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W. Mark C. Weidemaier

*University of North Carolina School of Law*, [weidemaier@unc.edu](mailto:weidemaier@unc.edu)

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# ARBITRATION AND THE INDIVIDUATION CRITIQUE

W. Mark C. Weidemaier\*

## INTRODUCTION

Skeptics and champions of the use of arbitration for consumer and employment disputes do not agree about much, but each group views arbitration as an individualized dispute resolution process. Many skeptics view arbitration as a tool used by repeat-player businesses to combat the increased influence of the plaintiffs' bar. To a significant extent, that influence derives from lawyers' ability to aggregate claims in both formal and informal ways.<sup>1</sup> Skeptics object that businesses use arbitration to prevent such aggregation, forcing consumer and employee claimants into individualized proceedings where neither they nor their lawyers can counter the advantages enjoyed by more powerful repeat players. I call this the "individuation critique." In reply, arbitration proponents defend its fairness as a forum and advance efficiency arguments in its favor, but they do not suggest that arbitration could or should facilitate the aggregation of consumer and employee claims.

This article calls into question skeptics' and proponents' shared conception of arbitration. In Part I, I describe the individuation critique, which derives from Professor Marc Galanter's famous distinction between repeat players (those who routinely encounter the same issue in litigation) and one-shotters (those with only sporadic and unpredictable contact with the legal system).<sup>2</sup> The arbitration debate often focuses on disputes between "one-shot" consumer or employee claimants and repeat-player businesses as respondents, and that is the type of dispute I am concerned with here.

I view the individuation critique, at least in theory, as one of the more potent objections to the use of pre-dispute arbitration agreements between parties

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\* Assistant Professor of Public Law and Government, University of North Carolina at Chapel Hill. For helpful comments and discussion on prior drafts, thanks to Scott Baker, John Conley, Laura Cooper, Jill Family, Adam Feibelman, Elizabeth Gibson, Mitu Gulati, Melissa Jacoby, Bill Marshall, Hiroshi Motomura, Richard Myers, Jean Sternlight, and to workshop participants at the University of Wisconsin Law School.

1. See *infra* text accompanying notes 35–54.

2. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

of unequal power.<sup>3</sup> Yet as a description of current arbitration practice, the critique is of uncertain validity. First, the critique takes largely for granted that arbitration agreements routinely include individuating terms, such as terms that prohibit class actions, prevent arbitrators from awarding punitive damages, or require that arbitration results remain confidential. To be sure, such agreements do exist, and they may be particularly common in some industries, but it is not clear that the critique accurately describes consumer and employment arbitration agreements generally.

Second, the critique arguably pays too much attention to arbitration agreements themselves, and too little attention to the institutional context in which arbitration takes place. In particular, arbitration providers like the American Arbitration Association (“AAA”) and JAMS have adopted “due process” standards that may significantly improve the “fairness” of arbitration procedure. If consistently interpreted and enforced (we do not know if they are), these standards may limit the impact of some individuating contract terms. In short, a number of unanswered empirical questions are relevant to the individuation critique, including questions about the contents of arbitration agreements and the role of arbitration providers in shaping arbitration procedure. Systematic analysis of these questions may reveal the critique to be overstated.

Moreover, a full assessment of the individuation critique requires more than an understanding of current arbitration practices. We should also consider arbitration’s potential as a forum for aggregate dispute resolution. Relying in part on evidence from the recent, and rather unusual, phenomenon of class arbitration, I argue in Part II that arbitration may have significant potential, especially for consumers.<sup>4</sup> I begin by discussing class arbitration.

In class arbitration, an arbitrator selected and paid by the parties, rather than an elected or appointed judge, presides over a class action. The arbitrator decides whether to certify a class, determines the form and manner of notice to class members, resolves all issues of law and fact, and enters an award that may bind many hundreds or thousands of class members. This wholesale privatization of justice is subject only to limited judicial review. A rare occurrence until the Supreme Court’s decision in *Green Tree Financial Corp. v. Bazzle*,<sup>5</sup> over 120 class arbitrations are now pending before the AAA.<sup>6</sup>

Both the legal literature and the alternative dispute resolution (“ADR”) providers involved in administering class arbitrations tend to view these

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3. A predispute arbitration agreement is a contract that obliges the parties to submit future disputes to binding arbitration.

4. I use the term “consumer” to refer to individuals who assert relatively small-value claims, typically not for personal injuries, arising from standardized transactions for credit, services, or goods intended for personal or household use.

5. 539 U.S. 444 (2003).

6. Unlike most arbitrations, the AAA class arbitrations are quasi-public. Many of the arbitrators’ decisions, and many of the arbitration agreements themselves, are available on the AAA website. Am. Arbitration Ass’n, Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Jan. 27, 2007).

proceedings as little more than a private version of the judicial class action.<sup>7</sup> So narrow a conception fails to take seriously the possibilities of class arbitration. As I will explain, in many cases arbitrators will have the authority to resolve, in collective fashion, large-scale disputes that would have to proceed separately, if at all, in court. I argue that arbitrators should use this authority and that, at least in some circumstances, properly administered class arbitration might be acceptable both to claimants and respondents. I conclude this discussion by arguing that proponents and skeptics of arbitration should each embrace the aggregative possibilities of class arbitration.

Arbitration's potential to facilitate aggregation is not limited to formal methods like class arbitration. Thus, Part II also describes how arbitration might facilitate aggregation of individual consumer claims in informal ways. For example, although arbitrators generally do not create precedent and are not bound by other arbitrators' decisions, evidence from the AAA class arbitrations suggests that they may be strongly influenced by other arbitration awards in similar cases.<sup>8</sup> Indeed, under the right conditions, arbitrators may produce something akin to informal precedent, and this possibility may encourage plaintiffs' lawyers to invest in creating "rules" from which multiple claimants can benefit. Part II goes on to suggest some reforms to ADR provider policies that might encourage specialized, repeat-player lawyers to accept cases destined for arbitration and to make meaningful investments in these disputes. For individual consumers in particular, such a system might prove to be superior to the courts in important respects.

## I. THE INDIVIDUATION CRITIQUE

As I have explained, the individuation critique derives from Marc Galanter's distinction between repeat players and one-shotters.<sup>9</sup> Forests have gone to the blade discussing Galanter's taxonomy of litigants,<sup>10</sup> so my treatment of it in this section will be brief. I focus primarily on the extent to which repeat players benefit from their ability to aggregate claims.

### A. Automatic Claims Aggregation and the Presumed Repeat-Player Advantage

For a number of reasons, even a formally neutral legal system may favor repeat players, both in individual cases and over the long term.<sup>11</sup> Repeat players can justify significant investments in lobbying and other activities designed to shape the law,<sup>12</sup> and they learn from experience how to structure transactions to

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7. See *infra* text accompanying notes 142–143 and note 153.

8. See *infra* text accompanying notes 197–206.

9. Galanter, *supra* note 2. For another important article on repeat players in arbitration, see Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999), suggesting that repeat players in ADR may duplicate, or enhance, the advantages they enjoy in litigation and calling for research into ADR outcomes and procedures.

10. For a useful bibliography, see Brian J. Glenn, *The Varied and Abundant Progeny*, in *IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD?* 371, 373–74 (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

11. Galanter, *supra* note 2, at 103–04.

12. *Id.* at 100.

their advantage.<sup>13</sup> If a dispute occurs, the repeat player may seek to generate a favorable precedent<sup>14</sup> or, conversely, to suppress rule changes that might benefit future adversaries. To that end, a repeat-player defendant might settle weak cases and litigate only those it expects to win.<sup>15</sup> If it does litigate, the defendant may make substantial investments in its defense for a number of reasons. For one thing, it may invest because the result has consequences for future cases.<sup>16</sup> Likewise, the defendant may spend heavily on, say, developing expert witnesses and planning legal strategy, because it can spread these costs, and reap the benefits, over multiple cases.<sup>17</sup> The result is that, in many cases, repeat players will rationally make litigation investments that no individual litigant can hope to match.<sup>18</sup>

In part, this reality reflects the fact that defendants automatically aggregate claims presenting common legal and factual questions:

Faced with numerous actual and potential claims presenting common questions of liability and damages . . . , the defendant always, naturally and necessarily, prepares one defense for all of those claims, litigating from the posture of a *de facto* class action . . . . With class-wide aggregation of the defense interest, the defendant exploits economies of scale to invest far more cost-

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13. *Id.* at 98, 109.

14. By “precedent,” I mean not only published judicial opinions, but also any information of systemic value in similar cases. For example, a defense verdict, or one producing a modest damages award, might temper future plaintiffs’ settlement expectations. Conversely, a large award might increase settlement expectations, encourage more lawsuits, or generate an unfavorable reaction from the financial markets.

15. Galanter, *supra* note 2, at 101–02; William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 273–74 (1979) (noting that, in cases where litigants have asymmetric future stakes, “a necessary condition for a trial is that the odds favor the party with the greater stake”). As another example, a repeat-player defendant might allow a case to reach a jury without raising a key defense, because it anticipates an adverse ruling and does not wish to generate unfavorable precedent. *Cf.* Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing By Winning*, 33 LAW & SOC’Y REV. 869, 877–85 (1999) (describing various “rule-making” opportunities in the litigation process, including strategic settlement, dispositive motions at the trial court level, and appeal).

16. *See* Galanter, *supra* note 2, at 100 (noting significance to repeat player of events that will influence outcomes in future cases).

17. *See, e.g.*, David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 399–402 (2000). Note, too, that defense costs are also investments in reputation: by conveying its willingness to fight each claim tooth and nail the defendant may deter future claims or reduce their expected value. *See* Galanter, *supra* note 2, at 99; *see also* Menkel-Meadow, *supra* note 9, at 27 (noting value to repeat player of cultivating a reputation as a bargainer or litigator).

18. *E.g.*, Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1384 (2000); Rosenberg, *supra* note 17, at 401; William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1020 (1981). This is not to say that repeat players will always out-invest one-shotters, only that they will often have the ability and incentive to do so.

effectively in preparing its side of the case than plaintiffs can in preparing their side.<sup>19</sup>

Substantial litigation investments should pay off by permitting litigants to develop and deploy legal strategies that increase their odds of success. This advantage persists even in the face of positive law that seems to favor a less-resourced adversary.<sup>20</sup> Put baldly, “[a]dverse legal doctrine defeats only those who believe it can. For nonbelievers, the strategic application of resources can construct outcomes to order, within cultural limits.”<sup>21</sup> Whether or not one accepts that legal indeterminacy permits well-resourced parties to “construct outcomes to order,” parties who invest more in litigation will likely see superior results, especially across a class of similar cases.<sup>22</sup>

Galanter’s article spawned a vast body of scholarship,<sup>23</sup> including studies searching for evidence of a repeat-player effect. Though the evidence is somewhat mixed, studies generally support the existence of at least a modest advantage for repeat players before trial<sup>24</sup> and appellate<sup>25</sup> courts, in the development of precedent,<sup>26</sup> and, possibly, in arbitration as well.<sup>27</sup>

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19. Rosenberg, *supra* note 17, at 393–94. Although Professor Rosenberg focuses on mass torts, he recognizes that his argument applies to many consumer and employment disputes. *Id.* at 393 n.1. Indeed, a defendant need not be faced with a classic mass tort—in the sense of a fairly cohesive litigation presenting a common set of injuries resulting from exposure to a mass-produced product—in order to aggregate claims. Defendants have similar incentives whenever faced with present or potential future claims involving recurrent factual or legal issues. For a parallel discussion describing the tendency towards informal aggregation in much of American tort law, see Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

20. See Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1480–82 (2000).

21. *Id.* at 1480–81.

22. Repeat-player advantages include expertise, ready access to specialized legal representation, and “trust and legitimacy” with institutional players like judges and clerks of court. Legal rules are not self-executing, and repeat players can better monitor the officers and agencies charged with their implementation. See Galanter, *supra* note 2, at 98–99, 103, 109; Menkel-Meadow, *supra* note 9, at 27–28 & n.44. In short, “Repeat players initiate the play, enjoy economies of scale, develop facilitative informal relations, have access to client-specialized legal representation, play the odds in their repetitive engagements, and with regard to the rules of the game, play for rule-changes as much, or perhaps more than, for immediate gains.” Patricia Ewick & Susan S. Silbey, *The Significance of Knowing that the “Haves” Come Out Ahead*, in IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD?, *supra* note 10, at 273, 273. These advantages may also enhance repeat players’ leverage in informal negotiations. *E.g.*, Gary Goodpaster, *Lawsuits as Negotiations*, NEGOTIATION J., July 1992, at 221, 231–33; see generally HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION (1991).

23. See Glenn, *supra* note 10.

24. *E.g.*, Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the “Haves” Come Out Ahead over Time?: Applying Galanter’s Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, in IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD?, *supra* note 10, at 85; Craig Wanner, *The Public Ordering of Private Relations: Part II: Winning Civil Court Cases*, 9 LAW & SOC’Y REV. 293, 300–05 (1975); see also

### *B. Repeat-Player Lawyers and the Benefits of Aggregation*

Something is missing from this picture: lawyers. Lawyers are often repeat players,<sup>28</sup> indeed the only ones involved in many cases.<sup>29</sup> In such cases, any repeat-player advantage may result from “the repeat play of the large law firm lawyers who represent organizations.”<sup>30</sup> Perhaps plaintiffs’ lawyers can confer similar benefits on their one-shotter clients.<sup>31</sup> Indeed, as described most thoroughly by

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Lewis M. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 47 (1998) (not testing the repeat-player hypothesis directly, but finding that federal courts granted dispositive, pre-trial motions in 60 percent of all employment discrimination cases that resulted in a definitive judgment in 1994; employers won 98 percent of these decisions).

25. For examples of studies examining appellate decisions for a repeat-player effect, see Songer et al., *supra* note 24, at 26, and Stanton Wheeler et al., *Do the “Haves” Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC’Y REV. 403 (1987).

26. See Albiston, *supra* note 15, at 887–96 (reporting study of published judicial opinions under the Family and Medical Leave Act and noting that individual litigants’ successes are often not reflected in published judicial opinions); see also Maltby, *supra* note 24, at 47 (finding that in 1994 employers won 98% of dispositive, pre-trial motions granted by federal courts in employment discrimination cases).

27. The presence of a repeat-player effect in arbitration is a matter of dispute. See, e.g., Lisa B. Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 212–15 (1997) [hereinafter Bingham, *The Repeat Player Effect*] (finding that employees won something in 63% of all employment arbitrations studied, but in only 16% of arbitrations against repeat players; also finding that employees received, on average, a greater percentage of their demand when arbitrating with non-repeat player employers); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238–39 (1998) [hereinafter Bingham, *On Repeat Players*] (finding that employees lose more frequently when arbitrating against a repeat-player employer and when arbitrating before an arbitrator the employer has used before); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 817 (2003) (reporting results from 34 arbitrations involving repeat-player employers, finding that apparent repeat-player effect could be attributed to the presence of an internal dispute resolution program by which employers screen out and resolve meritorious claims, resulting in weaker claims going to arbitration); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1571–72 (2005) (interpreting Hill and Bingham studies to suggest that “repeat-player” effect may be attributable to presence of an internal dispute resolution program).

28. Galanter, *supra* note 2, at 114. Indeed, it has been argued that lawyers play a more significant role in shaping the law than do repeat-player litigants. See Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994).

29. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1319 (2005).

30. *Id.*

31. Galanter recognized this possibility but doubted that lawyers could offset the fundamental strategic advantage enjoyed by repeat players. Galanter, *supra* note 2, at 118. Moreover, for lawyers, “[c]onsiderations of interest are likely to be fused with ideological

Professor Stephen Yeazell,<sup>32</sup> plaintiffs' firms have gradually restructured themselves—becoming larger, more specialized, and better financed<sup>33</sup>—in ways that potentially offer repeat-player benefits to their clients.<sup>34</sup>

For my purposes, the most noteworthy aspect of this restructuring is the extent to which modern plaintiffs' firms, like other repeat players, aggregate claims. This happens in formal and informal ways. Formal methods include judicial mechanisms for combining multiple claims in a single judicial proceeding, such as joinder, class actions, intervention, and consolidation.<sup>35</sup> Where feasible, these mechanisms allow lawyers more effectively to coordinate and finance large-scale litigation.<sup>36</sup> Firms that undertake such litigation are of necessity specialized, well-financed repeat players.<sup>37</sup>

Moreover, even where formal judicial mechanisms are unavailable, technological and cultural changes have increased the ability and willingness of plaintiffs' lawyers to pool information and risk, allowing them to match defendants' litigation investments even in the largest cases.<sup>38</sup> For example,

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commitments: the lawyers' preference for complex and finely-tuned bodies of rules, for adversary proceedings, for individualized case-by-case decision-making." *Id.* at 119.

32. Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1991–2003 (2004) [hereinafter Yeazell, *The Silent Litigation Revolution*]; Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001) [hereinafter Yeazell, *Re-Financing*].

33. See RICHARD L. ABEL, AMERICAN LAWYERS 122–23, 178–84, 202–07 (1989); Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 48–51 (2004); Yeazell, *Re-Financing*, *supra* note 32, at 199–200.

34. Legal services organizations, too, might confer repeat-player benefits on their clients. On the role and repeat-player status of legal services lawyers, and restrictions governing their practice, see generally Richard L. Abel, *Law without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Kenneth W. Mentor & Richard D. Schwartz, *A Tale of Two Offices: Adaptation Strategies of Selected LSC Agencies*, 21 JUST. SYS. J. 143 (2000). See also David P. McCaffrey, *Corporate Resources and Regulatory Pressures: Toward Explaining a Discrepancy*, 27 ADMIN. SCI. Q. 398, 410–13 (1982) (discussing role of public interest groups, including unions, in generating regulatory pressure through litigation).

35. See FED. R. CIV. P. 20, 23, 24 & 42. For a general discussion of formal aggregation methods, and their inadequacy to the task of allowing true coordination of related cases, see Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 408–17 (2000).

36. See Hay & Rosenberg, *supra* note 18, at 1379–81; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 743–44 (1997). On the benefits to plaintiffs of collective representation, through the class action or otherwise, see Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 543–50, and Hay & Rosenberg, *supra* note 18, at 1383–89.

37. See Yeazell, *Re-Financing*, *supra* note 32, at 210–11. Slightly less formal methods of aggregation include federal multi-district litigation, 28 U.S.C. § 1407 (2006), and related state court procedures, e.g., CAL. CIV. PROC. CODE § 404 (West 2006), in which related cases are transferred to a single court for coordinated pretrial proceedings.

38. See Erichson, *supra* note 35, at 388–410; Issacharoff & Witt, *supra* note 19, at 1624.



plaintiffs' firms may agree to coordinate their efforts in multiple lawsuits, sharing expertise, discovery materials, and strategy,<sup>39</sup> and effectively treating the separate lawsuits as a single litigation.

Each of these aggregation methods is "formal" to a degree, in that each represents an effort to coordinate litigation in response to the (more or less) contemporaneous filing of many related cases. Yet lawyers aggregate claims in entirely informal ways and in entirely unrelated disputes. As an example, consider a firm that specializes in representing plaintiffs in employment disputes. The law governing lawyers has gradually changed to make it easier for lawyers to market themselves<sup>40</sup> and to share fees in exchange for client referrals.<sup>41</sup> As a result, the firm likely participates in a vibrant referral network in which lawyers routinely refer potential clients to firms with the expertise and resources necessary to litigate the case effectively.<sup>42</sup> Through marketing and referrals, the firm generates an inventory of unrelated cases in its area of specialty. This inventory justifies investment in specialized training<sup>43</sup> and generates economies of scale,<sup>44</sup> perhaps allowing the firm profitably to represent even clients with relatively low-value claims.<sup>45</sup>

By informally aggregating claims in this manner, the firm may confer repeat-player benefits on its clients.<sup>46</sup> For example, the firm's expertise makes it a

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39. See Erichson, *supra* note 35, at 388–89.

40. See ABEL, *supra* note 33, at 119–22; Yeazell, *Re-Financing*, *supra* note 32, at 200–03, 212–13; see also Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 749–53 (2002) [hereinafter Kritzer, *Seven Dogged Myths*] (reporting, from study of contingency fee practitioners in Wisconsin, on the relative significance of lawyer referrals, as opposed to direct advertising, in obtaining clients); Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 226 (2001) [hereinafter Kritzer, *Extraordinary Cases*] (generally describing stratification in plaintiffs' bar and here noting that advertising and modern communications have created markets for legal services "bounded largely by limitations on legal practice, such as admission to state bars").

41. See Issacharoff & Witt, *supra* note 19, at 1622–23; Yeazell, *The Silent Litigation Revolution*, *supra* note 32, at 1996 & n.89; Yeazell, *Re-Financing*, *supra* note 32, at 201.

42. See Yeazell, *Re-Financing*, *supra* note 32, at 205, 212–13; Yeazell, *The Silent Litigation Revolution*, *supra* note 32, at 1996. While the work in this area often focuses on personal injury lawyers, there is reason to believe that employment lawyers can be characterized in similar fashion. See *infra* text accompanying notes 52–54.

43. See generally Yeazell, *Re-Financing*, *supra* note 32, at 199–201, 212–14.

44. See *id.* at 199.

45. See Kritzer, *Extraordinary Cases*, *supra* note 40, at 228–29 (discussing personal injury practices). I emphasize "relatively" low-value. It is unlikely that many employment law firms (as in my example) would build a practice around representing clients with very modest claims in court. *E.g.*, William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 DISP. RESOL. J., Dec. 1995, at 40, 44. Whether firms might build such practices in arbitration is a separate question.

46. See Issacharoff & Witt, *supra* note 19, at 1613–14; see also Menkel-Meadow, *supra* note 9, at 30 (noting that developments in the personal injury bar have

credible threat in litigation and permits it to quickly broker favorable settlements.<sup>47</sup> Firm lawyers may seek out and, within ethical constraints,<sup>48</sup> select for litigation cases likely to establish favorable precedent.<sup>49</sup> While the firm may not pass on to its clients the full benefits of its repeat-player status,<sup>50</sup> there are reasons to believe that, on average, “the plaintiffs’ bar is able to offer its clients a more valuable product at a lower cost” than was historically possible.<sup>51</sup> Although these developments have been most pronounced in the personal injury and product liability bars,<sup>52</sup> the employment bar has experienced similar changes. Fueled in part by an expansion in the rights and remedies available to aggrieved employees,<sup>53</sup> a sizeable and specialized plaintiffs’ employment bar now exists.<sup>54</sup>

### C. Aggregation of Consumer Claims

Consumers, however, have derived limited benefit from this trend towards aggregation.<sup>55</sup> To see why, consider the following example, to which I will return later: A number of consumers buy cars from related dealerships—all subsidiaries of the same parent company—paying an additional fee of less than \$1000 for a “warranty” that promises to pay a specified benefit if the car is stolen. Assume that sales personnel at the various dealerships are alleged to have

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“converted the lawyers, if not the clients, into very successful repeat players”).

47. See Issacharoff & Witt, *supra* note 19, at 1601–02, 1614–15; Kritzer, *Seven Dogged Myths*, *supra* note 40, at 774–75.

48. For example, a lawyer could not encourage a client to drop a potentially valid claim simply because the case might generate a precedent unfavorable to other clients. See Galanter, *supra* note 2, at 117 & n.52.

49. This is not to say that lawyers will pursue rules that are optimal for their clients. Lawyers may prefer uncertain rules that are costly to enforce. See *id.* at 119; Rubin & Bailey, *supra* note 28, at 825. Yet there is likely to be substantial overlap between lawyers’ and clients’ interests. Moreover, as I mentioned earlier, I use the term “precedent” to refer to any information of systemic value in future cases. See *supra* note 14. In this sense, a settlement is precedential; information about the settlement value will inform future settlement decisions in similar cases.

50. See Menkel-Meadow, *supra* note 9, at 30.

51. Yeazell, *Re-Financing*, *supra* note 32, at 215–16; see also Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 553–54 (1987) (describing attorney impact in study of grievance arbitration); Issacharoff & Witt, *supra* note 19, at 1611–16 (describing developments in plaintiffs’ bar and resulting efficiency benefits—that is, more rapid settlement—for clients).

52. See Issacharoff & Witt, *supra* note 19, at 1610–14; Menkel-Meadow, *supra* note 9, at 30; Yeazell, *Re-Financing*, *supra* note 32, at 216.

53. See generally Sherwyn et al., *supra* note 27, at 76–80.

54. E.g., Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 1019 (1999) (reporting in 1999 that the National Employment Lawyers Association, a national organization of plaintiffs’ employment lawyers, had 3500 members). For information about the prevalence of employment and other class actions drawn from published judicial opinions and media reports, see DEBORAH H. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 51–61 (2000).

55. For a general discussion of the barriers to consumer litigation and the need for aggregating devices, see Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L. J. 135, 142–50 (1999).

misrepresented the true cost of the “warranty,” and that this conduct, if proven, amounts to an unfair trade practice. The “warranty,” moreover, may be void under state insurance law, and the consumers may be entitled to restitution.<sup>56</sup>

Few of these consumers are likely to obtain specialized legal representation as individuals. One obvious reason for this is the modest size of their claims.<sup>57</sup> Even with the prospect of treble damages—authorized by some consumer protection laws—individual claims remain small. The cost and uncertainty involved in collecting any judgment compounds this problem.<sup>58</sup> Moreover, procedural innovations like small claims courts, and statutory inducements like attorney’s fees, may not induce lawyers to accept individual consumer cases.<sup>59</sup> Many small claims courts do not allow legal representation at all,<sup>60</sup> and those that do may not offer adequate discovery<sup>61</sup> or a full range of remedies.<sup>62</sup> Nor do small claims courts typically publish their decisions or create precedent;<sup>63</sup> indeed, small claims courts are not always presided over by lawyers.<sup>64</sup> And although many consumer protection statutes authorize awards of attorney’s fees,<sup>65</sup> lawyers may doubt that courts will award enough in fees to justify their

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56. These facts are based on two class actions currently pending before the AAA. *See* Am. Arbitration Ass’n, Class Action Case Docket: Owens v. Auto. Protection Corp., <http://www.adr.org/sp.asp?id=25825> (last visited Jan. 27, 2007); Am. Arbitration Ass’n, Class Action Case Docket: Price v. Auto. Protection Corp., <http://www.adr.org/sp.asp?id=25827> (last visited Jan. 27, 2007).

57. *E.g.*, Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes*, 1993 WIS. L. REV. 13, 85. This problem is not unique to consumer litigants. *See supra* note 45 (discussing threshold for employment lawyers to accept a case). As a general matter, claimants with modest-size claims are poorly served by the court system. *See* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 84 (1983–84).

58. This is especially true for unrepresented consumers. *See* Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 298 (Richard L. Abel ed., 1982).

59. An ostensible purpose of small claims courts, of course, is to permit individuals to obtain informal, accessible justice without retaining a lawyer at all. But the reality may be somewhat different. *See* Abel, *supra* note 58, at 295 (“The notion that these are intended to benefit individuals or tenants is a contemporary post factum legitimation; small claims courts were explicitly established to facilitate debt collection by merchants.”).

60. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 133, 137–38; James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDC/DCSL L. REV. 177, 187 (2000). This may enhance the advantages repeat players already enjoy over one-shotters. *See* Abel, *supra* note 58, at 294, 296.

61. *See, e.g.*, Village of Castleton v. Pillsworth, 708 N.Y.S.2d 239, 241 (Just. Ct. 2000) (denying request for discovery as inconsistent with expedited nature of small claims actions); Budnitz, *supra* note 60, at 138.

62. *See* Budnitz, *supra* note 60, at 138; Turner & McGee, *supra* note 60, at 185–86.

63. Glenn E. Roper, *Eternal Student Loan Liability: Who Can Sue Under 20 U.S.C. § 1091A*, 20 BYU J. PUB. L. 35, 38 (2005).

64. *E.g.*, N.C. Stat. § 7A-171.2.

65. *E.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (2006); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3) (2006); *see also* Debra E. Wax, Annotation, *Award of Attorneys’ Fees in Actions Under State Deceptive Trade Practice and*

investment in the case.<sup>66</sup> For these and other reasons, individual consumers may have limited access to a vibrant and specialized plaintiffs' bar.<sup>67</sup>

Of course, a lawyer might be interested in bringing a class action on behalf of the dispersed consumers. Indeed, that is the primary method of aggregating consumer claims.<sup>68</sup> Although controversial,<sup>69</sup> class actions have undeniable benefits, allowing consumers to assert low-value claims they could not bring as individuals<sup>70</sup> and encouraging the development of a vibrant, well-financed class action bar.<sup>71</sup> Yet class certification is far from common. Class actions run counter to a strong individualist streak in American law, which demands respect for the individual litigant's right to control his or her own claim,<sup>72</sup> and which, by

*Consumer Protections Acts*, 35 A.L.R.4TH 12 (1985) (discussing state consumer protection statutes).

66. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 120–22, 130 (1979); Whitford, *supra* note 18, at 1030.

67. E.g., Macaulay, *supra* note 66, at 122, 130; Laura Nader & Christopher Shugart, *Old Solutions for Old Problems*, in NO ACCESS TO LAW 57, 58 (Laura Nader ed., 1980).

68. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. REV. 1237, 1254–56 (2001). Public interest lawyers, of course, may also offer specialized representation to some individual consumers. See *supra* note 34.

69. For just a sampling of diverse views on the merits and potential abuses of the class action, see Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995); John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475; Hay & Rosenberg, *supra* note 18; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141; Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

70. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 30 (2000).

71. The vibrancy of the consumer class action bar is apparent from the prevalence of consumer class action litigation in state and federal courts and in its prominence in media reports of class actions. See Hensler et al., *supra* note 54, at 52–53 (reporting that in 1995–1996 consumer cases accounted for around 25% of reported judicial opinions addressing class actions, and also around 25% of reports on class actions in the business and general press).

72. E.g., Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 822 (1985). Given the tendency of legal markets to aggregate claims informally when formal methods are unavailable, one might question whether litigants value the right to "control" litigation as much as is often supposed. E.g., Erichson, *supra* note 36, at 543–50; Hay & Rosenberg, *supra* note 18, at 1380 n.8; Silver & Baker, *supra* note 36, at 744; see also Issacharoff & Witt, *supra* note 19 (describing "inevitability" of aggregate settlement).

and large, requires individualized proof of facts unique to each claimant.<sup>73</sup> Because of the need for such proof, class actions seeking damages may generally be certified only where, among other things, common questions of law or fact predominate over questions affecting only individual class members.<sup>74</sup>

This balancing act leads courts to deny certification to many proposed consumer classes.<sup>75</sup> Recall my example of car buyers who purchase a theft-protection “warranty” from dealerships operating as subsidiaries of a common parent company.<sup>76</sup> Assume the buyers allege that individual salespersons, acting pursuant to a practice common to all dealerships and encouraged by the parent, misled customers as to key warranty terms. This dispute raises a number of common questions,<sup>77</sup> but also many questions requiring individualized proof in court: Did a salesperson misrepresent a material fact to each buyer? If so, did the buyer justifiably rely on that misrepresentation? To what extent was the buyer injured? Many (probably most) judges would decline to certify a class, reasoning that common questions do not predominate over these “individual” issues.<sup>78</sup>

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73. Cf. Bruce L. Hay, *Procedural Justice—Ex Ante v. Ex Post*, 44 UCLA L. REV. 1803, 1838 (1997) (class actions call for “less inquiry into the individual circumstances of each case”).

74. I am referring here to class actions under FED. R. CIV. P. 23(b)(3).

75. See *Andrews v. AT&T*, 95 F.3d 1014, 1025 (11th Cir. 1996) (reversing class certification in class action filed by customers of long-distance telephone companies; plaintiffs had to prove reliance on alleged misrepresentation, as well as fact and amount of injury, on an individual basis); *Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 343 (D. Minn. 1999) (declining certification in “vanishing premium” life insurance case due to need for individualized inquiry into whether a misrepresentation was made to, and relied upon by, each plaintiff); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 216–17 (N.D. Cal. 1994) (denying certification because individual issues of reliance on alleged misrepresentations predominated in suit by purchasers of hearing aids against manufacturer and other defendants); *Gross v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 696 A.2d 793, 798 (N.J. Super. Ct. 1997) (denying certification in consumer fraud suit against maker of heartburn medication because of predominance of individual issues concerning whether each consumer saw and relied on alleged misrepresentation). Consumers have had the most success obtaining class certification where the relevant substantive law dispenses with the need to prove individual reliance and damages, as with the statutory damages provisions of the Truth in Lending Act, U.S.C. § 1640(a)(2) (2006). See generally Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 886–90 (2003) (discussing the expansion and eventual contraction of TILA litigation); Whitford, *supra* note 18, at 1030–31 (noting potential success of TILA in inducing consumer claiming).

76. *Supra* text accompanying notes 55–56.

77. Examples of issues common to the class as a whole, or to appropriate subclasses, might include whether the parent company can be held liable for misrepresentations made by employees of its subsidiaries, and whether state insurance law authorizes a cause of action for rescission. Cf. Order No. 2 (Respondent’s Motion to Dismiss) at 12, *Owens v. Auto. Protection Corp.*, No. 30 459 00642 05, 13–17 (May 10, 2006) (Am. Arbitration Ass’n), available at <http://www.adr.org/si.asp?id=2239> (discussing these issues in the class arbitration from which my example is drawn).

78. See *supra* note 75; see also *In re Jackson Nat’l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 221 (W.D. Mich. 1998) (holding that plaintiffs failed to satisfy predominance requirement, despite alleging that defendant prepared uniform, misleading

For the consumer advocate, at least, this is an unsatisfactory result, one that “arises from slavish adherence to the fiction that individual members are before the court and hence that the amount of money to be paid by the defendant should be the sum of the individual claims.”<sup>79</sup> Denial of certification, of course, typically means that few if any consumers will assert claims at all,<sup>80</sup> and the deterrence objectives of consumer protection laws will go unfulfilled.<sup>81</sup>

#### ***D. The Individuation Critique***

##### *1. Does Arbitration Individuate Claiming?*

As should be clear from the foregoing discussion, aggregation benefits consumers and employees primarily as claimants.<sup>82</sup> Despite difficulties in obtaining certification, many consumer<sup>83</sup> and employment<sup>84</sup> classes have been certified, and employees, at least those with sizeable claims,<sup>85</sup> may also find specialized, effective representation in individual lawsuits.<sup>86</sup> These are significant developments, and they reflect the increased ability of the plaintiffs’ bar to influence the outcome of particular cases and the legal system at large.

The individuation critique sees arbitration as one of a number of tools repeat-player defendants use to combat the increased influence of the plaintiffs’

sales materials for independent insurance brokers, because of need to determine what materials were presented, and what representations made, by brokers to each plaintiff).

79. Nader & Shugart, *supra* note 67, at 93.

80. See Issacharoff, *supra* note 55, at 147 (noting need for device to aggregate consumer claims); *cf.* Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (“[A] class action has to be unwieldy indeed before it can be pronounced an inferior alternative . . . to no litigation at all.”).

81. See Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 168–75 (2006) (noting that arbitration and class action prohibitions may leave credit card industry free to engage in misconduct without challenge); Issacharoff, *supra* note 55, at 147 (“This problem [of finding a way to aggregate consumer claims] is all the more compelling if the purpose of consumer enforcement is seen to be as much deterrence of misconduct as actual compensation to victims of fraud.”).

82. As defendants (“respondents,” in arbitration), consumers may be even less likely to find a lawyer and, except in rare cases, cannot combine their defense efforts with other claimants. *But see* Sears Roebuck & Co. v. Avery, 593 S.E.2d 424 (N.C. Ct. App. 2004) (credit card holder sued in collections action files class action counterclaim).

83. *E.g.*, Carnegie, 376 F.3d at 661; Gordon v. Microsoft Corp., No. 00-5994, 2001 WL 366432 (D. Minn. Mar. 30, 2001); Lopez v. Orlor, Inc., 176 F.R.D. 35 (D. Conn. 1997); *In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677 (N.D. Ga. 1991); Dix v. Am. Bankers Life Assurance Co., 415 N.W.2d 206 (Mich. 1987); Varacallo v. Mass. Mut. Life Ins. Co., 752 A.2d 807 (N.J. Super. Ct. App. Div. 2000).

84. *E.g.*, Allen v. Int’l Truck & Engine Corp., 358 F.3d 469, 472 (7th Cir. 2004); Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 168–69 (2d Cir. 2001); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004); McReynolds v. Sodexo Marriott Servs., Inc., 208 F.R.D. 428 (D.D.C. 2002); Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667 (C.D. Ill. 1996); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 665–67 (D. Minn. 1991).

85. See *supra* note 45.

86. See *supra* text accompanying notes 52–54.

bar.<sup>87</sup> In general terms, the critique posits that businesses will structure the arbitration process in ways that force consumers and employees into individuated proceedings,<sup>88</sup> and that ADR providers, in their desire to attract arbitration business,<sup>89</sup> will adopt rules that have a similar effect.

The most obvious way this might happen is by preventing class actions. Especially in the consumer context, arbitration skeptics often assume that businesses use arbitration specifically to prevent class actions,<sup>90</sup> an assumption

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87. See Alderman, *supra* note 68, at 1255 (“[A]s consumers have marshaled the resources and expertise to compete with the repeat player in the courts, the repeat player has taken steps to change the forum through the imposition of mandatory arbitration.”). A similar argument might be made about efforts to restrict lawyers’ ability to advertise or solicit clients. Cf. Yeazell, *The Silent Litigation Revolution*, *supra* note 32, at 1985–88 (describing how states resisted desegregation efforts by seeking to restrict lawyers’ ability to solicit clients and control the strategic direction of litigation). Other possibilities include limits on the fees recoverable by plaintiffs’ lawyers and reduced or contingent funding for legal aid, see THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 27–37 (2002), and many other aspects of the “tort reform” movement, including public relations efforts to shape public opinion about the legal system, e.g., Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears*”: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers, 50 DEPAUL L. REV. 453, 461–72 (2000); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 50–52, 65–71, 74–80 (2002). See also John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005) (characterizing current tort reform movement as a reaction to the expansion of tort rights).

88. Arbitration skeptics not surprisingly focus on the temptation for repeat-player contract drafters to structure the arbitration process to their advantage. E.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649–52 (2005); Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 221, 232–39; Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 606–08 (2004); Paul D. Carrington, *Self-Deregulation, the “National Policy” of the Supreme Court*, 3 NEV. L.J. 259, 285 (2002–2003). That temptation may be enhanced by the Supreme Court’s expansive interpretation of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2006), which has restricted states’ efforts to regulate the terms of arbitration agreements. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (invalidating state-law “conspicuous notice” requirement for arbitration agreements); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (extending the FAA to the limits of Congress’ authority under the Commerce Clause); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (noting that unless the parties agreed otherwise, the FAA would preempt a state law rule forbidding arbitral awards of punitive damages); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (describing states’ limited authority to regulate arbitration agreements); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the FAA established a “national policy favoring arbitration” applicable in state as well as federal courts).

89. Cf. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1063–64 (2000) (noting incentives for arbitrators to rule in ways that do not offend repeat-player businesses).

90. E.g., Mark E. Budnitz, *Arbitration of Disputes Between Consumers and*

buttressed by various comments made by consumer finance industry insiders, advocates, and ADR professionals.<sup>91</sup> Indeed, because the class action features so prominently in any discussion of consumer litigation—and thus in any discussion of consumer arbitration—debates over consumer arbitration focus primarily on the use of arbitration to eliminate consumer class actions.<sup>92</sup>

But the lack of class actions is only the most obvious example of how arbitration might individuate disputes. Others include arbitrators' failure to develop or follow precedent,<sup>93</sup> issue written, reasoned awards, or award punitive damages, attorney's fees, and injunctive relief.<sup>94</sup> Such individuated arbitration proceedings might not permit the economies of scale needed to justify substantial litigation investments, specialized training, or efforts to develop a case inventory.<sup>95</sup> Contingency-fee lawyers might decline cases destined for arbitration,<sup>96</sup> and those

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*Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 310, 318, 326–330 (1995); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396–99 (2005); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 75; Sternlight, *supra* note 70, at 5–12. While contract drafters initially may have assumed that merely including an arbitration agreement in the transaction would prevent class action litigation, that assumption is no longer tenable after *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Thus, we might expect contracts increasingly to contain express waivers of the right to bring or participate in class proceedings. See Bingham, *supra* note 88, at 236–37; Gilles, *supra*, at 410.

91. E.g., Dwight Golann, *Consumer Financial Services Litigation: Major Judgments and ADR Responses*, 48 BUS. LAW. 1141 (1993) (describing class action litigation in California between consumers and financial institutions and the subsequent implementation of arbitration programs); Alan S. Kaplinsky & Mark J. Levin, *Drafting and Implementing of a Consumer Loan Arbitration Clause*, 51 CONSUMER FIN. L.Q. REP. 295, 295 (1997) (opining that consumer financial services companies are pressured to settle lawsuits for reasons having nothing to do with their merits and advocating arbitration as a means to prevent such lawsuits, particularly class actions); Lloyd N. Shields, *The Role of Mandatory Arbitration for Financial Institutions*, 46 ARB. J. 49, 52 (1991) (article by director of AAA stating that “[a]rbitration may be the financial community’s answer to the class-action contingent-fee strike suit”); Letter from Curtis V. Brown, V.P. and General Counsel, National Arbitration Forum, to prospective client (Jan. 14, 1999) (on file with author) (noting that an arbitration clause may eliminate class actions); *see also* Complaint, *Ross v. Bank of Am., N.A.*, No. 05-CV-07116 (S.D.N.Y. filed Aug. 11, 2005) (on file with author) (alleging major credit card issuers conspired, in violation of antitrust laws, to impose arbitration agreements, in part to avoid class actions).

92. See *supra* notes 90–91.

93. See Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003) (“Unlike court opinions, which are published, most decisions of arbitrators are kept secret, often not even accompanied by a written opinion. Even when published and made available to the public, the decision of one arbitrator, or a panel of arbitrators, is in no way binding on any other arbitrator or panel.”). *Cf.* Abel, *supra* note 58, at 288–91, 290 (“Conflict can result in prospective aggregation through the declaration or modification of general behavioral norms.”).

94. See Menkel-Meadow, *supra* note 9, at 37.

95. See *supra* text accompanying notes 40–45.

96. Bingham, *The Repeat Player Effect*, *supra* note 27, at 198–200.



who accepted such cases might be relatively unspecialized, poorly capitalized, and otherwise less effective than their repeat-player peers in the plaintiffs' bar.<sup>97</sup> Indeed, the individuation critique might retain its force even if we thought consumers and employees generally fared well in individual arbitrations.<sup>98</sup> Without formal aggregation techniques like the class action, and without repeat-player lawyers, overall claiming rates might remain low,<sup>99</sup> and certain claims—those requiring substantial investments and sophisticated lawyers—might not be brought at all.<sup>100</sup>

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97. *Id.*

98. At least in the employment context, a growing body of empirical evidence suggests that employees may fare relatively well in arbitration. *See, e.g.*, Bingham, *The Repeat Player Effect*, *supra* note 27, at 213 (finding 63% employee win-rate in 1993–1994, but only 16% win-rate against “repeat players”); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J., Jan. 2004, at 44, 48–49 (finding that higher-pay employees fare as well or better in arbitration and that lower-pay employees may fare somewhat worse, but noting that apparent superiority of court over arbitration for lower-pay employees may reflect greater likelihood that court plaintiffs are subject only to “for cause” termination); Hill, *supra* note 27, at 817 (presenting data suggesting that “repeat player” effect noted by Bingham may be attributable to the presence of an internal dispute resolution program, which allows employers to screen out and settle meritorious cases before arbitration); Howard, *supra* note 45 (finding employee win-rate of 28% in court, versus 68% in AAA arbitration and 48% in securities industry arbitration; results do not take into account pre-trial dispositions and may therefore overstate win-rate in court); Maltby, *supra* note 24, at 47–48 (finding, among other things, that employee claimants receive on average 18% of their demand in arbitration, versus 10.4% in litigation; also noting that 60% of employment cases in federal court are terminated on pretrial motion, with employers winning 98% of those decisions); *see also* Sherwyn et al., *supra* note 27, at 1578 (summarizing existing research). *But see* Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573 (2005) (finding, based on study of employment arbitration awards subjected to judicial review, that employees succeed more often in arbitration than at trial, but recover less, and that women more often received “split awards,” such as awards denying attorney’s fees). A variety of methodological issues make it difficult to draw firm conclusions from this research. *E.g.*, Sherwyn et al., *supra* note 27, at 1564–66.

One study of consumer arbitration, conducted by Ernst & Young and funded by the American Bankers Association, suggests that consumers generally fare well as arbitration claimants, although the study makes some debatable assumptions, including that consumers prevailed each time a case was dismissed at the claimant’s request. ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2004) [hereinafter ERNST & YOUNG STUDY], available at [http://www.ey.com/global/download.nsf/US/Outcomes\\_of\\_Arbitration/\\$file/OutcomesofArbitrationAnEmpiricalStudy.pdf](http://www.ey.com/global/download.nsf/US/Outcomes_of_Arbitration/$file/OutcomesofArbitrationAnEmpiricalStudy.pdf). For criticism of this study, see Ctr. for Responsible Lending, *Comments on Ernst & Young Arbitration Outcomes Report* (Feb. 24, 2005), [http://www.responsiblelending.org/pdfs/ib025-Ernst\\_Young\\_Arbitration\\_Comments-0205.pdf](http://www.responsiblelending.org/pdfs/ib025-Ernst_Young_Arbitration_Comments-0205.pdf).

99. *See* Whitford, *supra* note 18, at 1030 (noting role of attorneys in informing consumers of rights).

100. *Cf. id.* at 1030 (noting importance of lawyers in “inform[ing] consumers of their rights in an effort to stimulate legal business”).

While theoretically defensible, these objections to arbitration at present have only modest empirical support.<sup>101</sup> The best available evidence suggests that only a minority of consumer arbitration agreements—albeit a substantial minority—expressly prohibit class actions,<sup>102</sup> although these terms may become more common after *Bazzle*.<sup>103</sup> Employment arbitration agreements may be less likely than consumer agreements to prohibit classwide proceedings.<sup>104</sup> As for other individuating contract terms, such as those restricting arbitration remedies, requiring confidentiality, or preventing arbitrators from issuing written awards, the

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101. One can find evidence that some businesses include one-sided terms in arbitration agreements in published judicial opinions ruling on a consumer's or employee's challenge to the agreement's enforceability. *See, e.g.*, Bales, *supra* note 88, at 606–08; Carrington, *supra* note 88, at 286; David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 56–59 (2003). But focusing on such cases may yield a skewed picture of arbitration agreements generally, as lawyers should be less willing to challenge a scrupulously even-handed arbitration agreement. To my knowledge, Professors Linda Demaine and Deborah Hensler have conducted the most systematic study of consumer arbitration agreements. Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55.

102. *See* Demaine & Hensler, *supra* note 101, at 60, 65 (finding that 30.8% of a sample of consumer arbitration agreements collected in 2001 included contract terms precluding class actions). In conducting research for this paper, I also collected as many of the arbitration agreements at issue in the AAA class arbitrations as I could find. (These agreements are often available on the AAA website; in other cases I downloaded them from PACER.) In total, I collected 32 agreements (16 consumer and 16 employment). Of these, 5 of the 16 (31%) of the consumer agreements forbid class actions, but none of the 16 employment agreements contains a similar term. I do not suggest that these results are representative of the broader universe of arbitration agreements. Class action prohibitions in particular may be underrepresented in the sample, as the AAA requires a court order before it will accept for class arbitration a dispute under an agreement that expressly bars class actions. *See* Am. Arbitration Ass'n, American Arbitration Association Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=25967>.

103. Gilles, *supra* note 90, at 410; Sternlight, *supra* note 70, at 90–91.

104. For example, in a 1995 survey of employment arbitration agreements, the General Accounting Office found that only one of the twenty-six clauses studied limited the remedies available in arbitration. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (1995) [hereinafter 1995 GAO REPORT]. The 1995 GAO Report did not mention whether any of the agreements forbade class actions, and silence on that point likely indicates that the agreements did not refer to class actions at all. *See* Mei L. Bickner et al., *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs*, 52 DISP. RESOL. J., Jan. 1997, at 8, 81 (reporting that two-thirds of surveyed employment arbitration plans did not restrict available remedies, although a minority limited damages in some way, and that around one-half of plans specifically permitted punitive damages; no reference to class action prohibitions). Again, in my sample of arbitration agreements drawn from the AAA class arbitrations, none of the employment agreements expressly barred class actions. *See supra* note 102 (also noting that such terms may be underrepresented in these agreements). For an analysis of arbitration clauses in a sample of franchise agreements, see Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695.

best available evidence suggests that these terms may be less common than the individuation critique would predict.<sup>105</sup>

While further study may reveal the critique to be an apt description of arbitration contracts in certain industries—the consumer finance industry is an example<sup>106</sup>—the existing evidence suggests that the critique may be somewhat overbroad. There are other reasons why businesses might prefer arbitration to litigation, and it is not obvious that most agreements will contain individuating terms.<sup>107</sup> Furthermore, as I discuss below, even when an agreement does contain such terms, their impact may be limited. To understand why, we need to examine the institutional context in which many arbitrations occur.

## 2. *The Potential Moderating Effect of ADR Provider Rules*

The individuation critique is founded on an explicitly contractualist model of arbitration. The model assigns to the contracting parties themselves primary authority for setting the terms of arbitration and gives correspondingly little weight to the role of extra-contractual forces in shaping arbitration procedure. Of course, consumer and employment contracts tend not to be models of arms-

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105. See, e.g., 1995 GAO REPORT, *supra* note 104 (finding in a 1995 survey of employment arbitration agreements that only one of the twenty-six clauses studied limited the remedies available in arbitration); Bickner et al., *supra* note 104, at 81 (reporting that two-thirds of surveyed employment arbitration plans did not restrict available remedies, although a minority limited damages in some way); Demaine & Hensler, *supra* note 101, at 69, 71–72 (finding that 13.5% of a sample of consumer agreements collected in 2001 required that some aspect of the arbitration be kept confidential and that 7.7% of the agreements restricted the remedies available in arbitration).

106. See *supra* note 91.

107. Arbitration, for example, likely reduces the cost of resolving disputes, see Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90–91, and businesses and employers may pass some of these savings on in the form of higher wages or lower prices, e.g., Drahozal, *supra* note 104, at 741; Ware, *supra*, at 90–94. Arbitration may also produce faster results; all else being equal, this is a clear benefit to claimants. Most of the empirical evidence concerning arbitration procedures and results has focused on employment arbitration. In that context, there seems little question that arbitration produces faster results, e.g., Maltby, *supra* note 24, at 55; Sherwyn et al., *supra* note 27, at 1572–73, 1578, 1588–89, and the same is likely true for consumer arbitration.

Employers in particular may have varied reasons for adopting arbitration programs. Many have long relied on a variety of informal dispute resolution procedures that may reduce the costs associated with disputing: legal expenses, lost management time, increased employee turnover, and reduced employee morale. See Sherwyn et al., *supra* note 27, at 1579; see also 1995 GAO REPORT, *supra* note 104 (finding, in survey of businesses that filed 1992 EEOC reports and had at least 100 employees, that almost 90% used some variety of ADR, though only 9.9% used arbitration (often not mandatory)). For a different perspective on employment arbitration, one focusing on the consequences of permitting private organizations to internalize the disputing process, see Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court*, in *IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD?*, *supra* note 10, at 290. And for a discussion of the risk-management function of arbitration, see Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004).

length negotiation. To those skeptical that market forces will produce an acceptable allocation of risk, such contracts are an invitation to overreach for the party with the stronger bargaining position. Put bluntly, the individuation critique posits that arbitration will individuate disputes because that is what businesses and employers want, and they will structure their arbitration agreements accordingly.

This explicitly contractualist view of arbitration, however, may oversimplify a far more complex empirical reality—one in which other forces also shape the arbitration process. Here, I will focus on the role played by ADR providers. As I discuss in more detail below, the institutional values and incentives under which providers operate differ in significant ways from those of the businesses who are presumed to dictate the terms of arbitration.<sup>108</sup> For now, the important point is that providers may have a significant impact on arbitration procedure.<sup>109</sup>

For example, the AAA and other providers have adopted “due process” protocols applicable to consumer and employment cases. These protocols set minimum standards of procedural fairness for arbitrations and have been endorsed by a variety of organizations with an interest in consumer and employment relationships.<sup>110</sup> For illustrative purposes, I will focus primarily on the AAA’s Consumer<sup>111</sup> and Employment<sup>112</sup> protocols, along with its arbitration rules,<sup>113</sup> in the following discussion. Readers should bear in mind that if an arbitration agreement does not substantially and materially comply with the governing protocol, the AAA may decline to administer the arbitration unless the business

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108. See *infra* text accompanying notes 225–248.

109. In a sense, ADR provider rules are not extrinsic to the arbitration agreement. Drafting parties are often aware of these rules, which offer off-the-rack disputing procedures that can be incorporated into the agreement. Yet when provider rules conflict with an express term in the agreement, the provider is typically involved in resolving the conflict, often by insisting that the business waive (or the consumer waive objection to) the offending term. In a sense, the provider’s involvement consists of facilitating a second negotiation between the business and the consumer over disputing remedies and procedures. In this negotiation, however, the consumer may be represented by a lawyer.

110. The employment protocol, for example, was developed by a task force comprised of individuals designated by a number of organizations representing employers, employees, and arbitration providers. Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 165 (2005). The protocol emphasizes that its principles reflect the views of the designees and not necessarily those of the designating organizations. *E.g.*, AM. ARBITRATION ASS’N, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995) [hereinafter EMPLOYMENT PROTOCOL], available at <http://www.adr.org/sp.asp?id=28535>.

111. See AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL (1998) [hereinafter CONSUMER PROTOCOL], available at <http://www.adr.org/sp.asp?id=22019>.

112. See EMPLOYMENT PROTOCOL, *supra* note 110.

113. See AM. ARBITRATION ASS’N, SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES (2005) [hereinafter CONSUMER RULES], available at <http://www.adr.org/sp.asp?id=22014>; AM. ARBITRATION ASS’N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (INCLUDING MEDIATION AND ARBITRATION RULES) (2005) [hereinafter EMPLOYMENT RULES], available at <http://www.adr.org/sp.asp?id=22075>.

waives the offending term or revises its agreement to eliminate the term.<sup>114</sup> Other ADR providers have adopted similar rules,<sup>115</sup> though not all are equally favorable from the perspective of consumer advocates.<sup>116</sup>

These rules already limit the ability of businesses to impose certain one-sided arbitration terms. For example, provider rules typically limit the up-front costs of arbitration<sup>117</sup> and may also protect consumers and employees from contract terms requiring them to travel great distances to attend an arbitration hearing.<sup>118</sup> Other rules address more directly some of the potentially individuating aspects of the arbitration process.

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114. Am. Arbitration Ass'n, Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization, <http://www.adr.org/sp.asp?id=22036> (last visited Jan. 20, 2007); AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 33–34 (2003) [hereinafter FAIR PLAY], available at <http://www.adr.org/si.asp?id=1843>. If the business refuses to waive the defect or amend its agreement, the claimant may or may not be entitled to litigate in court. The business might succeed in compelling arbitration before another provider or before another arbitrator. Presumably, however, evidence that the provider views the agreement as inconsistent with minimum standards of fairness would increase the likelihood that a court would invalidate the agreement altogether.

115. See JAMS, JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2005) [hereinafter JAMS CONSUMER POLICY], available at [http://www.jamsadr.com/rules/consumer\\_min\\_std.asp](http://www.jamsadr.com/rules/consumer_min_std.asp); JAMS, JAMS POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2005) [hereinafter JAMS EMPLOYMENT POLICY], available at [http://www.jamsadr.com/rules/employment\\_Arbitration\\_min\\_stds.asp](http://www.jamsadr.com/rules/employment_Arbitration_min_stds.asp).

116. Consumer advocates generally view the National Arbitration Forum's rules as the least favorable. For those rules, see NAT'L ARBITRATION FORUM, CODE OF PROCEDURE (2006) [hereinafter NAF CODE OF PROCEDURE], available at <http://www.arbforum.com> (follow "Rules & Forms" hyperlink), and NAT'L ARBITRATION FORUM, CONSUMER AND EMPLOYEE ARBITRATION RIGHTS (2006), available at <http://www.arbforum.com> (follow "Rules & Forms" hyperlink).

117. For claims that do not exceed \$75,000, AAA rules limit consumers' and employees' up-front costs to \$125 or \$375, depending on the size of the claim. See CONSUMER RULES, *supra* note 113, R. C-8. The Employment Rules cap costs for most employees at \$125, although the employee may agree to pay part of the arbitrator's fee. See EMPLOYMENT RULES, *supra* note 113, administrative fee schedule. Other ADR providers have adopted similar rules. See JAMS CONSUMER POLICY, *supra* note 115; JAMS EMPLOYMENT POLICY, *supra* note 115. *But see* NAT'L ARBITRATION FORUM, FEE SCHEDULE: FEES FOR COMMON CLAIMS 3 (2006), available at <http://www.adrforum.com/users/nafr/resources/20060501FeeSchedule2.pdf>. As a general matter, the National Arbitration Forum's fee schedule is the least favorable, and also appears to allow the business to impose a greater fee in the contract. *Id.* For a discussion and critique of provider rules generally, see Budnitz, *supra* note 60, at 136–43.

118. AM. ARBITRATION ASS'N, LOCALE DETERMINATIONS (2006), available at <http://www.adr.org/sp.asp?id=28629>; see also JAMS CONSUMER POLICY, *supra* note 115. The AAA, for example, may require the business to "waive the [contractually required] locale if the locale is not reasonably convenient" for consumers. AM. ARBITRATION ASS'N, LOCALE DETERMINATIONS, *supra*; see also JAMS CONSUMER POLICY, *supra* note 115, para. 5 (addressing location of consumer arbitration); *cf.* NAF CODE OF PROCEDURE, *supra*

a. Reasoned Versus Summary Awards

The lack of a written, reasoned award is potentially one of the more individuating features of arbitration.<sup>119</sup> When present, such awards may influence future arbitrators in similar cases and provide important information to third parties. For instance, in my example of car buyers who purchase an additional theft protection warranty, such an award might facilitate judicial review, alert state regulators to questionable practices, and inform other consumers about dealer practices.

To the extent businesses would prefer that arbitrators avoid written, reasoned awards, provider rules generally do not oblige. Of the three major arbitration providers, two generally require brief written, reasoned awards in both employment and consumer arbitration, and the third entitles parties to receive such an award upon request and payment of a fee.<sup>120</sup> In employment cases, the AAA also makes its awards public, although it redacts the identities of the parties and witnesses.<sup>121</sup> To be sure, businesses might forbid reasoned, written awards in the arbitration agreement itself; it is unclear whether providers like the AAA would view such contract terms as consistent with the due process protocols.<sup>122</sup> It is an open question whether such terms appear with any frequency in consumer and employment arbitration agreements. The scant empirical evidence suggests that they may be relatively rare.<sup>123</sup>

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note 116, R. 32 (stating that an in-person, participatory hearing is to occur in the federal judicial district where the respondent resides or does business; respondent “does business where it has minimum contacts with a Consumer [or employee]”). I know of no similar AAA policy expressly protecting employees, but other providers may have more protective policies. *See* JAMS EMPLOYMENT POLICY, *supra* note 115, Standard No. 6 (location of hearing must not preclude access to arbitration).

119. A reasoned award is one that explains, even if briefly, the arbitrator’s findings and reasoning.

120. *See* EMPLOYMENT RULES, *supra* note 113, R. 34; *see also* CONSUMER RULES, *supra* note 113, R. C-7 (only requiring that the award be in writing); CONSUMER PROTOCOL, *supra* note 111, Principle 15 (requiring arbitrator, upon timely request of either party, to provide brief written explanation of basis for award); JAMS EMPLOYMENT POLICY, *supra* note 115, Standard No. 8 (providing for “concise written statement” of reasons for award); JAMS CONSUMER POLICY, *supra* note 115, para. 10 (same). *But see* NAF CODE OF PROCEDURE, *supra* note 116, R. 37(H) (stating that awards are to be “summary awards” unless the parties agree otherwise, or unless a party requests findings of fact and conclusions of law and pays a fee).

121. EMPLOYMENT RULES, *supra* note 113, R. 34.

122. Consumer Protocol Principle 15 provides that “[a]t the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award.” CONSUMER PROTOCOL, *supra* note 111, Principle 15. Likewise, the Employment Protocol provides that “[t]he arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).” EMPLOYMENT PROTOCOL, *supra* note 110, pt. C.5.

123. One study of consumer arbitration agreements found that only 4 of 52 clauses stated that the arbitrator would not provide a written explanation of their award. *See* Demaine & Hensler, *supra* note 101, at 68–69. Likewise, in my review of the consumer and

b. Remedies Available in Arbitration

Businesses might also include in their agreements terms restricting the remedies available in arbitration. Once again, however, provider rules may limit the impact of these terms. For example, the AAA Consumer and Employment protocols provide that arbitrators should be able to award “whatever relief would be available in court.”<sup>124</sup> This does not necessarily imply that all contractual limitations on remedies are invalid. One interpretation is that an arbitrator should honor a limitation if a court, applying applicable law, would enforce it in a judicial proceeding.<sup>125</sup> Yet on one occasion, the AAA asserted that an agreement violated the Consumer Protocol by allowing only recovery of direct damages in most cases and barring recovery of punitive and other damages in all cases, without suggesting that its decision depended on whether a court would enforce a similar limitation.<sup>126</sup> This suggests that in some cases AAA policies might offer consumers and employees more protection from one-sided terms than would be available in court.

c. Limits on the Right to Bring or Participate in a Class Action

There is little evidence concerning how frequently consumer and employment arbitration agreements expressly prohibit classwide proceedings.<sup>127</sup> Nevertheless, provider rules generally do not disapprove of such terms. The AAA, for example, requires a court order before it will administer a class arbitration if the agreement purports to bar class actions, consolidation, or joinder.<sup>128</sup> This

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employment agreements at issue in the AAA class arbitrations, none of the twenty-six agreements forbade reasoned, written awards; two of the sixteen consumer and nine of the sixteen employment agreements explicitly called for such awards.

124. See CONSUMER PROTOCOL, *supra* note 111, Principle 14; EMPLOYMENT PROTOCOL, *supra* note 110, pt. C.5; see also JAMS CONSUMER POLICY, *supra* note 115, para. 3 (stating that remedies that would be available in court must remain available in consumer arbitration); JAMS EMPLOYMENT POLICY, *supra* note 115, Standard No. 1 (same, for employment arbitration). As I indicated earlier, *supra* note 114, AAA policy is to decline to administer an arbitration if the agreement does not substantially and materially comply with the relevant protocol, unless the business waives the term or amends the agreement.

125. Cf. NAF CODE OF PROCEDURE, *supra* note 116, R. 20D (stating that remedies may not be “unlawfully restricted”—suggesting lawful restrictions should be enforced).

126. See Affidavit of Neil B. Currie on Behalf of the American Arbitration Association in Response and Objection to a Subpoena for Documents Issued By Plaintiff, *Ragan v. AT&T Corp.*, No. 02-L-168 (Ill. Cir. Ct. July 15, 2002) (on file with author).

127. See *supra* note 102.

128. See Am. Arbitration Ass’n, American Arbitration Association Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=25967>. For a rather tendentious summary of the evolution of the JAMS class action policy, see Kelly Thompson Cochran & Eric J. Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 793–94 (2005). The National Arbitration Forum (“NAF”) rules do not expressly address class arbitration, but the NAF has marketed its services in the past as one way for businesses to avoid class litigation altogether. See Letter from Curtis V. Brown, Vice President and General Counsel, National Arbitration Forum, to prospective client (Jan. 14, 1999) (on file with author) (noting that an arbitration clause may eliminate class actions).

policy is rather tolerant of class action prohibitions; the implication is that AAA arbitrators may not even consider challenges to the enforceability of such terms.<sup>129</sup> Instead, parties wishing to challenge them must do so in court.<sup>130</sup>

### 3. Summary

As we have seen, although arbitration providers are relatively indulgent of contract terms prohibiting class actions, their rules may limit the ability of businesses to impose certain one-sided terms, including some terms that individuate the disputing process. Nevertheless, if aggregation by formal or informal methods is essential to create a level playing field in arbitration, ADR providers do not yet do enough to facilitate this process. For individual consumers, for example, arbitral “due process” primarily means a neutral decision-maker, limited discovery, and a simplified hearing process.<sup>131</sup> These procedures may be incompatible with cases requiring significant discovery or raising complex issues. Moreover, provider rules do not establish conditions under which an arbitrator’s decision may be given precedential effect. This silence is consistent with the view that arbitration is neither “rule-based” nor “rule-communicating.”<sup>132</sup> That is, arbitrators need not apply consistent rules in similar cases,<sup>133</sup> nor do they

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129. *E.g.*, Letter from Thomas G. Foley Jr. to Karen Fontaine, AAA, 1–2 (Dec. 21, 2004). The letter recounts that, although the arbitration agreement barred class actions, the parties had agreed to let the arbitrator decide whether to allow class arbitration anyway, but that despite this agreement the AAA had declined to accept the case unless the claimants dropped their request for class arbitration or obtained a court order.

130. Contrast this policy to typical arbitration rules, which permit the arbitrator to decide questions of arbitrability, including questions concerning the existence, scope, or validity of the arbitration clause. *E.g.*, AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 7(a) (2005) [hereinafter COMMERCIAL RULES], available at <http://www.adr.org/sp.asp?id=22440>. Just how decision-making authority should be allocated between courts and arbitrators is a matter of some dispute among arbitration scholars. Compare Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 823–27 (2003) (generally suggesting a more active role for courts in considering challenges to the enforceability of arbitration agreements), with Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1 (2003) (generally suggesting a more limited role in which courts decide only questions that legitimately call into question a party’s assent to arbitration). Courts, too, have reached conflicting results. Compare *Hawkins v. Aid Ass’n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) (referring to arbitration dispute over enforceability of terms limiting remedies and class actions in arbitration), with *Ting v. AT&T*, 319 F.3d 1126, 1148–52 (9th Cir. 2003) (considering whether class action ban and other terms rendered arbitration agreement unconscionable). The AAA policy is noteworthy because, whichever decisionmaker should address these challenges, it is unusual indeed for an ADR provider voluntarily to limit its own decision-making authority.

131. This often means a “desk arbitration,” a telephonic hearing, or a streamlined in-person hearing that might last no more than a day. See CONSUMER RULES, *supra* note 113, R. C-5 & C-6; COMMERCIAL RULES, *supra* note 130, R. E-8.

132. Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 988–89.

133. As a general rule, arbitrators need not follow the decisions of other arbitrators, nor apply rules of substantive law: “The weight of authority permits an arbitrator



necessarily communicate rules to third parties in ways that influence future behavior.<sup>134</sup>

What may be most surprising, however, is the extent to which many provider rules even now do facilitate aggregation. Even outside the class arbitration context, for example, providers may require reasoned, written awards and may refuse to administer arbitrations where the agreement limits the remedies available to consumers or employees.<sup>135</sup> Moreover, providers may sometimes object to one-sided terms, such as terms requiring litigation in a remote forum, even when courts might reach the opposite conclusion.<sup>136</sup> These rules are hard to square with the individuation critique, which presumes that businesses wish to impose an individuated disputing process and that providers will abet them in that goal.

As a description of current arbitration practices, then, the individuation critique is of uncertain validity. Assessing its merit requires answers to a number

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to ‘do justice as he sees it’ and fashion an award that embodies the individual justice required by a given set of facts.” Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992). The FAA implicitly acknowledges this flexibility by sharply limiting the grounds on which a court may vacate an arbitral award; vacatur is not available for errors of law. *See* 9 U.S.C. § 10 (2006). And while some courts leave room to vacate awards issued in “manifest disregard of the law,” or that violate public policy, few awards are vacated on these grounds. *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 724–25 (1999); *see also* *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580–81 (7th Cir. 2001) (equating arbitrator to parties’ agent, who may order any relief parties could agree to themselves; vacatur on “manifest disregard” or public policy grounds appropriate only where award directs a violation of law). Thus, “an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator’s decision whether or not the arbitrator applies the law.” Ware, *supra*, at 711.

In consumer and employment arbitration, this “lawless” aspect of arbitration may raise concerns, especially over arbitrators’ ability and willingness to apply “mandatory” public law. *E.g.*, Ware, *supra*, at 727–28 (noting inconsistency of treating legal rules as mandatory in all contexts except arbitration). As an empirical matter, of course, arbitrators may or may not follow substantive law in consumer and employment disputes; there is little evidence on the question. *E.g.*, Patricia A. Greenfield, *How Do Arbitrators Treat External Law*, 45 INDUS. & LAB. REL. REV. 683, 694 (1992) (evaluating a sample of labor arbitration awards and concluding that “few arbitrators consider statutory rights fully and in detail”). If concerns over “lawlessness” are empirically valid, they may be addressed, at least in part, by provider rules requiring arbitrators to follow the law. *E.g.*, CONSUMER PROTOCOL, *supra* note 111, Principle 15(2). Where providers insist on such rules, refusal to apply mandatory substantive law arguably would exceed the arbitrator’s power and provide grounds for vacatur. *See* 9 U.S.C. § 10(a)(4) (2006).

134. *See* Baruch Bush, *supra* note 132, at 989; *see also* Landes & Posner, *supra* note 15, at 238–40 (noting reasons why private dispute resolution systems are unlikely to produce rules or precedent). As I note below, there may be conditions under which arbitrators do indeed develop something akin to precedent. *Infra* text accompanying notes 197–213.

135. *See supra* text accompanying notes 119–126.

136. *E.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596–97 (1991) (upholding forum selection clause requiring residents of Washington State to litigate in Florida).

of empirical questions about the contents of arbitration agreements, the role played by arbitration providers, and the participants in consumer and employment arbitrations.<sup>137</sup> For example, to what extent do businesses include individuating terms in their agreements? How effectively and consistently do arbitration providers enforce their due process protocols?<sup>138</sup> How frequently do lawyers represent consumers in arbitration proceedings, and what are the characteristics of those lawyers?<sup>139</sup> Are there conditions under which written, reasoned awards will produce something akin to precedent in arbitration? Without answers to these questions, it is difficult to assess how accurately the individuation critique describes modern consumer and employment arbitration.

Moreover, a full assessment of the individuation critique requires more than an accurate description of current arbitration practices. We must also consider arbitration's potential to facilitate aggregation. In the rest of this article, I argue that arbitration may have a great deal of potential. This is especially true for consumers, who except for the class action have little ability to aggregate their claims or to benefit from lawyers' aggregation efforts.<sup>140</sup> The remainder of this paper describes some ways that arbitration might achieve this potential, focusing on consumer disputes. Some of my suggestions are hypothetical and require that we rethink or revise current arbitration practices. But others may already be features of arbitration. Taken together, they suggest a system that, for many consumers, may prove superior to the courts in important respects.

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137. Answering these questions requires more than examining the results of arbitration proceedings, though that research is essential as well. See *supra* note 98 for a description of the existing research on arbitration outcomes, which primarily deals with employment arbitration.

138. With respect to the AAA, for example, we do not know whether it routinely conducts an adequate, independent review of the governing agreement before accepting a case for arbitration. In theory, specially trained AAA staff review the arbitration agreement at the start of the arbitration, identify any non-conforming terms, and give the business the opportunity to waive the term or revise the agreement. See FAIR PLAY, *supra* note 114, at 33–34; see also CONSUMER RULES, *supra* note 113, R. C-2(a) (requiring claimant to attach agreement to arbitration demand). I know of no data on how effectively this process screens out non-conforming arbitration agreements. Further research, and improved disclosure by providers, is needed to answer this question. See CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE 26–32 (2004) [hereinafter CDRI REVIEW], available at [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf) (noting problems with providers' data reporting pursuant to California statute).

139. There is some, albeit weak, evidence that consumer claimants are finding lawyers in arbitration. California law requires arbitration providers to make public information about certain consumer, employment, and health care arbitrations. See CAL. CIV. PROC. CODE § 1281.96 (West Supp. 2006). One recent study of this data found that 79.5% of the consumer-initiated arbitrations were commenced by a lawyer. See CDRI REVIEW, *supra* note 138, at 20, 26–32 (also noting problems with data reporting). Following California law, however, the study broadly defines “consumer” to include employment, real estate, insurance, and other disputes, and many of the claims involved amounts (reported in only a minority of arbitrations) large enough to attract a lawyer: \$90,341 (mean) and \$19,800 (median). *Id.* at 20.

140. See *supra* text accompanying notes 55–81.

It may seem counterintuitive to argue that arbitration has the potential to be a superior forum for aggregation of consumer claims. After all, how can a system supposedly controlled by more powerful interests be more favorable to consumer litigants? I address this objection in the last section.

## II. RETHINKING THE ABILITY TO AGGREGATE DISPUTES IN ARBITRATION

### A. Class Arbitration as a Laboratory for Innovation in Formal Aggregation

Although it may turn out to be a short-lived phenomenon,<sup>141</sup> class arbitration is the most obvious example of arbitration's potential to facilitate aggregate dispute resolution. Achieving this potential, however, may require that we reimagine current class arbitration practices. I do not want to describe the AAA class arbitration rules in detail. Suffice to say that they largely imitate federal class action practice.<sup>142</sup> So do the rules adopted by JAMS, the only other major ADR provider (to my knowledge) with class arbitration rules.<sup>143</sup> Given the variety of unanswered questions raised by class arbitration,<sup>144</sup> perhaps providers can be forgiven for offering a familiar set of procedural rules.<sup>145</sup> Unfortunately, these rules largely fail to engage with the possibilities of class arbitration.

For example, AAA rules parrot the predominance inquiry of Federal Rule of Civil Procedure 23(b)(3), asking whether common questions of law or fact predominate over questions affecting only individual class members.<sup>146</sup> The point of this inquiry is to decide whether class members' claims are sufficiently alike to

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141. For example, some businesses may seek to eliminate classwide proceedings altogether by appending class action prohibitions to their arbitration agreements, or, if courts prove unwilling to enforce such prohibitions, may channel class actions into court. As I discuss below, however, it is also possible that class arbitration is here to stay. *See infra* text accompanying notes 173–188.

142. For a truncated discussion of that practice in consumer cases, see *supra* text accompanying notes 68–81.

143. The JAMS rules are also available on-line. JAMS, JAMS Class Action Procedures, [http://www.jamsadr.com/rules/class\\_action.asp](http://www.jamsadr.com/rules/class_action.asp) (last visited Jan. 27, 2007). For a thorough discussion of provider rules and due process issues raised by class arbitration, see Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006).

144. For example, what, if any, due process rights do absent class members and defendants have? To what extent and under what conditions will the award bind absent class members? What is the court's role in supervising a class arbitration?

145. Indeed, the decision to model class arbitration rules on FED. R. CIV. P. 23 may reflect little more than the AAA's ambivalence. *See* Russ Bleemer, *The Current State of Class Action Arbitration*, 22 ALTERNATIVES TO HIGH COST LITIG. 63, 68–69 (2004) (summarizing comments by William K. Slate II, president and CEO of the AAA, that although the AAA had on occasion administered class arbitration referred by courts, they “never asked for” the increase in class arbitration occasioned by *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)). It may also merely reflect the tendency of lawyers and courts to favor familiar procedures.

146. *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS R. 4(b) (2003) [hereinafter AAA CLASS RULES], available at <http://www.adr.org/sp.asp?id=21936>; JAMS, JAMS CLASS ACTION PROCEDURES R. 3(b)(3) (2005), available at [http://www.jamsadr.com/rules/class\\_action.asp](http://www.jamsadr.com/rules/class_action.asp).

warrant collective, representative adjudication,<sup>147</sup> or, under another view, whether formal aggregation will promote efficiency without sacrificing fairness.<sup>148</sup> These are necessary questions in any adjudicative context, but there is no reason why they should yield the same answers in arbitration and litigation. Yet that is what the AAA rules seem to suggest.<sup>149</sup> In effect, the AAA class rules encourage arbitrators to view a class arbitration merely as a class action that happens to occur in arbitration.

This is a remarkably impoverished view of class arbitration, one that views arbitration as little more than a private court system and arbitrators as little more than judicial impersonators. But arbitration has potential, in part, precisely because arbitrators are not judges. Subject to constraints imposed by the parties' agreement, arbitrators, unlike judges, have great flexibility to fashion an appropriate remedy<sup>150</sup> and to adopt efficient procedures that are tailored to the parties' dispute.<sup>151</sup> There is no reason why this authority should vanish once the arbitrator contemplates collective dispute resolution procedures. At least in theory, such procedures need bear little resemblance to the class action, and, even under a more limited view, federal class action practice should inform—but rarely dictate—class arbitration practice.

Exactly how arbitrators should approach the decision to certify a class is a complex topic, and one that is tangential to my purposes.<sup>152</sup> But it is one worth

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147. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

148. John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 401 (2000) (disputing that predominance inquiry asks about class cohesion and locating purposes of requirement in concerns for judicial efficiency).

149. For example, in one class arbitration, a panel of arbitrators declined to certify a class of franchisees, operators of retail art galleries, who alleged that franchisor representatives misrepresented the likely profitability of their businesses at a series of meetings. The panel reasoned that “[c]lass action status is generally denied in cases alleging verbal fraud because of the need for individualized proof on key factual issues, including the making of the misrepresentations, materiality, reliance and damages.” Class Determination Award at 6, *Tarek, LLC v. Kincade*, No. 11 Y 114 00578 04 (Apr. 4, 2005) (Am. Arbitration Ass’n), available at <http://www.adr.org/si.asp?id=1896>.

150. See *supra* note 133. Arbitrators may also be constrained by provider rules, of course. For example, the Consumer Rules instruct arbitrators to apply pertinent substantive law. See CONSUMER RULES, *supra* note 113, R. C-7(c).

151. On arbitrators’ authority to control arbitration procedure, see, e.g., *Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8, 11 (1st Cir. 2001); *InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 352 (S.D.N.Y. 2005); *M&L Power Servs., Inc. v. Am. Networks Int’l*, 44 F. Supp. 2d 134, 142–44 (D.R.I. 1999). If arbitrators have great flexibility to fashion substantive relief, see, e.g., *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580–81 (7th Cir. 2001); *Ware*, *supra* note 133, at 711, they should have at least as much flexibility to fashion arbitration procedure. If the agreement does not forbid a particular procedure, the arbitrator should, in theory, be free to use it, unless perhaps the process violates some fundamental notion of what is fair in arbitration or permissible as a matter of policy.

152. Also separate issues are the many potential objections to class arbitration, beginning with normative objections to the wholesale privatization of justice. For example, one might argue that juries, not arbitrators, should decide whether the conduct of an

exploring.<sup>153</sup> The flexibility and informality of arbitration do not make it unsuitable for class litigation,<sup>154</sup> quite the contrary. These attributes permit arbitrators to implement innovative procedures that courts have been hesitant to accept.<sup>155</sup>

Consider once more my example of car buyers who purchase a theft-protection “warranty.”<sup>156</sup> I mentioned earlier that class certification was unlikely in court, because, to a judge, questions of misrepresentation, reliance, and damages all require individualized proof.<sup>157</sup> This insistence on individualized proof reflects an almost entirely individuated view of adjudication, one that rejects the use of collective proof even if it is the most efficient method—perhaps even the only economically feasible one—to resolve large numbers of similar disputes. For example, it is unlikely that a judge would agree to estimate that an actionable misrepresentation occurred in 40 percent of, say, 1,000 transactions, causing an average loss of \$500, and to devise some formula for allocating the resulting \$200,000 judgment among class members. At the risk of oversimplifying, the goal of a class action in court is to find out which class members relied to their detriment on a salesperson’s misrepresentation and to award to those class members (and no others) the appropriate relief.<sup>158</sup>

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employer or business violates the broader community values underlying applicable law. *See, e.g.,* Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 2 (1999) (“[T]he absence of a jury makes arbitration an inappropriate forum for resolving claims that derive from an employer’s violation of external community values.”).

153. Recent scholarship has begun to address the many questions raised by class arbitration, but has not addressed the standards arbitrators should apply to class certification decisions, nor the range of aggregative procedures that might be available in arbitration. Examples of scholarship addressing class arbitration, or the use of arbitration to avoid class actions, include Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) be Resolved by Class-Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451 (2005); Buckner, *supra* note 143; Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. L. REV. 301 (2004–2005); Gilles, *supra* note 90; Sternlight, *supra* note 70; Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737 (2005).

154. *See* Bales, *supra* note 152, at 2 (“[A]rbitration’s informality makes it an inadequate forum for resolving large, complex, class-based claims.”).

155. In this sense, class arbitration may be more akin to an estimation proceeding in a bankruptcy case involving mass tort claims than to a judicial class action. Bankruptcy judges have exercised substantial discretion in devising efficient methods for estimating the debtor’s aggregate liability to a class of individual claimants. *See, e.g., In re Eagle-Picher Indus., Inc.*, 189 B.R. 681 (Bankr. S.D. Ohio 1995); *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988).

156. *Supra* text accompanying notes 55–56.

157. *See supra* text accompanying notes 75–78.

158. This goal arguably conflicts with the reality of large-scale litigation—perhaps even with the reality of any routine form of litigation, such as personal injury litigation—in which individual claims are typically resolved by settlement according to essentially actuarial principles. *E.g.,* Issacharoff & Witt, *supra* note 19, at 1618, 1625–31.

An arbitrator, by contrast, might ask the following, very different question: Is it consistent with the parties' agreement to resolve this dispute in a collective fashion and, if so, what type of process is fair, efficient, and consistent with the remedial purposes of the relevant substantive law?<sup>159</sup> Answering this question, the arbitrator might decide to hold an initial hearing to resolve common issues,<sup>160</sup> followed by hearings on the merits for a representative sample of car buyers, the results of which would then be extrapolated to the class as a whole. Thus, after finding in favor of 40 percent of the sample claimants, the arbitrator might award \$200,000 to the class (again, assuming a class of 1,000 and an average award of \$500).<sup>161</sup> After fixing the defendant's aggregate liability, and perhaps discharging it from the case, the arbitrator might devise procedures for allocating funds among class members, might rely on other ADR processes like mediation to allocate funds, or might simply allocate funds pro rata.<sup>162</sup>

The foregoing is only one example modeled on trial plans that have been proposed (though rarely accepted) in judicial proceedings.<sup>163</sup> But the fact that courts use such procedures rarely, if at all, should not be determinative. Many of the constraints that shape class action practice in court do not apply to arbitration:

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159. Because most arbitration agreements will not specify arbitration procedures, much less procedures for collective adjudication, the parties effectively delegate to the arbitrator the authority to devise appropriate dispute resolution procedures, much the same as they have delegated the authority to fashion an appropriate remedy. *See supra* note 151.

160. *See supra* note 77 for examples of common issues.

161. For arguments in favor of applying similar techniques in court, especially in the mass tort context, see David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 31–33 [hereinafter Rosenberg, *Cost Without Benefit*]; David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1892–97 (2002) [hereinafter Rosenberg, *Decoupling*]; Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998); Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329 (1999).

162. In most consumer cases, it seems unlikely that a pro rata distribution would result in significant numbers of opt-outs, given the relatively modest stakes involved and the expense of individual adjudication. (Though, as I argue, *infra* text accompanying notes 189–224, arbitration may be a more hospitable forum than the courts for resolving individual consumer claims.) One might object that a pro-rata distribution to claimants will overcompensate some and undercompensate others. There are two short answers to this objection. First, an arbitrator could devise simplified procedures for distributing proceeds according to some relevant metric—severity of harm, strength of claim, etc.—without conducting extensive (and expensive) fact-finding. Second, an arbitrator could legitimately conclude that a pro-rata distribution is consistent with the parties' agreement. Arguably, consumers benefit by trading expensive, individualized procedures for simplified procedures that produce higher net proceeds for allocation. *Cf.* Rosenberg, *Decoupling, supra* note 161, at 1885–87 (arguing, in mass tort context, that plaintiffs would prefer, *ex ante*, a system that distributes proceeds according to severity of loss rather than strength of claim).

163. *Compare* Hilao v. Estate of Marcos, 103 F.3d 767, 786–87 (9th Cir. 1996) (approving use of sampling to measure damages in suit under Torture Victim Protection Act), *with* Cimino v. Raymark Indus., 151 F.3d 297, 311 (5th Cir. 1998) (holding that trial plan based on statistical sampling violated state law, due process, and the right to a jury trial).

The right to trial by jury in class actions seeking damages is an example.<sup>164</sup> And those that do apply may mean something quite different to an arbitrator than to a judge. So even if there is a right to due process in arbitration,<sup>165</sup> which includes, say, the right to obtain essential discovery,<sup>166</sup> no one would suggest that arbitrators follow Federal Rules of Civil Procedure 26 through 37. That is because, although arbitrators may order substantial discovery in appropriate cases, implementing federal discovery practice would compromise arbitration's virtues—informality and efficiency chief among them<sup>167</sup>—without offering a commensurate benefit. There is likewise no reason to compromise these virtues in the class certification decision.

This is not to say that class arbitration should be a free-for-all. Arbitrators should ensure that class representatives and counsel will adequately represent the class, that they have no material conflicts of interest, and that class members have adequate notice and opportunities to participate in the arbitration.<sup>168</sup> Beyond that,

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164. An arbitration agreement, of course, relinquishes that right. That is why some have suggested that arbitration agreements be judged by a “knowing, voluntary, and intentional” standard. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 676 (2001). But see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167, 167–68 (defending use of contract-law standards of assent).

165. At least in individual arbitrations, most courts hold that there is no right to due process. See Buckner, *supra* note 143, at 214–16. See generally Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 7; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 38 (1997).

166. Cf. *Norman v. Young*, 422 F.2d 470, 474 (10th Cir. 1970) (affirming default judgment granted as sanction for withholding discovery materials and asserting that default judgment protected plaintiff's right to due process).

167. See Wilson, *supra* note 153, at 779 (noting these strengths). As should be obvious, I disagree with the view that arbitration's “relative efficiency, low cost, informality and flexibility, and privacy [] are likely to be substantially diminished or even eliminated in the class action context.” *Id.* A class arbitration is surely less efficient, more costly, etc. than one individual arbitration, but that seems the wrong comparison. Compared to a (hypothetical) multitude of individual arbitrations or lawsuits, class arbitration may offer significant efficiency and other advantages. Nor is it obvious that these advantages disappear when we compare class arbitration to class litigation. To be sure, current class arbitration rules sacrifice much of arbitration's potential advantage by slavishly adhering to federal class action practice (and by contemplating a multitude of essentially interlocutory appeals). But these procedures could be refined to make class arbitration a more efficient and flexible process.

168. Without such protections, it seems unlikely that a class arbitration award would bind absent class members. To the extent *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), implicitly approves class arbitration in at least some cases, see *supra* note 5, it follows that absent class members can be bound by such proceedings. But it is unclear exactly how they are bound. Does a court order confirming the award bind them if the motion to confirm is filed by the arbitration class representative? Must the court itself certify a class on the common question of whether the award should be confirmed or

arbitration procedures should be fair to all parties—providing, for defendants, a dispassionate assessment of liability, a reasonably accurate measure of any damages owed to the class as a whole,<sup>169</sup> and a judgment that binds class members. But as long as they honor these restrictions, and any lawfully imposed by the parties' agreement, arbitrators need not mimic judges in deciding whether to certify a class.<sup>170</sup>

The AAA class arbitrations suggest that at least some arbitrators recognize that they have a good deal of procedural flexibility, though perhaps not to the degree I am suggesting.<sup>171</sup> Indeed, both arbitration proponents and skeptics, each of whom often take for granted that arbitration will individuate disputes, should acknowledge, even welcome, the potential benefits of class arbitration. Properly administered, class arbitration could preserve many of arbitration's traditional virtues—efficiency, expert decision-making, flexible procedure—while enabling claimants to capture litigation economies and to compete with respondents on relatively even terms.<sup>172</sup>

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vacated? Or will subsequent courts and arbitrators simply give preclusive effect to a prior class arbitration award, no matter how (or whether) it is confirmed? For a brief discussion of similar issues in class arbitration, see Kristen M. Blankley, *Res Judicata and Class Action Arbitration Awards*, 4 MAYHEW-HITE REP. ON DISP. RESOL. & CTS. (2005–2006), <http://moritzlaw.osu.edu/jdr/mayhew-hite/vol4iss1/lead.html>.

169. *E.g.*, Rosenberg, *supra* note 161, at 1892–97 (arguing in mass tort context for separating deterrence and compensation functions, first assessing the defendant's liability and damages in the aggregate, then distributing according to severity of loss).

170. To some extent, of course, class arbitration rules constrain arbitrators' procedural options. But I do not interpret the current rules to preclude all procedural innovation in class arbitration. Although the rules are modeled on FED. R. CIV. P. 23, that does not mean that an arbitrator must follow federal case law in deciding, say, whether statistical sampling is both fair and consistent with the parties' agreement. As I have mentioned, many of the principles that inform the case law have limited, or no, relevance to arbitration. *See supra* text accompanying notes 164–167.

171. As one arbitrator reasoned in certifying a class of physicians challenging an insurer's reimbursement practices:

If it is found that [the insurer engaged in a scheme to underpay physicians], then how [the scheme] affected various members of the class will have to be dealt with. If all of these contracts were breached, then a remedy will be found. Procedures could be subclasses within this arbitration, separate arbitrations, or some combination thereof. . . . Arbitration is a flexible tool and I am confident that when and if that point is reached, good management will handle the individual claims in a fair and expeditious manner. Since the alternative, denying the class, is essentially to deny these doctors any realistic possibility of redress, I believe that we should go ahead and do the best we can.

Partial Final Class Determination Award of Arbitrator at 11–12, *Sutter v. Oxford Health Plans*, No. 18 193 20593 02 (Mar. 24, 2005) (Am. Arbitration Ass'n), *available at* <http://www.adr.org/si.asp?id=1835>. In another, more problematic, example, an arbitrator certified an opt-out class of employees under the Fair Labor Standards Act, which permits only opt-in collective actions. *See* Class Determination Partial Final Award at 4–10, *Cole v. Long John Silver's Rests.*, No. 11 160 00194 04 (Sept. 19, 2005) (Am. Arbitration Ass'n), *available at* <http://www.adr.org/si.asp?id=2011>.

172. *See supra* text accompanying notes 35–37.



Of course, arbitrators must honor contractual limits on their authority, which raises an obvious objection: Won't businesses simply revise their agreements expressly to prohibit class proceedings? Arbitration skeptics often assume that such clauses will become common,<sup>173</sup> but this may be unduly pessimistic. To be sure, some businesses, especially in the consumer finance and telecommunications industries, appear to view arbitration as a means to eliminate class litigation, and these businesses may expressly prohibit class actions in their agreements.<sup>174</sup> Except for one study, however, there is little evidence of the frequency with which such prohibitions appear in consumer contracts.<sup>175</sup> As I discuss below in the context of individual arbitration, consumers and consumer advocates ultimately may have significant influence over arbitration procedures<sup>176</sup> and over whether businesses use arbitration agreements in the first place.<sup>177</sup> Over the long-term, whether businesses will routinely seek to contract around the class action remains an open empirical question.

Of course, to the extent arbitration agreements include terms prohibiting class actions, there remains the normative question whether such terms should be enforced. A minority of the reported cases hold that class action prohibitions will be invalid in at least some circumstances.<sup>178</sup> A great deal has been written about the role of the class action in securing the enforcement of public law, and I will not repeat that discussion here.<sup>179</sup> For my purposes, it is enough to recognize that class action prohibitions can effectively eliminate private rights of action granted by important public laws, and that a principled argument can be made in favor of judicial or legislative intervention to prevent this from happening.

Assuming businesses cannot contract around the class action altogether, of course, they may elect to arbitrate only individual disputes, channeling class actions into court. In fact, some lawyers for businesses engaged in consumer transactions have expressed distaste for class arbitration.<sup>180</sup> This is not surprising;

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173. *E.g.*, Gilles, *supra* note 90, at 410; Sternlight, *supra* note 70, at 90–91.

174. As I mentioned earlier, *supra* note 102, of the sixteen consumer arbitration agreements I located from the AAA class arbitrations, five expressly bar class actions. All five of these agreements involve businesses in the consumer finance or telecommunications industries.

175. *See* Demaine & Hensler, *supra* note 101, at 65.

176. *See infra* text accompanying notes 239–246.

177. *See infra* note 246 and accompanying text.

178. *E.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005); Muhammad v. County Bank, 912 A.2d 88 (N.J. 2006); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 278–80 (W. Va. 2002); Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1178–79 (W.D. Wash. 2002). Arguably, the arbitrator should decide whether to enforce a ban on class proceedings, but that is a topic for a different article. The Supreme Court has yet to decide whether the FAA requires courts to enforce contract terms prohibiting class arbitration. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 455–60 (2003) (Rehnquist, C.J., dissenting) (asserting that FAA requires enforcement of contracts “according to their terms,” including contract term dissent interpreted to bar class actions).

179. *E.g.*, Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996).

180. *See The Current State of Class Action Arbitration*, *supra* note 145, at 67–68 (reporting comment attributed to attorney Alan Kaplinsky—who can fairly be described as a

class arbitration is an unfamiliar phenomenon, and current AAA rules do little to make it efficient or cost-effective. But under a more rational set of class arbitration rules, it is at least conceivable that some businesses, like consumers, might benefit from properly-administered class arbitration.

While there are limits to a business's ability to dictate arbitration procedure,<sup>181</sup> it can structure the class arbitration process to eliminate or reduce many of its likely objections to class actions.<sup>182</sup> For example, an arbitration agreement could significantly (and in my view, legitimately) reduce the scope of discovery,<sup>183</sup> substantially reducing the cost of arbitration. It could also replace a lay jury with an expert decision-maker,<sup>184</sup> possibly reducing the expected amount of any award,<sup>185</sup> and it could provide a further hedge against large and unpredictable awards by calling for de novo review.<sup>186</sup> Moreover, many of the uncertainties now present in class arbitration will be removed as arbitrators and courts process the disputes now in the system.<sup>187</sup> If the class action does survive, at

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proponent of predispute arbitration agreements—that he advises clients to include terms declaring the entire arbitration agreement void if a court or arbitrator finds the class action prohibition to be unenforceable).

181. See *infra* text accompanying notes 232–248 (describing how those procedures evolve, in part, in response to other forces).

182. Contract parties also may tailor judicial procedures, though to a lesser extent. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable* (Accepted Paper Series, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=888221](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888221).

183. Although arbitrators may order substantial discovery in appropriate cases, the scope of discovery will likely be much more limited in arbitration, whether or not the agreement imposes additional (and enforceable) restrictions. Compare FED. R. CIV. P. 26(b), with COMMERCIAL RULES, *supra* note 130, R. 21, and AM. ARBITRATION ASS'N., COMMERCIAL RULES AND MEDIATION PROCEDURES (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES) L3 & L4 (2005), available at <http://www.adr.org/sp.asp?id=22440>.

184. Cf. Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 66–67 (2001) (noting reasons to doubt jurors' capacity to resolve complex issues in high stakes cases).

185. There is some evidence from individual arbitrations that award amounts may be lower in arbitration than in litigation. *E.g.*, Bingham, *The Repeat Player Effect*, *supra* note 27, at 199–200; Sherwyn et al., *supra* note 27, at 1576. Whether or not this is true of class arbitration, arbitrators may be less likely than juries to award extravagant amounts.

186. This review could take place before a panel of arbitrators, see FAIR PLAY, *supra* note 114, at 21, or, perhaps, in court, *e.g.*, Christopher R. Drahozal, *Contracting Around RUA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 426–33 (2003).

187. Ultimately, cost may be the most significant barrier to class arbitration, as arbitrators must be paid for their time. But the arbitration agreement can limit or offset these costs, for example by limiting discovery or by capping the length of the arbitration hearing. Moreover, current provider rules increase the cost of class arbitration by providing for a series of essentially interlocutory appeals. See, *e.g.*, AAA Class Rules, *supra* note 146, R. 3 & 5. These rules should be changed, as they needlessly complicate the process and may significantly increase the expense of class arbitration.

least some businesses might benefit by choosing tailored class arbitration procedures over the off-the-rack class action procedures in court.<sup>188</sup>

### *B. Aggregation in Individual Disputes*

Notwithstanding my analysis in the prior section, it is possible that class arbitration will be a short-lived phenomenon.<sup>189</sup> If that is true, many consumers will have to assert claims, if at all, in individual arbitrations. Yet even in individual arbitration, we should not assume that arbitration necessarily will individuate the disputing process. In a number of ways, individual arbitration might facilitate the informal aggregation of consumer claims.

#### *1. Reduced Cost*

An obvious and frequently noted potential benefit of arbitration is reduced cost and time of dispute resolution. These potential benefits may not induce repeat-player lawyers to accept consumer arbitration cases, especially if fewer cases are settled in arbitration than in court.<sup>190</sup> And to the extent arbitration awards tend to be lower than jury verdicts,<sup>191</sup> lawyers may be less willing to accept cases on a contingency basis,<sup>192</sup> unless they win more frequently in arbitration.<sup>193</sup> Yet repeat-player lawyers are already unlikely to accept large numbers of consumer cases, even those destined for court.<sup>194</sup> If arbitration costs less and yields generally favorable results, it at least raises the possibility that lawyers might build practices around handling large volumes of relatively low-value claims.<sup>195</sup> This would be a clear benefit to consumer claimants.<sup>196</sup>

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188. To a degree, of course, parties may of course customize the procedures and remedies that will be available to them in court. But arbitration offers significantly greater opportunities for customization. *E.g.*, Moffitt, *supra* note 182.

189. *Supra* note 173 and accompanying text.

190. *See, e.g.*, Sherwyn et al., *supra* note 27, at 1575 (noting in employment context that reduced cost and faster disposition may increase lawyers' willingness to take cases, but that reduced defense costs might make settlement less likely).

191. *See supra* note 185.

192. Much, though not all, of the premium lawyers obtain from contingency fee practice may derive from the top 10–20% of case recoveries. *See* Kritzer, *Seven Dogged Myths*, *supra* note 40, at 766–68, 772. To the extent arbitration reduces expected recoveries, lawyers may be less willing to accept arbitration cases. *See* Bingham, *The Repeat Player Effect*, *supra* note 27, at 199–200.

193. *See* Sherwyn et al., *supra* note 27, at 1567–69 (discussing studies of win-rate in employment arbitration); *see also supra* note 98 (discussing Ernst & Young Study of consumer arbitration).

194. *See supra* text accompanying notes 57–67.

195. *See* Frederic N. Smalkin & Frederick N.C. Smalkin, *The Market for Justice, the "Litigation Explosion," and the "Verdict Bubble": A Closer Look at Vanishing Trials*, 2005 FED. CTS. L. REV. 8, 40 (2005) ("[T]he speed and low cost . . . [of] arbitration . . . may work in favor of the plaintiff's attorney who handles a large volume of cases and/or is underwriting costs for an impecunious clientele.").

196. The frequency with which consumers are represented by lawyers in arbitration, and the characteristics of those lawyers (repeat player vs. one-shotter), are important areas for further study. *See supra* note 139.

## 2. Development of Precedent

It is routine to hear that arbitrators neither follow nor create precedent.<sup>197</sup> And there is no doubt some truth to this. But there is also some reason to believe that, over time, arbitrators' decisions may come to form what Professor Richard Reuben has called "collective arbitral wisdom."<sup>198</sup> For that to happen, of course, arbitrators may need to issue reasoned awards. Some ADR providers now encourage or require this in consumer and employment cases.<sup>199</sup>

Whether or not these awards become public,<sup>200</sup> they increase the likelihood that information about arbitration results will spread among consumers and their lawyers.<sup>201</sup> And, in turn, arbitrators will become better informed about how their peers have decided particular issues. As a result, although not bound by prior decisions, arbitrators might develop a consensus about how to interpret particular contract terms or how to view particular business practices. One can imagine, for example, a consistent pattern of awards finding that a particular business model—say, providing an up-front cash "rebate" and nominal access to internet services in exchange for a consumer's agreement to make substantial monthly payments—constitutes consumer lending activity subject to state usury law.<sup>202</sup>

Indeed, the AAA class arbitrations offer an example of how such a consensus might develop. The AAA Class Rules call for a clause construction award, in which the arbitrator determines whether the parties' agreement permits class arbitration.<sup>203</sup> These awards are available to the public, and of course they are of great interest to the lawyers involved in these cases. So far, arbitrators have

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197. See Alderman, *supra* note 68, at 1242; Baruch Bush, *supra* note 132, at 988–89; see also Menkel-Meadow, *supra* note 9, at 37 (noting that lack of reasoned or written opinions may individuate disputing process).

198. Reuben, *supra* note 89, at 1085.

199. The AAA Employment Rules, for example, require arbitrators to state "the written reasons" for their award, unless the parties agree otherwise, and also make redacted versions of awards available to the public on a cost basis and on the AAA website. EMPLOYMENT RULES, *supra* note 113, R. 34; see also CONSUMER RULES, *supra* note 113, R. C-7 (only requiring that the award be in writing); CONSUMER PROTOCOL, *supra* note 111, Principle 15 (requiring arbitrator, upon timely request of either party, to provide brief written explanation of basis for award); JAMS EMPLOYMENT POLICY, *supra* note 115, Standard No. 8 (providing for "concise written statement" of reasons for award); JAMS CONSUMER POLICY, *supra* note 115, para. 10 (same). *But see* NAF CODE OF PROCEDURE, *supra* note 116, R. 37(H) (awards to be "summary awards" unless the parties agree otherwise, or unless a party requests findings of fact and conclusions of law and pays a fee).

200. Even if not made publicly available by the ADR provider, in many circumstances, the award would become public if the prevailing party sought a court order confirming it. See Reuben, *supra* note 89, at 1086.

201. See *id.* at 1085 (noting that spread of information may offset repeat-players' advantage in arbitration); Bingham, *The Repeat Player Effect*, *supra* note 27, at 218–19 (noting that repeat-player lawyers might gather information on arbitrators and make other investments in intellectual capital).

202. See *State ex rel. Cooper v. NCCS Loans, Inc.*, 624 S.E.2d 371, 377 (N.C. App. 2005).

203. See AAA Class Rules, *supra* note 146, R. 3.

issued clause construction awards in thirty-one consumer and employment cases, and in all but one they have interpreted the agreement to permit class certification.<sup>204</sup> Now, even judges have limited use for precedent in interpreting actual contract language. Yet while acknowledging they were not bound by other arbitrators' interpretations of other contracts, some arbitrators have discerned, and followed, a "national pattern of clause construction awards."<sup>205</sup> And even when they assign little weight to prior clause construction awards, the cases show the arbitrators engaging with those awards much like one trial judge might engage

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204. Perhaps this consistency can be attributed to arbitrators' presumed tendency to issue rulings that favor their continued jurisdiction (and collection of fees). *E.g.*, *Trafalgar Shipping Co. v. Int'l Milling Co.*, 401 F.2d 568, 573–74 (2d Cir. 1968) (Lumbard, J., dissenting); Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?*, 13 AM. REV. INT'L ARB. 19, 27 (2002). But in a number of cases arbitrators who interpreted the agreement to permit class arbitration subsequently denied certification, dismissed the arbitration on the merits, or otherwise ruled contrary to their presumed economic interests. *E.g.*, *Class Certification Award of Arbitrator, Milstein v. Protection One Alarm Servs., Inc.*, No. 11 110 00270 04 (May 12, 2005) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=1876> (denying class certification); *Award on Motions (i) for Summary Disposition and (ii) For Posting of Bond at 16–24, Rhodes College Inc. v. Satz*, No. 11 181 02217 04 (July 5, 2005) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=2133> (granting motion to dismiss); *Award on (i) Clause Construction, and (ii) Motion to Dismiss for Lack of Jurisdiction at 8–11, Warrior Transportation v. FFE Transp. Servs. Inc.*, No. 11 118 00365 05 (Aug. 18, 2005) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=1966> (invalidating entire arbitration agreement—not a consumer or employment case); *Partial Final Clause Construction Award, Budner v. Wellness Int'l Network, Ltd.*, No. 11 181 00828 04 (Dec. 20, 2004) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=1721> (interpreting agreement to require dispute to be brought in court).

In any event, an arbitrator seeking only to maximize fees might think it strategically unwise to prolong class arbitrations. Presumably, these arbitrators derive some (probably most) of their fees from commercial arbitrations between businesses. Class arbitration respondents and their lawyers are likely to be repeat players in these business-to-business disputes and can discipline "pro-claimant" arbitrators not only by denying them future class arbitration work, but by denying them future work in commercial disputes as well. By contrast, the plaintiffs' class action firms that represent claimants in class arbitrations may appear infrequently in business-to-business disputes. These are all assumptions, of course, but they seem at least plausible.

205. *Clause Construction Award at 14–17, Awe v. I&M Rail Link, LLC*, No. 11 160 00026 05 (May 4, 2005) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=1938>; *Clause Construction Award at 3 & app., Grayson v. Rent-A-Center, Inc.*, No. 11 160 01823 04 (Aug. 8, 2005) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=1947> (listing decisions by other arbitrators); *see also* *Clause Construction Award at 2, Ali v. Morton's of Chicago/Sacramento, Inc.*, No. 11 160 02015 05, (Mar. 22, 2006) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=2177> (referencing the "vast majority of clause construction awards"); *Partial Final Clause Construction Award of Arbitrator at 9–11, Petsch v. Orkin Exterminating Co.*, No. 11 181 02541 04 (Aug. 31, 2005) (Am. Arbitration Ass'n), available at <http://www.adr.org/si.asp?id=2153> (discussing award in similar dispute and court's ruling declining to vacate that award).

with another's opinion in a similar case.<sup>206</sup> We should not automatically equate class arbitration to the arbitration experiences of individual consumers, nor should we assume that clause construction awards are typical examples of arbitral decision-making. Nonetheless, the class arbitrations suggest that, with an active plaintiffs' bar, reasoned awards, and rapid exchange of information about arbitration results, arbitration may produce a body of law that is essentially "public"—i.e., a set of publicly available principles that convey information about the arbitration process and guide decision-making in future cases.

In fact, arbitrators themselves may have professional values conducive to the development of a "public" body of law. These values might include a desire to transmit knowledge to future arbitrators, to demystify the process for lawyers who are skeptical of arbitration, or to communicate the nature of the arbitration process to the public or to policymakers. Labor arbitration offers an example of how a private dispute resolution system can create "public" law in this fashion. Like the Restatements of the Law, *The Common Law of the Workplace*, a standard reference in labor arbitration, attempts to distill a large body of "common law"—in this case the decisions of labor arbitrators—into a set of principles to guide future disputes.<sup>207</sup> Although these principles are not formally binding, arbitrators may hesitate to depart from them in any significant way.<sup>208</sup> Compared to labor arbitration, consumer and employment arbitration are relative newcomers, and it is possible that they will develop similar bodies of "public" law over time.<sup>209</sup> The AAA's decision to begin publishing its employment awards, even if in redacted form, is a modest step in that direction.<sup>210</sup>

Indeed, there is a sense in which ADR providers already establish precedent, not just informal consensus. As I have explained, the AAA conducts an

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206. E.g., Clause Construction Award at 3, *Hearthside v. Qwest Dex, Inc.*, <http://www.adr.org/si.asp?id=1722> (noting two prior clause construction awards but describing them as "unhelpful" on the question whether state law relevant to this case, and the parties' agreement, permitted class arbitration); Clause Construction Award at 25–28, *Scher v. Oxford Health Plan, Inc.*, <http://www.adr.org/si.asp?id=2144> (dissent; noting more than twenty consistent clause construction awards, attempting to distinguish some of them, and finally expressing disagreement with the remainder).

207. THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., 2d ed. 1998).

208. E.g., Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 501 (1976). According to Summers, [a]lthough arbitrators often cite to no other decisions in their opinion and never consider other cases as binding precedents, they usually are quite aware of the pattern of decisions by other arbitrators and are reluctant to deviate far from that pattern. Results in a discipline case may well depend on the length of the arbitrator's foot, but that leads to relatively small differences, for there are few peg-legs or abominable snowmen among arbitrators, and no one follows in their footsteps.

209. Cf. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843, 907 (2004) (noting development of public law attributes in securities arbitration).

210. See *supra* note 199.

administrative review of each arbitration agreement prior to accepting a case.<sup>211</sup> If an agreement does not substantially comply with the due process protocol, the business must either waive the offending term or amend its agreement.<sup>212</sup> If the process works as designed, the due process rules—such as the rule against restrictions on remedies—effectively act as precedent applicable to all disputes administered by the provider. Perhaps consumer lawyers and advocates should press for a conception of arbitral “due process” that includes some procedure for multiple claimants to obtain binding rulings on merits issues as well. As I explain below, there is reason to believe provider rules may become more favorable to consumers over time.<sup>213</sup>

### 3. *Facilitating Award Collection*

Beyond reducing disputing costs and time and developing precedent, other policies, if implemented by ADR providers, would make arbitration more attractive to consumer claimants and repeat-player lawyers. One simple and effective reform would be for providers to decline to arbitrate disputes when a business has not paid, or sought a court order vacating, awards issued in favor of individual consumers. There is some precedent for such a procedure. The National Association of Securities Dealers has taken steps to reduce the number of unpaid securities arbitration awards issued on behalf of investor claimants.<sup>214</sup> These steps include requiring NASD member broker-dealers to certify that they have paid outstanding awards and, in some cases, suspending the license of members who fail to pay.<sup>215</sup>

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211. See *supra* notes 114 & 138 and accompanying text.

212. See *FAIR PLAY*, *supra* note 114, at 33–34. The consequences of AAA’s refusal to accept the case are unclear. Possibly, the business could still compel arbitration before another provider, but it might also find itself litigating the case (and all others under the agreement) in court.

213. See *infra* text accompanying notes 232–248.

214. In 2001, around 33% of NASD-administered monetary awards issued in favor of investors were not fully paid, down from 64% in 1998, and around 55% of awarded amounts remained unpaid, down from 80% in 1998. Most of the unpaid awards involved brokers who had left the securities industry. U.S. GEN. ACCOUNTING OFFICE, GAO-03-162R, FOLLOW-UP REPORT ON MATTERS RELATING TO SECURITIES ARBITRATION 3, 9–10 (2003) [hereinafter 2003 NASD REPORT]; see also U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-115, SECURITIES ARBITRATION: ACTIONS NEEDED TO ADDRESS PROBLEM OF UNPAID AWARDS 33–39 (2000) [hereinafter 2000 NASD REPORT] (discussing data on unpaid awards and NASD procedures); U.S. GEN. ACCOUNTING OFFICE, GAO-01-654R, EVALUATION OF STEPS TAKEN TO ADDRESS THE PROBLEM OF UNPAID ARBITRATION AWARDS (2001) [hereinafter 2001 NASD REPORT] (discussing steps taken to monitor award payment).

215. See 2003 NASD REPORT, *supra* note 214, at 10. Some have questioned whether these steps adequately address the problem of unpaid securities arbitration awards. Per Jebson, *How to Fix Unpaid Arbitration Awards*, 26 PACE L. REV. 183, 200–05 (2006). Most of the unpaid awards, however, involve broker-dealers who have left the securities industry, filed for bankruptcy, or challenged the award in court. See 2003 NASD REPORT, *supra* note 214, at 9–10 & tbl.1. Unpaid awards are a problem in any context, but these reasons for non-payment may have little to do with arbitration in general or with NASD rules in particular.

For individual consumers, such a policy would offer substantial benefits, potentially saving them the delay and expense involved in confirming the award<sup>216</sup> and invoking the judicial execution process,<sup>217</sup> and thereby making consumer arbitration claims far more attractive to lawyers. Nor does it seem outlandish to expect ADR providers to adopt such policies, perhaps modeling them on those implemented by the NASD. Providers have already demonstrated a willingness to decline arbitrations where the agreement does not conform to their standards of fairness.<sup>218</sup> Perhaps a reasonable conception of arbitral “due process” includes the notion that ADR providers should not lend their services to businesses who refuse to honor their awards.

#### 4. Punitive Damages and Other Remedies

I have already mentioned the AAA’s assertion that it will not administer arbitrations under an agreement that prevents consumers from recovering punitive and other damages.<sup>219</sup> That statement was made in an affidavit submitted by an AAA official in opposition to a subpoena seeking discovery of AAA documents.<sup>220</sup> Given that context, the statement may say more about the AAA’s desire to avoid discovery than it does about actual AAA policy. As I have said, I know of no data showing how consistently the AAA or other providers enforce their due process protocols.<sup>221</sup> This is an area worthy of further study, although providers will have to make available the necessary data. Yet the AAA’s statement is a reasonable interpretation of the Consumer Protocol, and it sets a precedent that may influence, if not control, the analysis of other agreements. It suggests, moreover, that ADR providers can play a role in limiting businesses’ efforts to include “remedy stripping”<sup>222</sup> terms in their arbitration agreements.<sup>223</sup>

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216. This is a significant point. While there is reason to believe that arbitration is less expensive than litigation for consumers, *see supra* text accompanying notes 190–196, an arbitration award must be confirmed by a court before it becomes a judgment enforceable by judicial process, *see* 9 U.S.C. § 9 (2006). *See also* Thomas H. Oehmke, *Arbitration Highways to the Courthouse: A Litigator’s Roadmap*, 86 AM. JUR. TRIALS 111, § 244 (2006). When comparing the cost (in dollars and time) of arbitration to litigation, then, the proper comparison may be between (1) the cost of arbitration plus the cost of judicial proceedings to confirm the award and (2) the cost of litigating the disputes on the merits.

217. Unrepresented consumers in particular may struggle to understand and utilize the arcane execution process. *See* Abel, *supra* note 58, at 298.

218. *See, e.g., supra* notes 114, 138.

219. *See supra* text accompanying note 126.

220. *See supra* note 126.

221. *See supra* text accompanying note 138.

222. Schwartz, *supra* note 101, at 49.

223. Other suggested reforms are designed to limit repeat players’ potential advantage in arbitration, though not to induce repeat players into arbitration on behalf of consumers and employees. *E.g.,* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 452–53 (2004) (suggesting disclosure of relationship between provider and other party, and option to file suit in court if the provider and repeat player have a relationship “that produces the appearance of partiality”).



### 5. Summary

A less costly dispute resolution system that shares some aspects of a “public” legal system, facilitates award collection, and offers some protection from onerous contract terms would offer significant benefits to consumers. Returning once more to my theft-protection warranty example, even if class arbitration were unavailable, it is possible that consumers might find specialized lawyers willing to represent them in individual cases. Seeking to develop favorable rules, those lawyers might make significant litigation investments and seek to build an inventory of cases. The relative ease of collecting awards would further encourage lawyer participation, while making it easier for claimants who wished (or had no choice but) to represent themselves to do so. Claiming rates might increase, along with settlement rates,<sup>224</sup> further reducing the cost of arbitration on a per-dispute basis. While imperfect, such a system would in many ways represent an improvement over the procedures available to individual consumer litigants in court.

### C. The Effect and Evolution of Provider Rules

The cautiously optimistic view of arbitration underlying my prior discussion raises some obvious objections. For one thing, arbitration is contractual.<sup>225</sup> A business can designate an ADR provider that will enforce its chosen terms, or it can forego a provider’s services and simply require the parties to designate an arbitrator from an acceptable list.<sup>226</sup> For that matter, ADR providers compete fiercely for business.<sup>227</sup> Providers that implement business-friendly terms may have a competitive advantage. If that is true, why should we expect provider rules to become more favorable to consumers, rather than less?

It seems likely, however, that businesses will continue using providers like the AAA. As growing arbitration caseloads suggest,<sup>228</sup> businesses value providers’ services, which may include identifying and training potential arbitrators, handling case logistics, and promulgating off-the-rack arbitration procedures.<sup>229</sup> No doubt the market for arbitration services is competitive,<sup>230</sup> and

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224. To the extent arbitration yields predictable results in similar cases—and both precedent and easy award collection increase the likelihood that this will happen—one might expect settlement rates to increase.

225. See Bales, *supra* note 88, at 602–04.

226. See Bingham, *supra* note 88, at 239–43 (discussing how ADR provider rules can create a more balanced system but noting that drafters can avoid these protections by creating their own arbitration panels or contracting with alternative providers); Harding, *supra* note 223, at 421–22.

227. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 52 (1999).

228. E.g., Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 199 & n.43 (2000) (describing increase in AAA and JAMS caseload in 1990s); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 167 & n.11 (2003) (reporting increase in AAA caseload from 1990–2002).

229. See Brunet, *supra* note 227, at 52–53 (also noting that bundling these

providers that implement unpopular policies risk losing business.<sup>231</sup> So it would be foolish to expect providers to insist on rules that were unacceptable to their customers. But for several reasons providers may implement, and businesses may accept, reasonable arbitration reform.

First, judicial scrutiny limits the extent to which providers can favor their business customers, and in fact may create pressure to increase the level of “due process” afforded consumers.<sup>232</sup> Providers need courts to view their procedures as fair, and businesses want assurances that courts will respect a provider’s rules and enforce awards issued by its arbitrators.<sup>233</sup> Thus, providers may file amicus briefs defending their procedures,<sup>234</sup> and they may adjust their procedures in response to judicial criticism.<sup>235</sup> These are investments in reputation; to a judge familiar with

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services may reduce transaction costs). In “non-administered” arbitration, the parties and the arbitrator may handle case logistics, and the provider’s role, if it has one, may be limited to helping select an arbitrator or ruling on challenges to the arbitrator.

230. See Reuben, *supra* note 89, at 1063–64 (also noting subtle incentives that may cause arbitrators to favor institutional players). In collections cases, in which consumers are respondents, there may be particular cause for concern. Given the modest stakes in many collections cases, few consumer debtors are likely to be represented by repeat-player lawyers, *see supra* note 82, and this may enhance businesses’ ability to shape the arbitration process.

231. For example, JAMS, a major ADR provider, recently retracted a policy generally viewed as favorable to class arbitration, replacing it with one similar to the AAA’s. See Meredith W. Nissen, *Class Action Arbitrations*, DISP. RESOL. MAG., Summer 2005, at 19; Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2005) (on file with author); *see also supra* note 128.

232. Courts routinely police the fairness of arbitration agreements, most often through state-law unconscionability doctrine, but also when deciding whether to confirm or vacate an arbitration award. *See, e.g.,* Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (holding that agreement that, among other things, prevented consumer from bringing class action was unconscionable); Shankle v. B-G Maint. Mgmt., 163 F.3d 1230, 1235 (10th Cir. 1999) (refusing to enforce agreement that required employee to pay half of arbitration expenses); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (same, where agreement required employee to pay arbitrator’s fee); *see also* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 222 (2004) (generally describing and critiquing courts’ application of unconscionability doctrine to police arbitration agreements).

233. See Drahozal, *supra* note 104, at 752, 769–70; Llewellyn Joseph Gibbons, *Creating a Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT’L L. & BUS. 1, 27 (2002).

234. *E.g.,* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 280–81 (1995) (noting that AAA had filed an amicus brief); Brief Amicus Curiae of the American Arbitration Ass’n, Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235), 2000 WL 744161.

235. See AAA Reduces Arbitration Costs to Be Paid by Employees, 57 DISP. RESOL. J., Jan. 2003, at 5 (noting that AAA had reduced cost of arbitration to employees and that change was in response to recent court decisions); Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremiad on the “Costs of Arbitration,”* 57 DISP. RESOL. J., Jan. 2003, at 8, 11–12 (noting provider trend

an ADR provider, designation of that provider in a contract may signal that the agreement should be upheld.<sup>236</sup> This dialogue between courts and providers, moreover, is a two-way street. Provider rules and due process protocols inform courts about best practices in arbitration, and courts may come to view the absence of these practices as a warning sign.<sup>237</sup> Over time, this dialogue may limit contract drafters' efforts to impose procedures that conflict with those "reputable" providers view as fundamental to a fair arbitration process.<sup>238</sup>

As others have noted, moreover, providers and businesses are subject to a variety of external constraints that, over time, may lead to arbitration reform. Pressure from the plaintiffs' bar, for example, may lead ADR providers to reform arbitration procedures.<sup>239</sup> And consumers themselves may create pressure for reform. Businesses and providers that resist needed reform might suffer reputational consequences.<sup>240</sup> As an initial matter, one might think employers more sensitive to reputational concerns than businesses engaged in consumer transactions.<sup>241</sup> Moreover, consumers may have less information about businesses' practices than employees do about the practices of their employers. In the workplace, information about the employer's dispute resolution process may spread easily among employees.<sup>242</sup> By contrast, information may spread less easily

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towards reduced cost).

236. See, e.g., *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1318 (Ct. App. 1986) ("The rules of the American Arbitration Association . . . are generally regarded to be neutral and fair."); *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at \*15 (N.D. Cal. Apr. 5, 2004) (rejecting challenge to confidentiality requirement under AAA rules: "The AAA is a reputable arbitration body and the reasons for confidentiality are designed to protect all parties in a dispute"); see also *Drahozal*, *supra* note 104, at 752 ("An institution that develops a reputation for unfairness or biased arbitrators risks losing credibility, which courts rely on to recognize and enforce arbitral awards.").

237. See *Harding*, *supra* note 223, at 409 ("[A]t a minimum, the protocols have influenced, to some degree, both the manner in which arbitration agreements are evaluated and the development of the common law regarding the conditions that must be met for a court to compel arbitration.").

238. Cf. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (noting testimony and amicus briefs by ADR providers criticizing as unfair the arbitration process structured by the employer).

239. E.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 399 (2005) (noting role of plaintiffs' employment lawyers in shaping arbitration law and practices); Menkel-Meadow, *supra* note 9, at 41-43 (describing threatened boycott of ADR providers by the employment plaintiffs' bar and creation of resulting employment arbitration due process protocol); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 41 n.19 (attributing development of employment due process protocol to pressure from plaintiffs' employment bar); Margaret A. Jacobs, *Firms With Policies Requiring Arbitration Are Facing Obstacles*, WALL ST. J., Oct. 16, 1995, at B5 (describing potential boycott of ADR providers).

240. See *Drahozal*, *supra* note 104, at 767-69.

241. See *id.* at 768-69.

242. If the employer hopes to use arbitration and other ADR tools to resolve disputes quickly and with little acrimony—preserving workplace morale and minimizing employee turnover, see *Sherwyn et al.*, *supra* note 27, at 1579; see also *supra* note 107—it will not help to have employees quickly discover that the employer has stacked the deck in

among dispersed consumers.<sup>243</sup> Yet new technologies and increased interest among consumers and advocacy groups are facilitating information exchange<sup>244</sup> and enabling campaigns to pressure businesses and arbitration providers.<sup>245</sup> To date, most of these efforts have focused on eliminating pre-dispute arbitration agreements altogether, sometimes successfully.<sup>246</sup> Consumer groups might have similar success advocating for reforms to existing arbitration practices.

But focusing on the need for consumers to force arbitral reform, or courts to impose it, may overlook a fundamental point about how arbitration procedure evolves. Ultimately, there may be limits to the ability of businesses and other repeat players to control the evolution of arbitration procedure. Instead, to a significant degree those procedures may evolve over time through the combined influence of ADR providers, arbitrators, and lawyers.<sup>247</sup> This process may result in the widespread adoption of a reasonably uniform and fair set of procedures even in transactions between parties of unequal bargaining power.<sup>248</sup>

### III. CONCLUSION

By aggregating claims in formal and informal ways, one-shot claimants enhance their ability to compete in litigation with their repeat-player adversaries. In what I have called the individuation critique, skeptics assert that arbitration does not permit such aggregation. While arbitration proponents defend arbitration for independent reasons, such as economic efficiency, they do not suggest that arbitration could or should facilitate aggregate dispute resolution. Thus, both sides of the debate view arbitration as an individuated disputing process.

This shared view of arbitration takes too much for granted. As an empirical matter, it is not clear whether the individuation critique accurately describes current arbitration practices. Perhaps more importantly, neither side of the arbitration debate gives much thought to arbitration's potential to facilitate aggregate dispute resolution. This is unfortunate, for arbitration has a good deal of

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its favor.

243. See Drahozal, *supra* note 104, at 769.

244. See *id.* at 768.

245. E.g., Give Me Back My Rights!, <http://www.givemebackmyrights.com> (last visited Jan. 25, 2007); Call Before You Buy, <http://www.callbeforeyoubuy.com> (last visited Jan. 25, 2007).

246. For example, in most cases Fannie Mae and Freddie Mac will no longer purchase or securitize mortgage loans that contain pre-dispute arbitration agreements. See FANNIE MAE, ANNOUNCEMENT 04-06, at 4-5 (2004), available at <http://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2004/04-06.pdf>; Freddie Mac, Freddie Mac Promotes Consumer Choice With New Subprime Mortgage Arbitration Policy (Dec. 4, 2003), [http://www.freddiemac.com/news/archives/afford\\_housing/2003consumer\\_120403.html](http://www.freddiemac.com/news/archives/afford_housing/2003consumer_120403.html).

247. See Laura J. Cooper, *The Process of Process: The Historical Development of Procedure in Labor Arbitration*, in ARBITRATION 2005: THE EVOLVING WORLD OF WORK 99, 119-120 (Charles J. Coleman ed., 2006).

248. See *id.* at 120 (arguing that labor arbitration procedures evolved “to a point where they are universally accepted as fair by workers, unions, employers and courts, without their having been the product of negotiations between parties of equal bargaining power”).

potential. In class arbitration, arbitrators have the flexibility to resolve, in fair, efficient, and collective terms, disputes that would have to proceed individually in court. Arbitrators should recognize and use this authority, and courts should respect it. Even in individual cases, arbitration has the potential to facilitate the informal aggregation of disputes. As currently practiced, arbitration may create precedent in a variety of ways and offers consumers and employees some protection from a variety of oppressive terms. Appropriate reforms might strengthen these features of arbitration and offer additional benefits not available in court, such as simplified, low-cost collection of awards.<sup>249</sup>

Both proponents and skeptics have reason to embrace arbitration's aggregative potential, especially but not exclusively in consumer disputes. For proponents, the creation of such a system would further legitimize arbitration, demonstrating its capacity to provide justice on even terms and increasing support for arbitration among consumers, consumer advocates, and plaintiffs' lawyers. Skeptics, too, should recognize the promise of arbitration and advocate for reforms to enhance its aggregative potential. Accomplishing such reforms, however, may require more than a broadside attack on pre-dispute arbitration itself. That such attacks have been staples of consumer advocates and private lawyers is perhaps unsurprising. These actors share a justified suspicion that businesses do not implement arbitration programs as a service to their customers. Objections to consumer arbitration in particular also reflect a concern for the future of the class action. Yet however justified, these concerns should not lead us to reject pre-dispute arbitration out-of-hand, nor to cease efforts to influence the evolution of arbitration procedure. Potentially, arbitration may prove superior to the courts as a forum for resolving many consumer disputes. Consumers may benefit most if we recognize the possibilities as well as the dangers of arbitration.

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249. See *supra* text accompanying notes 214–218. As I have described, ADR provider rules have gradually become more favorable to consumer and employee claimants. For example, in addition to gradually reducing the cost of arbitration, see Estreicher & Ballard, *supra* note 235, at 11–12; see also *supra* text accompanying note 117, ADR providers may now (1) require that arbitration agreements be mutually binding, see JAMS CONSUMER POLICY, *supra* note 115, para. 1; JAMS EMPLOYMENT POLICY, *supra* note 115, Standard No. 7; (2) require that businesses waive contract terms requiring arbitration in an inconvenient forum, see *supra* note 118 and accompanying text; (3) decline arbitrations under agreements that limit the remedies available in arbitration, see *supra* note 124–126 and accompanying text; (4) make awards publicly available, see *supra* notes 199–200 and accompanying text; and (5) require reasoned opinions, see *supra* note 199.