenforceable are less likely to use arbitration clauses, as compared to issuers in states that have upheld class arbitration waivers or that have no decisions on point”).

use arbitration clauses in, say, New York than in California, New York courts might still produce precedents interpreting Article 2 that could be used as persuasive precedents in California.

B. Classifying Contracting Markets

Once the relevant contracting market is defined, the next step in the analysis is to determine the proportion of disputes in that contracting market that are resolved in court and the proportion that are resolved in arbitration. Relevant contracting markets can be categorized by their use of arbitration (not their use of arbitration *clauses*) as litigation-only, partial-arbitration, and arbitration-only markets. Litigation-only markets are those in which most or all disputes are resolved in court and not by arbitration. Partial-arbitration markets are those in which some disputes are resolved in arbitration and others are resolved in court. Arbitration-only markets are those in which most or all disputes are resolved in arbitration. In reality, of course, the use of arbitration is on a spectrum rather than falling into neat categories. But using a categorical approach here helps to simplify the analysis.

Widespread use of arbitration clauses (or other forms of predispute agreements to arbitrate) is a necessary but not a sufficient condition for a market to be characterized as arbitration-only.⁵⁹ It is necessary because the vast majority of arbitration proceedings arise out of predispute arbitration agreements.⁶⁰ Before a dispute arises, parties can trade off the means of dispute resolution against other aspects of their contract (such as price). Or there might be sufficient uncertainty about what sorts of future disputes will arise that both parties, *ex ante*, might see arbitration as beneficial. After a dispute arises, however, tradeoffs in contract terms are no longer possible and the type of dispute that will arise has become certain.⁶¹ Without widespread use of arbitration clauses, it is unlikely that all or almost all disputes in a market will be resolved in arbitration.

As a matter of federal law, contracts in some markets will not include arbitration clauses—most notably motor-vehicle-franchise

59. Conversely, limited use of arbitration clauses is a necessary but not sufficient condition for a market to be characterized as litigation-only, depending on the extent to which parties enter into post-dispute arbitration agreements in the market.

60. Rutledge, *supra* note 32, at 280 (“At the empirical level, a variety of empirical measures suggest that postdispute arbitration will not work.”); Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 *LOY. L.A. L. REV.* 187, 209 n.128 (2006) (citing studies).

61. Christopher R. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 *U. ILL. L. REV.* 695, 746.

contracts (contracts between motor-vehicle dealers and manufacturers)⁶² and home-mortgage contracts.⁶³ In addition, many corporate transactional contracts, at least contracts required to be filed with the SEC (i.e., that are not in the ordinary course of business for the filing company⁶⁴) do not use arbitration clauses.⁶⁵ At the other extreme, customer and employment contracts in the securities industry all require arbitration (although they except class actions).⁶⁶ Almost all storefront payday lenders and almost all storefront payday loan contracts use arbitration clauses (at least in the states studied by the CFPB),⁶⁷ as do, apparently, all or almost all mobile-wireless-services

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62. 15 U.S.C. § 1226(a)(2) (2019).
63. *Id.* § 1639c(e)(1).
64. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 457–59 (2010).
65. Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. 6, 11 (2019) (finding 19% of sample of domestic and international contracts filed with SEC from 2000–2016 included arbitration clauses); Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1151 (2019) (same); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 350–52 (2007) (finding that arbitration clauses “appear at about twice the domestic rate when the contract includes a non-U.S. party . . . [H]owever, the international contracts, like the domestic contracts, contain a low absolute rate of arbitration clauses: only about 20% of international contracts contain them.”).
66. CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES, FINRA, r. 12200 & 12204(a), <https://www.finra.org/arbitration-mediation/printable-code-arbitration-procedure-12000> [<https://perma.cc/7J4U-85K4>] (last visited Oct. 19, 2021); CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES, FINRA, r. 13200 & 13204(a), <https://www.finra.org/arbitration-mediation/printable-code-arbitration-procedure-13000> [<https://perma.cc/2E8R-R8PE>] (last visited Oct. 19, 2021); see Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REGUL. L.J. 181, 182 (2008) (“[S]ince 1987, when the Supreme Court validated the mandatory arbitration of disputes between investors and their securities brokers, the law in this area has virtually disappeared.” (footnote omitted)). The regulated nature of the securities industry might help explain the widespread use of arbitration (and the exception for class actions).
67. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) § 2.3.4, at 22 (2015) [hereinafter CFPB ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/TB5J-NVA5>] (“Extrapolating to California, Florida, and Texas, 83.7% of the lenders use an arbitration clause. Lenders with more locations were somewhat more likely to use

contracts.⁶⁸ In between are employment contracts (both with rank-and-file employees and corporate executives),⁶⁹ franchise agreements,⁷⁰ and corporate licensing agreements.⁷¹

Credit-card agreements are an intermediate case as well but in a different way. Back in 2009, over 95% of credit-card debt outstanding was subject to arbitration clauses.⁷² With the partial settlement of an antitrust suit against leading credit-card issuers, that percentage

arbitration clauses: 98.5% of licensed storefronts in our sample were subject to contracts with arbitration clauses . . .”).

68. *Id.* § 2.3.6, at 26 (“Of the eight wireless services providers in the sample, seven (87.5%) included arbitration clauses in their consumer contracts as of summer 2014. The one provider that did not use an arbitration clause was one of the smallest in the sample, so that over 99.9% of subscribers to these providers were parties to contracts that used arbitration clauses.”). I say “apparently” because the CFPB study was limited to what were then “the eight largest facilities-based providers of mobile wireless services in the United States,” *id.* at 25, and did not include other providers of mobile wireless services. *See* 2020 Communications Marketplace Report, 36 FCC Rcd. 2945, 2949 (2020). To my knowledge, no one has studied the dispute-resolution clauses used by these other mobile-wireless-service providers.
69. Sanga, *supra* note 65, at 1151 (finding that 42% of employment contracts filed with SEC included arbitration clauses); ALEXANDER J.S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> [<https://perma.cc/FFH9-JUNJ>] (“More than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.”); *see also* Elizabeth C. Tippet & Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459, 492 (2018) (“Even in 2016, one third of companies did not include any form of arbitration clause . . .”).
70. *See infra* text accompanying notes 102–11.
71. Eisenberg & Miller, *supra* note 65, at 350 (“33% of licensing agreements [filed with the SEC] provided for arbitration.”). Another possible intermediate case is bank-deposit-account agreements. The CFPB found in its *Arbitration Study* that 44.4% of insured deposits, and only 7.7% of banks, used arbitration clauses in their deposit account agreements. CFPB ARBITRATION STUDY, *supra* note 67, §2.3.2, at 15 fig.2. Updated data on the use of arbitration clauses in bank-deposit-account agreements are not available, however.
72. Drahozal & Rutledge, *supra* note 58, at 558 (“Measured by the dollar value of credit card loans outstanding (which is highly correlated with the number of credit card accounts), over 95.1 percent of credit card agreements included arbitration clauses [as of December 31, 2009].”).

dropped to just over 50% as of the end of 2013.⁷³ It has now moved back up, with, for example, Chase announcing in 2019 that it was resuming the use of arbitration clauses in its credit-card agreements.⁷⁴ As a result, somewhere between 63% and 75% of credit-card debt outstanding currently is subject to an arbitration clause.⁷⁵ Throughout this entire period, however, the substantial majority of credit-card issuers did not—and still do not—use arbitration clauses.⁷⁶ As of December 31, 2019, only 16.5% of credit-card issuers used arbitration clauses in their standard form credit-card agreements.⁷⁷

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73. CFPB ARBITRATION STUDY, *supra* note 67, §2.3.1, at 10–11 & fig.1 (reporting “53.0% of credit card loans outstanding were subject to arbitration clauses”).
74. Emily Flitter, *JPMorgan Chase Seeks to Prohibit Card Customers from Suing*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/business/jpmorgan-chase-credit-card-arbitration.html> [<https://perma.cc/HHU7-CFNP>].
75. Partial data on credit card issuer market share is available from the Nilson Report. *See* Bianca Peter, *Market Share by Credit Card Issuer* (June 9, 2021), WALLETHUB <https://wallethub.com/edu/cc/market-share-by-credit-card-issuer/25530> [<https://perma.cc/973F-7MEQ>] (providing data from the Nilson Report). The CFPB provides a database of credit card agreements. *See Credit Card Agreement Database*, CFPB [hereinafter *CFPB Credit Card Agreement Database*], <https://www.consumerfinance.gov/credit-cards/agreements/> [<https://perma.cc/4CZU-Z99H>] (last visited Oct. 19, 2021). In June 2021, I used a combination of automated and manual review to determine if the issuer’s agreement included an arbitration clause. Of the top fifteen issuers according to the Nilson Report, eleven (with a combined 63.89% market share) used arbitration clauses; four (with a combined 24.55% market share), did not. Accordingly, the share of the market subject to arbitration clauses ranges from a minimum of 63.89% to a maximum of 75.45%.
76. *See* CFPB ARBITRATION STUDY, *supra* note 67, § 2.3.1, at 10 fig.1 (only 15.8% of credit card issuers used arbitration clauses); Drahozal & Rutledge, *supra* note 58, at 558 (“[O]nly 17.1 percent (51 of 298) of the issuers in our sample used arbitration clauses in their cardholder agreements.”).
77. *CFPB Credit Card Agreement Database*, *supra* note 75. Again, I used a combination of automated and manual review to determine whether the issuer’s agreement included an arbitration clause. Several issuers did not provide their entire arbitration agreement to the CFPB (instead reporting a summary of terms); I excluded these issuers from the sample. In the few cases (seven) in which issuers provided multiple agreements to the CFPB, some of which included arbitration clauses and some of which did not, I coded the issuer as using an arbitration clause when the majority of clauses provided for arbitration. The number of such issuers is small enough that it does not materially affect the results. I did not consolidate issuers in the CFPB database with common ownership, so that these data are not perfectly comparable to prior studies. But any effect of consolidation is likely to be small and to decrease reported arbitration clause usage (because larger issuers are more likely to use arbitration clauses than smaller issuers).

But widespread use of arbitration clauses is not a sufficient condition for a market to be characterized as arbitration-only, for at least three reasons. First, many arbitration clauses carve out specified claims or disputes from arbitration.⁷⁸ Such “carve-outs” appear in a wide variety of contracts.⁷⁹ The most common types of claims carved out of arbitration clauses are claims for injunctive relief, provisional measures, and intellectual-property protections.⁸⁰ To the extent a relevant type of dispute is commonly carved out of arbitration clauses, the contracting market is not arbitration-only, at least as to claims likely to fall within the carve-out.

Second, consumers and employees⁸¹ might take advantage of the opportunity provided by some arbitration clauses to opt out of the obligation to arbitrate. While not ubiquitous, opt-outs in arbitration clauses are not uncommon either.⁸² The available evidence suggests that this opt-out option is rarely used.⁸³ In certain contracting markets, however, a sufficient number of individuals have opted out of arbitration to justify a court in certifying a class consisting of persons who opted out.⁸⁴ In markets like those, the ability to opt out might keep the market from being arbitration-only.

78. Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1950 (2014); Erin O’Hara O’Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177, 2180 (2014).

79. Drahozal & O’Hara O’Connor, *supra* note 78, at 1966.

80. *Id.* at 1967, 1969.

81. I use the term “employees” here broadly to include workers formally classified as independent contractors, such as Uber drivers. *See* *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (interpreting FAA “§ 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work”).

82. *See* CFPB ARBITRATION STUDY, *supra* note 67, § 2.5.1, at 31 (reporting from 14.3% of wireless arbitration clauses to 50.7% of storefront payday loan arbitration clauses included opt-outs); Tippet & Schaaff, *supra* note 69, at 498 (“Gig companies have also been using ‘opt out’ provisions with greater frequency, through which employees can decline to consent to arbitration if they notify the company within a specified period.”).

83. *See* Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 219 (2017) (“[T]he costs to gig economy enterprises of offering an opportunity to opt out of [individual arbitration clauses] seem to be small, as anecdotal evidence suggests that few workers actually opt out.”).

84. *See, e.g., James v. Uber Techs. Inc.*, 338 F.R.D. 123, 130, 145 (N.D. Cal. 2021) (granting in part “motion to certify a class of [4,828] Uber drivers who drove for Uber in the State of California between February 28, 2019 and December 16, 2020, and who opted out of Uber’s arbitration agreement”); *Congdon v. Uber Techs., Inc.*, 291 F. Supp. 3d 1012, 1024–

Third, parties do not necessarily arbitrate all disputes subject to an arbitration clause. A party can waive its right to arbitrate post-dispute by not invoking the arbitration clause in a lawsuit.⁸⁵ If both parties waive their right to arbitrate, the dispute will be resolved in court even though the parties' contract includes an arbitration clause.

Data from the *CFPB Arbitration Study* illustrate the point. The CFPB found that while consumer financial-services companies invoked the arbitration clause in 65% (26 of 40) of class actions filed against them, they invoked the arbitration clause in only 5.7% (8 of 140) of individual actions.⁸⁶ The CFPB was not able to determine the reason for the low invocation rate in individual cases (or for the less than 100% invocation rate in class actions). And more research is necessary to determine if the CFPB's finding extends to businesses other than financial-services companies, as well as to understand why businesses do not always invoke arbitration clauses.⁸⁷ But the CFPB's finding provides yet another reason why widespread use of arbitration clauses does not necessarily make a market arbitration-only.⁸⁸

C. Changes in the Use of Arbitration Clauses Since Concepcion

As explained above, widespread use of arbitration clauses is a necessary but not sufficient condition for a contracting market to be arbitration-only. This Subpart considers how likely it is that substantially all contracts in a relevant contracting market—particularly one involving standard form adhesion contracts—will include arbitration clauses. After the U.S. Supreme Court's 2011

25 (N.D. Cal. 2018) (finding that Uber breached contract with its drivers and certifying damages class of persons who “opted-out of arbitration under the last Uber driver contract the person executed”).

85. *E.g.*, RESTATEMENT OF THE L. OF INT'L COM. & INV.-STATE ARB. § 2.20(a), at 336 (AM. L. INST., Proposed Final Draft 2019).

86. CFPB ARBITRATION STUDY, *supra* note 67, § 6, at 61.

87. One possible reason is suggested in Part II: that businesses can selectively invoke arbitration clauses to litigate cases they perceive as likely to make favorable law while avoiding cases they perceive as likely to make unfavorable law. *See infra* text accompanying notes 136–51.

88. Professor Gilles neglects this possibility when she asserts that the use of arbitration clauses to avoid class actions necessarily also prevents courts from resolving “individual claims based on the same contracts that companies will alter in their efforts to avoid class exposure.” Gilles, *supra* note 3, at 413. She argues: “Like dolphins that get swept up in tuna nets, entire categories of non-class claims are certain to find themselves in arbitration as companies seek to exploit the benefits handed them in *Concepcion* and *Italian Colors*.” *Id.* at 413–14. Her argument assumes that businesses using arbitration clauses to avoid class actions will always invoke arbitration clauses in individual cases as well. As the CFPB study illustrates, such an assumption can be unwarranted.

decision in *AT&T Mobility LLC v. Concepcion*,⁸⁹ some commentators predicted that every business would soon use arbitration clauses in their standard form contracts with consumers and employees.⁹⁰ Because arbitration reduces business exposure to class actions, these commentators reasoned, every business would want to switch to arbitration.⁹¹ Indeed, they argued, lawyers who do not recommend that their clients use arbitration clauses might even be committing legal malpractice.⁹²

Certainly, the use of arbitration clauses in consumer and employment contracts has increased since *Concepcion*. A number of high-profile businesses—including companies such as Sony, Microsoft, Netflix, eBay, and PayPal—adopted arbitration clauses for their consumer contracts after *Concepcion* was decided.⁹³ More recently, however, media outlets have reported businesses ending their use of arbitration clauses. Some companies, such as Microsoft, Facebook, and some high-profile banks and law firms, stopped requiring the use of arbitration to resolve sexual-harassment claims.⁹⁴ Others, such as Google, Adobe, and Intuit, stopped requiring arbitration for all

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89. In *Concepcion*, the Supreme Court held that the Federal Arbitration Act preempted California courts' use of unconscionability doctrine to invalidate a provision permitting only individual and not class arbitration. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”); see also *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236–37 (2013) (rejecting argument that arbitration clause with class waiver was invalid because it precluded “effective vindication” of the federal antitrust laws).
90. See *supra* text accompanying note 17.
91. See Fitzpatrick, *supra* note 17, at 174.
92. See Gilles, *supra* note 17, at 377 (“Why wouldn’t they? Once the [class] waivers gain broader acceptance and recognition, it will become malpractice for corporate counsel not to include such clauses in consumer and other class-action-prone contracts.”).
93. Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 1001 tbl.3 (2014).
94. E.g., Samantha Cooney, *Microsoft Won’t Make Women Settle Sexual Harassment Cases Privately Anymore. Here’s Why That Matters*, TIME (Dec. 19, 2017, 5:19 PM), <https://time.com/5071726/microsoft-sexual-harassment-forced-arbitration/> [<https://perma.cc/2FQL-XEKA>]; Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, ABA J. (June 1, 2018, 12:15 AM), https://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses [<https://perma.cc/F7UV-R97H>] (Munger Tolles, Orrick, and Skadden).

employment disputes.⁹⁵ Amazon, facing over 75,000 individual arbitration claims by users of its Echo product, removed the arbitration clause from its terms of service for consumer products.⁹⁶

The empirical evidence on the change in arbitration-clause use likewise is mixed. (By comparison, the available evidence suggests that the use of arbitration clauses in corporate transactional contracts has remained steady over time.⁹⁷) In its *Arbitration Study*, the CFPB found an increased use of arbitration clauses in credit-card contracts and checking-account contracts through 2013, but not to the degree predicted by these commentators.⁹⁸ The data presented above show that a similar pattern continues for credit-card agreements.⁹⁹ Elizabeth C. Tippet & Bridget Schaaff reached similar conclusions about “gig economy” workers,¹⁰⁰ while a study of firms with “substantial market share and widespread name-recognition” from “six industries that consumers interact with on an almost daily basis” found a substantial increase in the use of arbitration clauses, but one that varied depending on the industry.¹⁰¹

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95. Rakeen Mabud, *Google Put an End to Forced Arbitration—And Why That’s So Important*, FORBES (Feb. 26, 2019, 6:00 AM), <https://www.forbes.com/sites/rakeenmabud/2019/02/26/worker-organizing-results-in-big-change-at-google/?sh=71f6cdc54399> [https://perma.cc/2ZFW-2H2L].
96. Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000> [https://perma.cc/U8HV-YNY7].
97. See Nyarko, *supra* note 65, at 12–13 (“For arbitration, the rates between domestic and international contracts are very similar and remained stagnant over the period of examination [from 2000–2016].”); Sanga, *supra* note 65, at 1151 (“The arbitration rate for employment and non-employment contracts has been roughly constant for the last twenty years.”).
98. CFPB ARBITRATION STUDY, *supra* note 67, § 2.3.1, at 17 (“Overall, the limited data provide evidence of only a slight move toward arbitration in checking account contracts since the 2013 Preliminary Results, but a somewhat larger move between 2012 and 2013.”).
99. See *supra* text accompanying notes 72–77.
100. Tippet & Schaaff, *supra* note 69, at 492 (“About forty percent of companies do not appear to have modified their contracts in light of *Concepcion* or *Italian Colors*.”).
101. Ryan Miller, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After Concepcion and American Express*, 32 GEO. J. LEGAL ETHICS 793, 803–04 (2019) (studying 100 businesses classified as “Telecom, E-Commerce, Entertainment, Apps and Internet Services, Consumer Electronics, and Credit Cards”). The percentage of companies in the sample using arbitration clauses increased from 22.3% to 66.0% from 2008 to 2018, *id.* at 806, with the change by industry varying as follows:

Bo Rutledge and I studied a sample of franchise agreements and found that, while the use of arbitration clauses in those agreements increased following *Concepcion*, many franchisors did not switch to arbitration.¹⁰² Franchisors face the risk of class actions brought by their similarly situated franchisees, and lawyers recommend that franchisors use arbitration clauses if they wish to reduce that risk.¹⁰³ But while franchise agreements often have been grouped together with consumer and employment contracts as standard form contracts provided on a take-it-or-leave-it basis to “little guys,”¹⁰⁴ franchise agreements differ in potentially important ways.¹⁰⁵ Accordingly, as Professor Rutledge and I stated previously, “one must be cautious not to extrapolate too

[C]redit card companies remained stable in their use of these [arbitration] agreements, while online shopping sites, streaming and entertainment services, and apps and internet services all saw a much more marked increase. While there was some movement in consumer electronics, the increase in this category was relatively small compared to those of other industries.

Id. at 807 (footnote omitted).

102. Rutledge & Drahozal, *supra* note 93, at 991–97.
103. *E.g.*, Doug Knox, *Arbitration Pacts in Franchising: One Size Doesn't Fit All*, LAW360 (May 22, 2019, 11:10 AM), <https://www.law360.com/articles/1160386/arbitration-pacts-in-franchising-one-size-doesn-t-fit-all> [<https://perma.cc/AB6H-M3YV>] (“[T]he prospect of enforcing class actions waivers remains the one factor that persuades many franchisors to include arbitration provisions in their franchise agreements.”); Kevin A. Adams, *Does Arbitration Make Sense for Franchisors? A Litigator's Perspective*, ST. BAR CAL.: BUS. L. NEWS, no. 3, 2017, at 23, 26, <https://mulcahy.blob.core.windows.net/sitedocs/pdf/businesslawnewsissue32017doesarbitrationmakeenseforfrancer-7688.pdf> [<https://perma.cc/6DQD-Q7ZK>] (“Arguably, the most significant benefit to large franchisors coming from the FAA pre-emption cases is the almost certain enforceability of class action waivers built into the agreements to arbitrate.”); Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).
104. For example, early versions of the Arbitration Fairness Act made predispute arbitration agreements unenforceable in consumer, employment, and franchise agreements. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4(1) (2009) (amending 9 U.S.C. § 2). *See generally* George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 669 n.20 (2013) (“Often, franchise agreements are lumped together with employment agreements and consumer contracts as problematic areas of adhesive bargaining, because franchisees are often small businesses dealing with large corporations, and thus lack the bargaining strength to negotiate arbitration clauses in advance.”).
105. *See* Rutledge & Drahozal, *supra* note 93, at 998 (noting that “franchise agreements have higher stakes, longer terms, and are subject to more regulation than the typical consumer or employment contract”).

broadly from our findings here [on franchise agreements] to other standard form contracts.”¹⁰⁶

The rest of this Subpart provides updated data on changes in the use of arbitration clauses in franchise agreements since *Concepcion*. While the use of arbitration clauses has increased since the Supreme Court’s decision in *Concepcion*, it remains the case that a substantial number of franchisors continue not to include arbitration clauses in their standard form agreements.

The sample of franchise agreements studied here consists of the top seventy-five franchises listed in *Entrepreneur Magazine*’s Franchise 500 in 1999 for which franchise agreements were available at the Minnesota Department of Commerce.¹⁰⁷ The data have been updated periodically, and in recent years annually, from the Minnesota Department of Commerce web page,¹⁰⁸ supplemented by agreements from the web site of the Wisconsin Department of Financial Institutions.¹⁰⁹ Because of franchisors either going out of business or restricting the states in which they do business, the sample now consists of 63 franchises tracked from 1999 through 2020.¹¹⁰

106. *Id.*

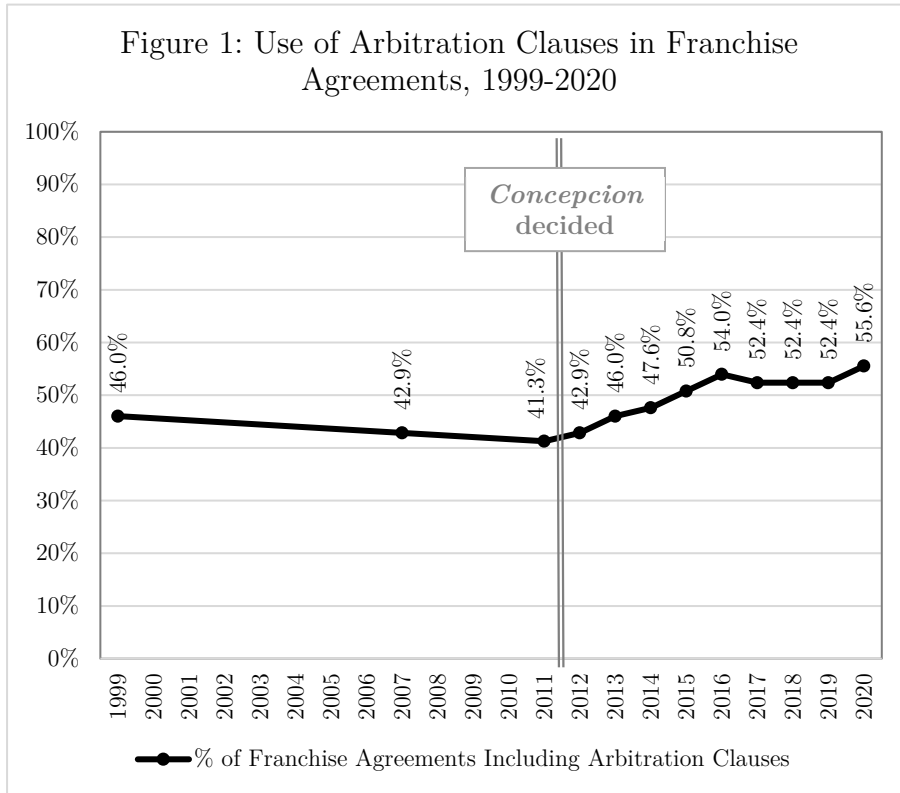
107. For further description of the sample, see *id.* at 987–90. For a comparison of the sample to a random sample of all franchise agreements filed with the Minnesota Department of Commerce, see *id.* at 991–94.

108. *Welcome to CARDS: Commerce Actions and Regulatory Documents Search*, MINN. DEPT. OF COMMERCE, <https://www.cards.commerce.state.mn.us/CARDS/> [<https://perma.cc/KQ8W-T7SY>] (last visited June 22, 2021).

109. *Franchise Search*, WIS. DEP’T OF FIN. INSTS., <https://www.wdfi.org/apps/FranchiseSearch/MainSearch.aspx> [<https://perma.cc/XS33-XALQ>] (last visited June 22, 2021).

110. Two franchise agreements are not available for 2014, two for 2015, and two for 2016. Two of those six franchise agreements were for the same franchisor (in 2014 and 2015), while the others were all for different franchisors. Of the five franchisors, one used an exclusive forum-selection clause for the entire period studied, both before and after the missing year, so I coded the clause for the missing year as an exclusive forum-selection clause. Another used an arbitration clause for the entire period, so I coded the missing year as an arbitration clause. A third used an exclusive forum-selection clause for the entire period both before and after the missing year, except for 1999. I coded the missing year as an exclusive forum-selection clause. The other two franchisors used an exclusive forum-selection clause before the missing year (or years) but an arbitration clause after the missing year. In other words, they both switched to arbitration, either during the missing year (or years) or immediately after. In both cases, I coded the franchisor as switching to arbitration at the earliest of the possible dates.

Figure 1 shows the percentage of franchise agreements in the sample that used arbitration clauses from 1999 through 2020. From 1999 through 2011, the percentage of franchise agreements using arbitration clauses was below 50% and declining slightly. After *Concepcion* was decided in 2011, the percentage increased every year to a high of 54% in 2016. But in 2017, the percentage of franchise agreements with arbitration clauses *declined* to 52.4%, where it remained in 2018 and 2019. Indeed, in that year, two franchisors switched from arbitration clauses to exclusive forum-selection clauses, while one franchisor switched to arbitration, for a net decline of one. In 2020,¹¹¹ two



franchisors switched from exclusive forum-selection clauses to arbitration clauses, so that the percentage of franchise agreements with arbitration clauses was at 55.6%. As of the end of 2020, almost ten years after *Concepcion* (and seven years after *Italian Colors*), almost

111. As of June 1, 2021, the 2020 Franchise Disclosure Documents for two of the franchisors in the sample were still not available from either the Minnesota or Wisconsin databases. The data as reported in Figure 1 assume that those two franchisors used the same dispute-resolution clause in 2020 that they did in 2019, which for both franchisors was an exclusive forum-selection clause.

half of the franchise agreements in the sample still did not include arbitration clauses.

The question then is: what explains these anecdotal and empirical results? Why do some businesses not use arbitration clauses? Why have some businesses moved away from arbitration? In my view, the reasons vary. In some cases, the reason for the move from arbitration was reputational: law firms and tech companies, for example, were suffering reputational losses with current and prospective employees (and others) by continuing to use arbitration to resolve sexual-harassment claims or employment disputes more generally.¹¹² In other cases, the reason is cost. Sometimes, the added process costs of arbitration (in addition to the possible need to defend the arbitration clause in court) might deter companies from choosing arbitration.¹¹³ Other times the arbitration fees incurred by companies such as Amazon facing mass individual arbitrations create huge settlement leverage in favor of plaintiffs, overriding any potential cost savings from eliminating class actions.¹¹⁴

112. *See, e.g.*, Leslie P. Norton, *Tesla's Sustainability Cred Is Being Challenged with Shareholder Proposals at Annual Meeting*, BARRON'S (Sept. 17, 2020, 7:15 AM), <https://www.barrons.com/articles/teslas-sustainability-reputation-will-be-challenged-with-shareholder-proposals-51600341300> [https://perma.cc/DQY4-TWLZ] (“Such changes [(including changes to Tesla’s employment arbitration policy)] are necessary to long-term success, say proponents of sustainable investing, because they make the company more attractive to potential employees, customers and the community.”).

113. *E.g.*, Adams, *supra* note 103, at 24 (“If the arbitration is substantially shorter than the court action, then there should be a proportionate reduction in attorneys’ fees. However, if the duration of each proceeding is substantially similar . . . commercial arbitration is not a viable cost-saving option to litigation in court.”).

114. As the CFPB noted in the Preliminary Results from its arbitration study, individuals with past due credit-card debts figured out that the asymmetric arbitration fees agreed to by businesses gave the debtors leverage in settlement negotiations. *See* CFPB, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE § 4.9.1, at 112–13 n.279 (2013), *reprinted in* CFPB ARBITRATION STUDY, *supra* note 67, app. A at 112–13 n.279. Plaintiffs’ law firms, in particular the firm of Keller Lenker LLC, have been using the same technique on a much larger scale. *E.g.*, Michael Corkery & Jessica Silver-Greenberg, ‘Scared to Death’ by Arbitration: Companies Drowning in Their Own System, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/business/arbitration-overload.html> [https://perma.cc/9CED-ZHRF]. In response, some arbitral institutions have changed their fee structures for multiple consumer and employment case filings to reduce the asymmetries. *E.g.*, AM. ARB. ASS’N, CONSUMER ARBITRATION RULES: COSTS OF ARBITRATION 1 (2020), https://adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf [https://perma.cc/V5VZ-B4PM]; AM. ARB. ASS’N, EMPLOYMENT/WORKPLACE FEE SCHEDULE: COSTS OF ARBITRATION 3, (2020), https://adr.org/sites/default/files/Employment_Fee_Schedule.pdf [https://perma.cc/D42B-WTE4]. The effect the fee changes will have on

Another explanation, likely at work in the credit-card and franchise settings, is that an arbitration clause is not solely a class-action waiver; it brings with it a bundle of other dispute-resolution procedures, such as reduced appellate review of decisions.¹¹⁵ Businesses that face a low risk of class actions might prefer to have their disputes resolved in court instead of arbitration, retaining the ability to appeal unfavorable decisions (or to use other court procedures that they prefer).¹¹⁶

Again, my point here is not that all contracting markets will remain partial-arbitration markets. It is certainly possible that the use of arbitration clauses will be widespread in some, if not many, contracting markets—possibly even including franchise agreements, although the evidence continues not to support that view. My point instead is that one should not simply assume that all contracting markets, even markets involving consumers and employees, necessarily will have widespread use of arbitration clauses.

II. RULE PRODUCTION IN A PARTIAL-ARBITRATION MARKET AND THE DISPLACEMENT HYPOTHESIS

As the preceding Part explains, some contracting markets currently are partial-arbitration markets—markets in which some disputes are resolved in arbitration and some are resolved in court. This Part examines how an increased but only partial use of arbitration is likely to affect the production of precedent in the court cases that remain—that is, to what extent an increase in arbitration will displace court precedent.¹¹⁷

The answer, central to evaluating the displacement hypothesis, is not straightforward. The amount of court precedent might decline as the number of disputes resolved in arbitration increases—that is, there might be a simple, negative relationship between the two. But that is

mass arbitrations, and the incentive of businesses to use arbitration clauses, remains to be seen.

115. See Rutledge & Drahozal, *supra* note 93, at 1012 (“An arbitration clause does more than waive class actions. It brings with it other characteristics of the arbitration bundle of dispute services, discouraging businesses from using arbitration even after *Concepcion* and *Ameex*.”).

116. See Knox, *supra* note 103 (“On the one hand, and at one extreme, the prospect of defending a franchise system-wide class action over multiple years in a court of law will not sit well with most franchisors. On the other hand, and at the other extreme, the risk of an adverse ruling by a runaway arbitrator with no right of judicial review persuades many franchisors to prefer litigation.”).

117. In a partial-arbitration market, rule production might also occur in arbitration. The next Part analyzes that possibility in an arbitration-only market. Interactions between rule production in court and in arbitration in a partial-arbitration market are possible but beyond the scope of this Article.

not necessarily so, and ultimately depends on how one models the production of precedent by courts. Indeed, under one plausible scenario, an increase in the use of arbitration might have no effect on the production of court precedent. This Part first describes several models of precedent production and their limitations. It then develops a strategic model of precedent production, extending Marc Galanter's *Why the "Haves" Come out Ahead*¹¹⁸ to the context of arbitration and rule production.

A. Models of Court Precedent Production

Models of the production of court precedent focus on either the demand side or the supply side (or both) of precedent production.¹¹⁹ Demand-side models look at how party demand for court precedent is likely to influence its production.¹²⁰ The early literature on the efficiency of the common law is an example. In its simplest form, that literature models the incentives parties have to challenge inefficient legal rules as tending to move the common law toward efficiency.¹²¹ By comparison, supply-side models focus on the characteristics of and constraints on suppliers of precedent (such as judges' incentives and procedural rules) and analyze how they are likely to influence the production of precedent.¹²²

In supporting the displacement hypothesis, some commentators seem to posit or assume a simple negative relationship between the use of arbitration and the production of precedent. According to Lord Neuberger, for example: "One of the disadvantages of an increase in [arbitration] awards *and a concomitant decrease in judgments*, particularly in the common law world, is that the law does not develop,

118. *See generally* Galanter, *supra* note 21.

119. *Cf.* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1554-65 (2003) (examining demand-side and supply-side models of efficiency in the common law).

120. *Id.* at 1552.

121. *E.g.*, Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 55 (1977) ("If only one party to a dispute is interested in future cases of this sort, there will be pressure for precedents to evolve in favor of that party which does have a stake in future cases, whether or not this is the efficient solution. This is because a party with a stake in future decision[s] will find it worthwhile to litigate as long as liability rests with him; conversely, a party with no stake in future decisions will not find litigation worthwhile.")

122. *Cf.* Zywicki, *supra* note 119, at 1565. *See generally* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

that it becomes ossified.”¹²³ On this view, as the use of arbitration increases the production of precedent decreases, perhaps linearly.

A model that would support such a prediction is one which assumes that (1) precedent is produced randomly in litigated cases and (2) arbitration randomly displaces cases being litigated. If precedent is produced randomly in cases being litigated—such as if parties seek to resolve disputes in court without regard to any precedent created by the court’s decisions—then reducing the number of litigated cases might reduce the amount of precedent produced linearly, at least on average. And if arbitration displaces cases being litigated at random, then an increase in the amount of arbitration would reduce the number of litigated cases, again linearly on average.

Assume, for example, that 10% of all litigated cases (at random) result in precedential opinions and that each case arbitrated replaces a case that otherwise would be litigated. Under those assumptions, increasing the number of arbitrations in a particular market by, say, 500, would reduce the number of court cases by 500. If 10% of those court cases would have resulted in a precedential opinion, the increase in arbitration would result in a decrease in the production of precedent (under this simple model) on average by 50 precedential opinions.

But there is strong reason to believe that the production of precedent from litigated cases is not random. Marc Galanter has written that one of the reasons the “haves” come out ahead is that repeat players can “play for rules in litigation itself.”¹²⁴ The literature on the efficiency of the common law assumes that parties expend more resources on some cases than others, rather than litigating cases at random.¹²⁵ Likewise, models of the decision to settle rather than litigate disputes assume that parties behave strategically in deciding whether to settle, rather than that parties choose the cases to settle at random.¹²⁶

If court precedent does not develop randomly, then the relationship between arbitration and precedent production becomes less clear and the displacement hypothesis less certain. Perhaps the fewer firms continuing to litigate can maintain the pre-arbitration level of precedent production.¹²⁷ Previously, those firms might have been free

123. Neuberger, *supra* note 7, at para. 24 (emphasis added).

124. Galanter, *supra* note 21, at 100.

125. *See supra* text accompanying note 121.

126. *E.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 12–17 (1984).

127. *See* Allan Erbsen, *Common Law in the Age of Arbitration*, JOTWELL (Sept. 23, 2016), <https://courtslaw.jotwell.com/common-law-in-the-age-of-arbitration/> [<https://perma.cc/ZR3B-7ZLF>] (reviewing Gilles, *supra* note 3) (“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.”).

riding on the efforts of other firms to create court precedent.¹²⁸ When the other firms switch to arbitration, the remaining firms can no longer free ride. Instead, the remaining firms might take the place of the arbitrating firms in seeking to create precedent. If so, then the remaining firms might create important precedent for an industry, as a single payday lender seems to have done in Florida in the 1990s.¹²⁹ Or maybe, as Scott Baker has suggested, high-risk employers (i.e., ones more likely to discriminate against employees) tend to opt for arbitration, while low-risk employers remain in court.¹³⁰ If so, court precedent would be “based on cases against low-risk employers, not high-risk employers,” and “the law might evolve in favor of employers.”¹³¹

The next Subpart develops in more detail a model of strategic precedent production, building on Galanter’s insights about the “haves” versus the “have nots.”

B. Strategic Precedent Production and Arbitration

Among the reasons why the “haves” come out ahead, as described by Marc Galanter in his classic article, is that repeat players can “play for rules in litigation itself.”¹³² According to Galanter, repeat players have an incentive to invest in litigating cases likely to result in favorable precedent and to “‘settle’ cases where they expect[] unfavorable rule outcomes.”¹³³ By comparison, non-repeat players (“one-shotters” in Galanter’s parlance) “should be willing to trade off the possibility of making ‘good law’ for tangible gain.”¹³⁴ As a result, “we would expect the body of ‘precedent’ cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to [repeat players].”¹³⁵ This view of the strategic use of the litigation

128. Cf. Rubin, *supra* note 121, at 60 (“[A] party of type A may decide not to litigate a case, even if such litigation would be efficient, in the hope that some other A may do the litigating and save the original A court costs. . . . [W]e might expect some free rider problems. Our model would predict, for example, that large companies would be involved relatively more in litigation than would small companies.”).

129. Christopher R. Drahozal, *Buckeye Check Cashing and the Separability Doctrine*, 1 YB. ON ARB. & MEDIATION 55, 67–68 (2009). *But see* Alderman, *supra* note 2, at 13 (“With only the occasional opportunity for creating law, the process of reformulating that law as times change would be gone.”).

130. *See generally* Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004).

131. *Id.* at 887.

132. Galanter, *supra* note 21, at 100.

133. *Id.* at 101.

134. *Id.* at 102.

135. *Id.*

process—including the strategic bringing and settling of claims—to influence the production of court precedent is widely held.¹³⁶

On the view that businesses as repeat players seek to obtain favorable precedent in court, why would they use an arbitration clause in their contract and give up the possibility of that favorable precedent? One possibility is that repeat players might use arbitration clauses in lieu of settlement to influence production of precedent in court.¹³⁷

A simple model illustrates the point. The model assumes two parties, a repeat player and a non-repeat player. The case is one in which the repeat player anticipates some probability that a court decision will be precedential, i.e., will make law. The non-repeat player has no interest in any law created by the case because it does not expect

136. *E.g.*, Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1483 (2020) (“Galanter’s distinction captures an important dynamic in Supreme Court criminal litigation. The two sides are playing fundamentally different games. The government plays for the rules, whereas each criminal defendant (and that defendant’s lawyer) must play to win the case.”); Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 527 (2020) (“Student loan creditors are able to identify which discharge cases they will win and aggressively litigate those disputes to obtain favorable precedent. At the same time, these creditors offer generous settlements to debtors who are likely to prevail on the merits. Given debtors’ one-shotter status and their corresponding risk aversion, they are eager to accept settlements. Ultimately, this dual-pronged approach allows creditors to develop significant favorable precedent while eliminating the potential for any unfavorable precedent.” (footnote omitted)); Yeon-Koo Che & Jong Goo Yi, *The Role of Precedents in Repeated Litigation*, 9 J.L., ECON., & ORG. 399, 417 (1993) (“[W]e have shown first that the defendant is more willing to settle when an unfavorable precedent is more likely to be set, resulting in a higher settlement rate. Second, the parties will engage in preemptive campaigns to turn the precedent in their favor, which could be socially wasteful.”); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 534 (1991) (“[R]epet players can expect principles and positions established in particular cases (such as a no-settlement policy or a judicial determination about the requirements of scienter) to have effects on future cases in which they will be involved. One-shot players who expect to be involved in only one litigation will not realize such benefits. For them, there is no long run; there is only now.”).

137. There are, of course, other possible explanations as well. First, the precedent might have no value in arbitration if arbitrators do not consider the law in making their decisions. The available empirical evidence does not, however, support such a strong conclusion about arbitral decisionmaking. *See* Drahozal, *supra* note 61, at 203. Second, and conversely, arbitrators might treat other arbitral awards as creating law and the business might believe that the law created by arbitrators will be more favorable than the law created in courts. Third, if an arbitration clause works as a complete waiver of a claim, then the business might receive little benefit from any favorable law. But even if no private disputes are litigated or arbitrated, businesses might still value favorable law in, say, dealing with public enforcement authorities.

to have any future cases. The repeat player, by comparison, has an interest in the law that might be created by the case, which will either be favorable to the repeat player in future cases (on average) or unfavorable to the repeat player in future cases (on average). I assume that the costs and benefits of the case are such that a repeat-player plaintiff will file suit when the action is expected to create no law or favorable law, but will not file suit if the case is expected to create unfavorable law. By comparison, a non-repeat player will file suit regardless of whether the case is likely to create law that is favorable or unfavorable to the repeat player and will prefer to litigate in court than to arbitrate. I also assume that dispute-resolution costs and deterrence benefits are the same in court as in arbitration,¹³⁸ and that court opinions create law while arbitral awards do not.¹³⁹ Finally, the parties are assumed to face zero transaction costs in entering into settlements.

In a contracting market without arbitration, the expected behavior of the repeat player is summarized in the third column of Table 1. If the repeat player is the plaintiff and expects the case to create favorable law, the repeat player will file suit and litigate the case. As plaintiff, it has control over whether to file suit, and will benefit from the favorable law it expects to be created. If the repeat player is the plaintiff and expects the case to create unfavorable law, it will not file suit. Because of the costs from the unfavorable law the case is expected to create, the net benefit from filing suit is negative. Note that under the simplifying assumptions of the model, this is a case that the repeat-player plaintiff would have filed but for the expected unfavorable law that would result.

Table 1. Repeat-Player Strategies in Court and Arbitration

<u>Repeat Player</u>	<u>Expected Outcome</u>	<u>No Arbitration</u>	<u>Arbitration</u>
RP Plaintiff	Favorable Law	File Suit	File Suit
RP Plaintiff	Unfavorable Law	Do Not File Suit	Arbitrate
RP Defendant	Favorable Law	Defend Action	Defend Action
RP Defendant	Unfavorable Law	Settle	Arbitrate

Next, assume that the repeat player is the defendant in a lawsuit brought by a non-repeat player. If the repeat-player defendant expects the case to create favorable law, it will defend the action and continue litigating the case. Note that the non-repeat player will file the action because the favorable law (for the repeat player) will have no effect on the non-repeat player, which will not have any future cases.¹⁴⁰ If the

138. See Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 223–28 (2000).

139. This assumption is considered in the next Part.

140. If the non-repeat player recognizes that the case is likely to create favorable law for the repeat player, it might behave strategically by threatening

repeat-player defendant expects the case to make unfavorable law, however, the repeat player will settle the case with the non-repeat player, paying a premium to settle if necessary to prevent the unfavorable law from being created. This latter case is the one described by Galanter in *Why the “Haves” Come out Ahead*.¹⁴¹

How does arbitration change this analysis? By agreeing to arbitrate pre-dispute, typically through an arbitration clause in the parties' contract, a party agrees not to bring any claims in court. Instead, it agrees that any claims must be resolved in arbitration. A party can waive the right to arbitrate, and if both parties do so the dispute will be resolved in court instead of arbitration.¹⁴² But when the parties have agreed pre-dispute to arbitrate, either party can invoke that right post-dispute and have the case sent to arbitration without further agreement from the other party.

Accordingly, in a contracting market in which a repeat player and a non-repeat player have agreed to arbitration pre-dispute, the expected behavior of the repeat player is summarized in the fourth column of Table 1. If the repeat player is the plaintiff and expects the case to create favorable law, the repeat player will file suit and litigate the case as it would have done without an arbitration clause. By doing so it waives its right to arbitrate. In theory, the non-repeat player could seek to stay the court case pending arbitration, or at least threaten to do so; such a threat would give the non-repeat player some degree of leverage given the value of the favorable law to the repeat player. It is not clear, however, how the non-repeat player would be able obtain value from the threat.

If the repeat player is the plaintiff and expects the case to create unfavorable law, it will not file suit. But it will file a claim in arbitration. Under the assumptions of the model this is a case that the repeat-player plaintiff would have filed but for the expected unfavorable law that would result from filing suit in court. Arbitration allows the repeat player to bring claims it otherwise would not bring (assuming, of course, that arbitral awards do not create law).

Next, assume that the repeat player is the defendant in a lawsuit brought by a non-repeat player. If the repeat-player defendant expects the case to create favorable law, it will waive the right to arbitrate, defend the action, and continue litigating the case. (The non-repeat player likely will waive its right to arbitrate by litigating the suit as plaintiff.) The result here is the same as without an arbitration clause.

to dismiss the case unless the repeat player gives it some incentive to continue. What that incentive would be, and whether this sort of collusive litigation would actually occur, is uncertain.

141. Galanter, *supra* note 21, at 100–02.

142. See *supra* text accompanying note 85.

When the repeat-player defendant expects the case to create unfavorable law, however, the repeat player no longer needs to pay a premium to the non-repeat player to settle the case to prevent the unfavorable law from being created. Instead, the repeat player can stay the litigation pending arbitration, in which, again, the arbitrators' award is assumed not to create any law. The ultimate result is the same with and without an arbitration clause: the repeat player will be able to avoid the creation of unfavorable law. But the mechanism by which the repeat-player accomplishes that end is different.

In sum, under the assumptions of this simple model, the use of arbitration clauses does not affect the production of court precedent. The repeat player still gets favorable law made and avoids the production of unfavorable law. Instead, arbitration potentially benefits the repeat player in two different ways. First, arbitration clauses enable the repeat player to bring claims it otherwise would not bring because of the risk of unfavorable law—but in arbitration rather than court (assuming, again, that arbitral awards do not create law). Second, arbitration clauses might enable a repeat player to avoid paying a settlement premium in cases expected to create unfavorable law, redistributing wealth from the non-repeat player to the repeat player.

Richard Alderman makes a point similar to this latter one but posits a different mechanism: that the repeat player will adjust its use of arbitration by changing the terms of the dispute-resolution clauses in its contracts. He argues:

Consumers have no choice but to agree to arbitrate, while businesses have the choice to leave out an arbitration provision whenever they wish to pursue litigation. Through the sophisticated use of mandatory arbitration provisions, the business sector may engage in a form of selective creation of the common law—selecting which disputes, if any, our courts will be allowed to deal with. In other words, consumer arbitration may stall the development of the common law, or even worse, it may control common law development to accommodate the needs of business.¹⁴³

Alderman has it partly right. But a business does not need to amend its standard form contracts to move cases into or out of arbitration. Instead, the business can keep an arbitration clause in its contracts but simply not invoke the clause when it wants to litigate instead. Indeed, the *CFPB Arbitration Study* provides evidence consistent with this possibility, as described in the previous Part.¹⁴⁴

Moreover, Alderman's argument overlooks that businesses do the same thing without using arbitration clauses—by selectively settling

143. Alderman, *supra* note 2, at 13–14.

144. See *supra* text accompanying note 86.

cases. Without arbitration clauses, according to Galanter, businesses would settle cases they perceive likely to make unfavorable law and litigate cases they perceive likely to make favorable law.¹⁴⁵ With arbitration clauses (under Alderman's view¹⁴⁶ and the model outlined here), businesses arbitrate cases they perceive likely to make unfavorable law and litigate cases they perceive likely to make favorable law. Indeed, the Coase Theorem suggests that in a world of low transaction costs, whether the contract includes an arbitration clause (giving a repeat-player defendant the right to keep the case out of court) or does not (giving a non-repeat-player plaintiff that right), the development of precedent will be essentially the same.¹⁴⁷

So what difference does the use of arbitration clauses make in this model? While the assignment of property rights (in a low-transaction-cost world) does not affect the distribution of resources, it does affect the distribution of wealth.¹⁴⁸ So while the production of court precedent would remain (roughly) the same, the distribution of wealth between the parties would not. Without arbitration clauses, to avoid the unfavorable legal precedent, the repeat player would need to pay the non-repeat player a premium to settle the dispute. But with an arbitration clause, the repeat player would no longer need to pay a settlement premium, it could simply invoke the arbitration clause (which the non-repeat player already has agreed to) to get the case out of court and avoid the unfavorable court precedent. Arbitration saves the repeat player from having to pay a settlement premium to the non-repeat player.¹⁴⁹

This model is a highly simplified one. Given that plaintiffs' lawyers can be repeat players, even if individual consumers or employees are

145. Galanter, *supra* note 21, at 101.

146. Alderman, *supra* note 2, at 10.

147. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960) (“[T]he ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.”).

148. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1095 (1972) (“In a society which entitles Taney to make noise and which forces Marshall to buy silence from Taney, Taney is wealthier and Marshall poorer than each would be in a society which had the converse set of entitlements.”).

149. Note that the point here is different from the point made by Deepak Gupta and Lina Kahn, who characterize arbitration as a wealth redistribution mechanism. Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 503 (2017) (“By both suppressing claims and yielding outcomes less favorable to workers and consumers, arbitration most likely transfers wealth upwards.”).

not,¹⁵⁰ disputes between repeat players and non-repeat players may be less common than sometimes supposed. Moreover, the model assumes low transaction costs in settling the disputes, which, given bilateral monopoly problems in settlement negotiations, might not be accurate.¹⁵¹ Finally, the role of class actions in resolving consumer and employment disputes (or the lack thereof when arbitration clauses are used) further complicates the relative incentives of repeat players and non-repeat players. The point, however, is more general: that one should not simply assume that increased use of arbitration clauses necessarily reduces the production of court precedent—i.e., that the displacement hypothesis is correct. More careful analysis is needed to predict what the effect might actually be in a partial-arbitration market.

III. RULE PRODUCTION IN AN ARBITRATION-ONLY MARKET AND THE POSITIVE EXTERNALITIES HYPOTHESIS

The previous Part examined the extent to which courts might continue to produce rules in a partial-arbitration market. This Part focuses instead on rule production in an arbitration-only market: a market in which all relevant disputes are resolved in arbitration. By definition, in an arbitration-only market, no disputes raising issues of law in the relevant contracting market end up in court, and no new court precedent on those issues is produced. This is the scenario that many commentators assume or assert will result from the use of arbitration clauses.¹⁵² This Part examines rule production in such a market by considering the extent to which arbitral awards might substitute for court precedent in producing legal rules.

Certainly, arbitral awards do not serve as binding precedent the way court opinions can.¹⁵³ But Mark Weidemaier and others have shown

150. *E.g.*, Drahozal, *supra* note 61, at 751 (“Plaintiffs’ attorneys may represent numerous employees, franchisees, or consumers against corporate defendants, effectively becoming repeat players.”); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001) (“[T]he emergence of an organized plaintiffs bar . . . should drive down considerably any claimed systematic advantage for employers.”).

151. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 567 (6th ed. 2003); *see also* Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 118 (2017) (“[I]n any negotiation that does occur after a dispute arises, each party has an incentive to drive a hard bargain because the parties are stuck with each other in the bilateral-monopoly sense that their dispute is with each other so they cannot ‘shop around’ to find someone else with whom they would rather negotiate an agreement about this dispute.”).

152. *See supra* text accompanying note 123.

153. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 437 (1999) (“Should

that arbitral awards can and do serve as persuasive precedent—at least when arbitrators issue reasoned awards that are publicly available.¹⁵⁴ This result is unexpected given the standard view that arbitrators lack the incentive to issue reasoned awards and make them public—i.e., the positive externalities hypothesis. This Part revisits the positive externalities hypothesis and argues that taking a broader view of the arbitration process helps reconcile that hypothesis with the empirical realities of arbitration today.

A. Rule Production as a Private Good

As described earlier,¹⁵⁵ William Landes and Richard Posner contend that arbitrators “may have little incentive to produce precedents.”¹⁵⁶ In essence, they argue that rule production results in positive externalities—benefits conferred on nonparties to the agreement—so that arbitrators have too little incentive to produce arbitral precedents.¹⁵⁷ This positive externalities hypothesis is widely

an arbitration result in a new interpretive rule, it applies only to the case at hand. Even if other arbitrators know about a prior arbitral decision, they have no obligation to follow it.”); Michael A. Scodro, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1951 (1996) (“[W]ritten arbitral awards carry no binding legal authority, and thus do not add to the stock of controlling legal precedent.”).

154. See *supra* text accompanying note 23.

155. See *supra* text accompanying notes 8–9.

156. Landes & Posner, *supra* note 8, at 238. As a possible exception, they suggest the following:

Yet, despite all this, private judges just might produce precedents. We said earlier that competitive private judges would strive for a reputation for competence and impartiality. One method of obtaining such a reputation is to give reasons for a decision that convince the disputants and the public that the judge is competent and impartial. Competition could lead private judges to issue formal or informal ‘opinions’ declaring their interpretation of the law, and these opinions—though intended simply as advertising—would function as precedents, as under a public judicial system. But this scenario is no more than plausible. If there were cheaper methods of advertising one’s impartiality as an adjudicator than by writing opinions, those methods would be chosen and precedents would not be produced.

Id. at 238–39 (footnote omitted).

157. Because “much of the social benefit of litigation, viewed as a rule-creating activity, is received by people who may never be involved in any litigation,” according to Landes and Posner, “[t]he existence of this external benefit may justify externalizing some of the costs of litigation by financing judges’ salaries out of general tax revenues and keeping litigant fees low.” *Id.* at 241. Of course, whether those fees currently are set at the level for the optimal production of precedent is a wholly separate

accepted.¹⁵⁸ But Landes and Posner’s theoretical account is incomplete. It both understates the incentives for private production of precedent and overlooks the role of arbitral institutions—third parties that promulgate arbitral rules and administer arbitration proceedings—in promoting and publicizing arbitral precedent.

The description by Landes and Posner of the positive externalities hypothesis elides two important sets of players in the arbitration process. The first is the parties to the arbitration agreement.¹⁵⁹ The parties are the ones with the dispute, and the parties are the ones who select the arbitrator (or at least the process for selecting the arbitrator). As such, a more precise statement of the incentives of arbitrators is that the arbitrators have an incentive to provide the services sought by the disputing parties. Or perhaps even more precisely, the arbitrators have the incentive to do what is likely to get them selected in future cases, which typically translates into doing what the parties to the present dispute want them to do.¹⁶⁰ So if the parties pay the arbitrators to resolve their dispute using certain procedures—such as by preparing a reasoned award—that is what the arbitrators have the incentive to do.

Of course, eliding the role of the parties in the arbitration process might only be a simplification that does not change the result. Rather than asking, as Landes and Posner do, “why should [the arbitrators] make any effort to explain the result in a way that would provide guidance for future parties?,”¹⁶¹ one could instead ask “why should *the parties pay the arbitrators* to make any effort to explain the result in a way that would provide guidance for future parties?” It might be that the answer to these two questions is the same. Parties, like the arbitrators themselves, might have no incentive to take (or to pay others to take) actions that benefit future parties. On this view, the positive externality is still present and arbitral precedent will still be underproduced.

question. See Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 911 (2013) (“Too large a subsidy can overproduce a public good, and that includes the public good of law and precedent.”).

158. See *supra* text accompanying notes 8–12.

159. Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT’L 1, 4 (2015) (describing the parties as “essential actors,” “without which international arbitration would not exist”).

160. See, e.g., Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983); Robert D. Cooter & Daniel L. Rubinfeld, *Trial Courts: An Economic Perspective*, 24 L. & SOC’Y REV. 533, 545 (1990).

161. Landes & Posner, *supra* note 8, at 238.

But even if parties do not have an incentive to pay arbitrators to produce awards that benefit future parties, they do have an incentive to pay arbitrators to produce awards that benefit the disputing parties themselves.¹⁶² And reasoned awards might benefit the parties themselves. If the private benefits from reasoned awards are large enough, the disputing parties might nonetheless demand reasoned awards even though those awards benefit others as well.¹⁶³

Stacie Strong has identified four (what she calls “non-structural” and what I would call “private”) benefits that reasoned awards provide to disputing parties:

- “reasoned awards provide key assurances regarding the nature and quality of justice that is being dispensed by the arbitrator;”
- “use of reasoned awards improves the quality of the decision-making process and consequently of the decision itself;”¹⁶⁴
- “reasoned awards provide parties with a more comprehensive and satisfactory explanation of why the arbitrator decided as he or she did and may therefore increase the likelihood of voluntary compliance, since the losing party will feel fully ‘heard’;”¹⁶⁵ and
- “reasoned awards enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public, including national courts that may be asked to enforce an award, even if there is no ability to review the merits of the award, by demonstrating the seriousness and integrity of the arbitral endeavor.”¹⁶⁶

162. See Cooter & Rubinfeld, *supra* note 160, at 545.

163. *E.g.*, THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS 71 (2017) (explaining that a “common situation[] in which private actors . . . create public goods” is “when some individuals have personal preferences (i.e., high enough reservation prices for the amenity at issue) that justify their bearing all the cost of the amenity, despite the spillover of benefits onto others”).

164. S.I. Strong, *Reasoned Awards in International Commercial Arbitration*, KLUWER ARB. BLOG (Feb. 19, 2016) [hereinafter Strong, *Kluwer Arbitration Blog*], <http://arbitrationblog.kluwerarbitration.com/2016/02/19/reasoned-awards-in-international-commercial-arbitration/> [<https://perma.cc/67UG-3AHX>]; see also Richard A. Posner, *Judges’ Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447–48 (1995) (“Reasoning that seemed sound when ‘in the head’ may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react.”), quoted in S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT’L L. 1, 20 (2015) [hereinafter Strong, *Reasoned Awards Article*].

165. Strong, *Kluwer Arbitration Blog*, *supra* note 164.

166. *Id.* For a more detailed description of each of these considerations, see Strong, *Reasoned Awards Article*, *supra* note 164, at 19–20.

Professor Strong concludes that these benefits “provide some explanation of why parties continue to require reasoned awards even though many jurisdictions do not incorporate a legal requirement for such awards.”¹⁶⁷

Focusing on the incentives of the parties instead of (or in addition to) the incentives of the arbitrators thus directs attention to the possibility that arbitrators will issue reasoned awards because the parties demand it. The question remains, of course, whether party demand will provide sufficient reasoned awards given that other parties benefit as well. But that is a different question from the one answered by Landes and Posner.

The second important player in the arbitration process (often, anyway) that Landes and Posner omit is the arbitral institution—a third party that promulgates rules, administers the arbitration proceeding, and might appoint arbitrators, in exchange for a fee. The substantial majority of arbitration agreements, from contracts governing consumer transactions to contracts governing sophisticated international transactions, provide for an institution to administer the parties’ arbitration.¹⁶⁸

The incentives of arbitral institutions differ from the incentives of the parties and the arbitrators. According to Mark Weidemaier, “[a]rbitration providers [(another name for arbitral institutions)] sell a diverse range of goods and services, including administration, ‘lawmaking,’ risk management, and legitimacy.”¹⁶⁹ As Weidemaier explains:

Administrative services include identifying and training arbitrators, handling case logistics, and managing arbitration facilities. Providers also sell private “lawmaking,” for example by generating default disputing procedures and by providing an institutional context in which private legal norms can develop. And providers sell risk management, such as insulation from some of the risk of class actions.

Most important for my purposes, providers may also sell legitimacy. Arbitration clauses are often challenged by parties who would prefer to litigate their disputes in court, and the

167. Strong, *Kluwer Arbitration Blog*, *supra* note 164.

168. CFPB ARBITRATION STUDY, *supra* note 67, § 2.5.3, at 34; John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT’L L. 323, 355 (2019) (“Only nine (of 86, or 10.5 percent) of the arbitration clauses provided for ad hoc arbitration.”).

169. W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 661 (2007).

designation of a recognized provider may help immunize the arbitration agreement from challenge.¹⁷⁰

To enhance the legitimacy of the arbitration process (and thus increase the value of the legitimacy services they provide to parties), arbitral institutions have an incentive to invest in their own reputations, including their reputation for providing fair dispute-resolution services.¹⁷¹ Likewise, the political realities faced by arbitral institutions—the possibility of statutes or regulations restricting the enforceability of certain arbitration agreements, for example—give institutions the incentive to make arbitration (at least appear) fair to all parties.¹⁷² One way institutions can advance both of these ends is by requiring arbitrators to issue reasoned awards and to make (at least redacted versions of) those awards public.

Finally, arbitral institutions have an additional incentive for making arbitral awards publicly available: revenue from the sale of the awards. Positive externalities from rule production, like other externalities, create a profit opportunity. As Donald J. Boudreaux and Roger Meiners explain:

Any failing market necessarily contains the opportunity for profit; that is, the possibility of converting unexploited “social gains” into exploited private gains. Whoever works successfully to improve the allocation of resources (say an “entrepreneur”) can profit from efforts: the person or persons who gain from the

170. *Id.*

171. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 299 (2012) (“[O]ne reason an arbitration provider might adopt a due process protocol would be to protect its reputation as a provider of a fair dispute resolution process and hence to enhance the enforceability of arbitration agreements and awards in court. Indeed, the benefits of developing a reputation for fairness are not limited to the provider’s credibility with courts, but could extend to the provider’s acceptability to parties more generally.”).

172. *Id.* at 299 (“Arbitration providers might adopt a due process protocol to reduce the risk of additional public regulation—that is, to reduce the likelihood that Congress would regulate consumer arbitration more stringently or preclude altogether the enforcement of pre-dispute arbitration clauses in consumer and employment contracts.”); *see also* ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 143 (2009) (“These moves presumably represent a compromise between consumer groups and companies brokered by the AAA to preserve consumer arbitration against the risk that consumer groups will be able to persuade legislators to enact more stringent protections at the state or federal level.”).

improved allocation will be willing to pay the entrepreneur for the results of his effort.¹⁷³

If the available profit is sufficiently high, and transaction costs sufficiently low, the entrepreneur can effectively internalize the externality.

Arbitral awards are valuable to non-parties to the arbitration. Lawyers (and their clients) are willing to pay to obtain copies of awards because they can serve as persuasive precedent in other arbitrations and because the awards provide information about the decision making of the arbitrators who issued them.¹⁷⁴ The entrepreneur is the arbitral institution (or, say, a legal publisher) that has access to arbitral awards and can capture some of that value by selling access to the awards.¹⁷⁵ As the next Subpart illustrates, arbitral institutions and legal publishers have done exactly that in international commercial arbitration. These incentives also explain, at least in part, why arbitral institutions have adopted consumer and employment arbitration rules that require

173. Donald J. Boudreaux & Roger Meiners, *Externality: Origins and Classifications*, 59 NAT. RES. J. 1, 21 (2019) (footnote omitted); see also Bruce L. Benson, *Arbitration*, in V ENCYCLOPEDIA OF LAW AND ECONOMICS 159, 172 (Boudewijn Bouckaert & Gerrit De Geest, eds., 2000) (“But if external benefits are significant there are strong incentives to internalize them, so when precedents become important institutional adjustments are likely to be made.”).

174. See, e.g., *Wolters Kluwer Partners with American Arbitration Association to Enhance Labor and Employment Awards Database*, CISION PR NEWSWIRE (June 7, 2018, 01:52), <https://www.prnewswire.com/news-releases/wolters-kluwer-partners-with-american-arbitration-association-to-enhance-labor-and-employment-awards-database-300661896.html> [<https://perma.cc/X79B-WL7L>] (“This move is a direct response to our customers, who have requested more awards for their research. The addition of these highly valuable arbitration awards is Wolters Kluwer’s latest step to further strengthen our investment in labor and employment offerings that leverage high-quality content and cutting-edge technology.” (quoting Chris Carr, Labor & Employment Law Portfolio Director for Wolters Kluwer Legal & Regulatory U.S.)).

175. Unlike legal publishers, arbitral institutions face a countervailing party demand (at least in some cases) for privacy of the dispute resolution process. Some have suggested that parties value privacy less in dispute resolution than is commonly supposed. Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People; A Forced Rank Analysis*, 30 INT’L BUS. LAW. 203, 207 (2002), reprinted in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 43, 52 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (“Subsequent discussions with arbitrators in a round-table setting revealed a view that privacy is an often overrated attribute. . . . This is not to say that in certain specific cases privacy is not of primary importance. But in overall rankings, privacy was next to last on the scale.”). Regardless, arbitral institutions can balance the demand for privacy against the demand for awards by publishing awards with party-identifying information redacted.

arbitrators to issue reasoned awards and that permit the publication of awards (with the names of parties redacted). Recognizing the central role of institutions in the arbitration process thus provides an essential perspective for evaluating the positive externalities hypothesis.

B. Arbitral Practice and Rule Production

The Landes and Posner account of the positive externalities hypothesis may have been consistent with the practice in domestic commercial arbitration in the United States when they were writing.¹⁷⁶ But it is not consistent with usual practice today in international arbitration, domestic U.S. consumer and employment arbitration, and, to an increasing degree, in domestic U.S. commercial arbitration.

First, reasoned awards are standard practice in international arbitration. International arbitration rules commonly require reasoned awards as a default rule¹⁷⁷ (although they typically do not permit publishing even a redacted award if a party objects¹⁷⁸). And the only available empirical study finds no substantial evidence that parties contract out of that default.¹⁷⁹ The same study (of international supply

176. Mark Weidemaier describes these sorts of views using Ed Brunet's phrase "folklore arbitration":

[T]he foregoing picture of arbitration is quite stylized. It proffers a vision of "folklore arbitration" that primarily reflects assumptions about domestic arbitration practices within the United States. Even within that sphere, it corresponds imperfectly to a market reality in which arbitrators and arbitral institutions offer a diverse range of arbitration products.

Weidemaier, *Precedent in Arbitration*, *supra* note 23, at 1905 (footnote omitted) (citing Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 42-45 (1999)).

177. S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. DISP. RESOL. 93, 98 n.32 ("Reasoned awards are nearly universal in international commercial arbitration and investment arbitration."); *see, e.g.*, UNITED NATIONS COMM'N ON INT'L TRADE L., UNCITRAL ARBITRATION RULES ART. 34(3), AT 24 (2014) ("The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given."); INT'L CT. OF ARB., INT'L CHAMBER OF COM., ARBITRATION RULES IN FORCE AS FROM 1 JANUARY 2021, art. 32(2), at 38 (2020) ("The [arbitral] award shall state the reasons upon which it is based.").

178. *E.g.*, INT'L CTR. FOR DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) ART. 40(4), AT 36 (2021) ("The ICDR may also publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details unless a party has objected in writing to publication within 6 months from the date of the award.").

179. Coyle & Drahozal, *supra* note 168, at 370 ("All leading international arbitration rules require the arbitrators' award to be in writing and to give reasons. Several clauses (11 of 86, or 12.8 percent) in the sample

contracts) also finds that parties typically do not add confidentiality provisions to their arbitration clauses.¹⁸⁰ Moreover, a number of international arbitral institutions have published redacted versions of awards they have administered, and several legal publishers—including Westlaw, Lexis, and Kluwer—provide electronic databases of international arbitral awards they have collected (from court filings and other sources).¹⁸¹

Second, the same is true for consumer and employment arbitration in the United States. The AAA and JAMS both require arbitrators in consumer and employment arbitrations to issue awards that explain the reasoning behind their decisions.¹⁸² The AAA consumer and employment rules also each authorize the AAA to publish redacted awards.¹⁸³ As of June 1, 2021, over 3,500 AAA employment arbitral awards and over 3,000 AAA consumer arbitral awards were available on Westlaw.¹⁸⁴

reiterated those requirements, while another six (of 86, or 7.0 percent) required the award to be in writing without mentioning reasons.” (footnote omitted)).

180. *Id.* at 367–68 (“The default rule in American arbitration law is that arbitration agreements do not impose an obligation of confidentiality on the parties (as opposed to the arbitrators or the arbitration institution). Only a minority of the arbitration clauses in the sample changed that default rule: . . . just under 30 percent of the clauses required some degree of confidentiality in the arbitration proceeding, meaning that, conversely, just over 70 percent of the clauses did not address the issue.” (footnote omitted)).
181. S.I. Strong, *Past As Prologue: Arbitration As an Early Common Law Court?*, 57 HOUS. L. REV. 985, 1023–24 (2020) (“[T]ens of thousands of arbitral awards have been published over the last few decades in specialty reporters and electronic databases, thereby providing parties and arbitrators with a rich source of materials to consider.”); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1319 (2006) (“[I]nternational commercial arbitration awards are being voluntarily published with greater frequency.”).
182. AM. ARB. ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 23 (2017) [hereinafter AAA EMPLOYMENT RULES] (effective Nov. 1, 2009); AM. ARB. ASS’N, CONSUMER ARBITRATION RULES R-43(b), at 27 (2016) [hereinafter AAA CONSUMER RULES] (effective Sept. 1, 2014); JAMS, JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES 22–23 (2014) (effective July 1, 2014); JAMS, CONSUMER ARBITRATION MINIMUM STANDARDS: JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES MINIMUM STANDARDS OF PROCEDURAL FAIRNESS ¶ 10 (2009) (effective July 15, 2009).
183. See AAA CONSUMER RULES, *supra* note 182, R-43(c), at 26; AAA EMPLOYMENT RULES, *supra* note 182, Rule 39(b), at 23.
184. Sternlight, *supra* note 16, at 175 (“Currently, AAA employment awards are available, for a fee, from LEXIS, Westlaw, BNA & Kluwer. However, the fact that these decisions are available may not be well known, and

To be clear, an award with reasons is not the same as an award with findings of fact and conclusions of law; a reasoned arbitral award might not include the same detailed factual or legal analysis as a court opinion.¹⁸⁵ Scholars have only begun to study the AAA's reasoned consumer and employment awards. The few studies that exist suggest that the awards are often highly fact-based, as are many court opinions.¹⁸⁶ The extent to which these awards can substitute for court precedent in producing legal rules remains to be determined.¹⁸⁷

Third, the practice of reasoned awards is growing in domestic commercial arbitration in the United States as well. The rules of several arbitral institutions provide for reasoned awards as the default.¹⁸⁸ Although the *AAA Commercial Arbitration Rules* do not so provide,¹⁸⁹

other arbitration providers may not make their decisions publicly available." (footnote omitted)).

185. See Ava J. Borrasso, *Seeing "Reason" in Arbitration Awards: Recent US Appeals Court Rulings Provide Clarity*, DISP. RESOL. MAG., Summer 2017, at 30, 31 ("[T]he courts addressing the issue thus far have identified an award as sufficiently reasoned when it falls between a plain statement of result and detailed findings of fact and conclusions of law.").
186. *E.g.*, Sternlight, *supra* note 16, at 182 ("Upon reviewing the twenty-two AAA decisions made available on LEXIS as of June 2018, this author generally found them to be well-written and several pages long. These decisions tended to focus more on facts than law, which is not surprising given that arbitration awards are equivalent to trial court decisions." (footnote omitted)). See generally Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 944 (2020) ("[M]ost cases simply do not generate important precedents, clarify ambiguous parts of the law, or otherwise have any chance of impacting future parties' behavior. Most cases settle, and even those that do not rarely involve a precedent-setting appellate opinion.").
187. *Cf.* Weidemaier, *Judging-Lite*, *supra* note 23, at 1139 ("In the three regimes that feature reasoned awards, arbitrators wrote reasonably lengthy decisions that were substantially devoted to legal analysis and that made ample use of precedent."); Martin H. Malin & Jon M. Werner, 14 Penn Plaza LLC v. Pyett: *Oppression or Opportunity for U.S. Workers; Learning from Canada*, 2017 U. CHI. LEGAL F. 347, 376 (2017) (comparing labor arbitration awards in Ontario to decisions of the Human Rights Tribunal of Ontario) ("Although relatively rare in either forum, arbitrators are more likely to criticize or refuse to follow established authority or to identify and reconcile established authorities. They are also more likely to distinguish established authority, although that appears to be due to the higher rate of public sector cases in arbitration.").
188. See John Burritt McArthur, *Parties Usually Benefit Most from Reasoned Awards, Not Standard Awards*, 38 ALTS. TO HIGH COST LITIG. 44, 45 (2020) (citing JAMS and CPR rules).
189. AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-46(b), at 27 (2016) (effective Oct. 1, 2013) ("The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.").

the available data indicate that roughly half of AAA commercial awards nonetheless are either reasoned awards or include more detailed findings of fact and conclusions of law.¹⁹⁰ Unlike consumer and employment arbitration, there is as yet no mechanism for making (even redacted versions of) these awards public, although the incentive to do so is still there.

Overall, the realities of arbitral practice, particularly in international arbitration and consumer and employment arbitration, but increasingly in commercial arbitration, are inconsistent with the positive externalities hypothesis. Instead, they are more consistent with the possibility that arbitral awards might in fact produce legal rules in an arbitration-only market.

CONCLUSION

This Article has sought to provide the foundation for a more systematic study of the relationship between arbitration and rule production. It has examined critically both the displacement hypothesis—the view that arbitration is likely to displace precedent produced by courts—and the positive externalities hypothesis—the view that arbitrators lack the incentive to issue rule-producing decisions of their own. The main conclusion of the Article is that the analysis is not as straightforward as many commentators have assumed—that it raises difficult theoretical and empirical questions, including (1) how often is arbitration likely to be used to resolve disputes? (2) are the “haves” more likely to obtain favorable court precedent (or avoid unfavorable precedent) by using arbitration clauses? and (3) to what extent do the incentives of parties and arbitral institutions to seek reasoned, published awards differ from those of arbitrators? For all three questions, the traditional answer is incomplete or misguided in important ways, as the Article explains.

Many other questions remain to be examined and are worthy of future research. From a positive perspective, those questions include: How are judges likely to respond if disputes are increasingly resolved in arbitration rather than in court? Will they write more opinions in their remaining cases? Or perhaps write fewer opinions and hold more jury trials instead?¹⁹¹ How will parties respond if, in fact, courts produce less

190. McArthur, *supra* note 188, at 45 (“[I]n awards issued in 2016, 41% of AAA commercial and construction awards were reasoned, and another 8% were findings of fact and conclusions of law, while 51% were standard awards.”).

191. See Christoph Engel & Keren Weinshall, *Manna from Heaven for Judges: Judges’ Reaction to a Quasi-Random Reduction in Caseload*, 17 J. EMPIRICAL LEGAL STUD. 722, 724 (2020) (“Our indicators suggest that judges in the treated courts invest the additional time in better resolving their assigned cases. For example, they use more laborious means of

precedent?¹⁹² Will disputes be more or less likely to arise? Will parties be more or less likely to file suit when a dispute does arise? Will parties be more or less likely to settle? Will government enforcement actions become more common to replace private suits subject to arbitration?¹⁹³ How does the effect of arbitration on class actions, as opposed to individual actions, change any of this analysis?

And from a normative perspective, those questions include: Is there currently too much law or too little law?¹⁹⁴ Or stated otherwise, how much law is enough? If the use of arbitration increases, should governments increase the subsidy they provide to court systems? Or should they instead provide subsidies to arbitration, perhaps making arbitral awards more widely (and inexpensively) available? As an institutional matter, do courts or legislatures produce better legal rules? Do courts or arbitrators?¹⁹⁵ And how do the answers to all those

evidence (are more likely to hear witnesses), are less likely to write summary judgments, more likely to decide cases on the merits, and write more elaborate opinions. These changes are largely to the benefit of plaintiffs”); Lee, *supra* note 16, at 17 (“As the rate of such resolutions slowed, judges would probably publish opinions that they otherwise would have ordered withheld from publication. They might even hear claims generating publishable opinions that they otherwise would not have heard.”).

192. See Lee, *supra* note 16, at 18 (“Moreover, any decline in the production of precedent sufficient to cause an appreciable rise in uncertainty about how courts would interpret the law would tend to be self-correcting. The uncertainty would itself spawn additional litigation—in part, perhaps, because parties would less frequently agree to arbitrate their disputes—and more litigation would in turn cause a rise in the production of precedent.” (footnote omitted)).
193. See Erbsen, *supra* note 127; see *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 282, 289 (2002) (holding that “an agreement between an employer and an employee to arbitrate employment-related disputes [does not bar] the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief”).
194. See S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 573 (2018) (“[T]hese elements suggest that linking the legitimacy of particular proceedings to the ability to generate binding precedent not only misstates various issues of substance, but also seeks to address a problem (*i.e.*, a shortage of judicial decisions) that does not in fact exist.”).
195. See Ware, *supra* note 157, at 911 (“[P]erhaps arbitrators tend to make better decisions than courts so arbitrator precedents—some arbitrators do cite each other’s precedents—tend to be better than court precedents and the higher quality of arbitrator precedents more than makes up for the higher quantity of court precedents.” (footnote omitted)); Weidemaier, *Judging-Lite*, *supra* note 23, at 1100 n.33 (“[E]ven if widespread use of arbitration erodes the supply of judicial precedent, this loss may be partially or entirely offset by the value of having competing producers of law.”).

questions change when different substantive areas of law are considered? This Article is only the beginning. Much more work remains to be done to understand the relationship between arbitration and rule production.

APPENDIX

Cases addressing the formation of consumer contracts, decided with published opinions by the U.S. courts of appeals and state supreme courts, from 2015 to 2020.

Cases involving challenges to the enforceability of arbitration clauses:

1. Bacon v. Avis Budget Grp., Inc., 959 F.3d 590, 599–604 (3d Cir. 2020).
2. Wilson v. Huuuge, Inc., 944 F.3d 1212, 1219–21 (9th Cir. 2019).
3. *In re* Holl, 925 F.3d 1076, 1084–85 (9th Cir. 2019) (denying mandamus).
4. Starke v. SquareTrade, Inc., 913 F.3d 279, 292–93 (2d Cir. 2019).
5. Dye v. Tamko Bldg. Prods., Inc., 908 F.3d 675, 686 (11th Cir. 2018).
6. Nat'l Fed'n of the Blind v. The Container Store, Inc., 904 F.3d 70, 84 (1st Cir. 2018).
7. Cullinane v. Uber Techs., Inc., 893 F.3d 53, 63–64 (1st Cir. 2018).
8. Meyer v. Uber Techs., Inc., 868 F.3d 66, 74–80 (2d Cir. 2017).
9. James v. Glob. TelLink Corp., 852 F.3d 262, 267–68 (3d Cir. 2017).
10. Norcia v. Samsung Telecomms. Am., LLC, 845 F.3d 1279, 1286 (9th Cir. 2017).
11. Nicosia v. Amazon.com, Inc., 834 F.3d 220, 238 (2d Cir. 2016).
12. Bazemore v. Jefferson Cap. Sys., LLC, 827 F.3d 1325, 1330–32 (11th Cir. 2016).
13. Sgouros v. TransUnion Corp., 817 F.3d 1029, 1036 (7th Cir. 2016).
14. Williams v. TAMKO Bldg. Prods., Inc., 451 P.3d 146, 151 (Okla. 2019).
15. Moore-Dennis v. Franklin, 201 So. 3d 1131, 1144 (Ala. 2016).

Cases involving challenges to the enforceability of other contract provisions:

1. Miller v. Sunapee Difference, LLC, 918 F.3d 172, 177 (1st Cir. 2019) (liability waiver).
2. Starkey v. G Adventures, Inc., 796 F.3d 193, 197–98 (2d Cir. 2015) (forum-selection clause).