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## Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration

**ABSTRACT.** In consumer and employment arbitration, companies have more freedom to choose dispute resolution procedures than they do in courts. Specifically, companies may, through their form contracts, require their customers and employees to waive their rights to present certain forms of evidence, conduct certain forms of discovery, appeal a final judgment, and join a class. Because these procedural terms are attractive to companies, they often require their consumers and employees to bring claims to arbitration rather than to courts. Consequently, consumer and employment disputes appear less frequently on courts' dockets than they would in the absence of mandatory arbitration, preventing courts from providing important public goods. Many critics have proposed various large-scale legislative reforms that would limit the scope of mandatory arbitration. These proposals, however, have largely not gained political traction. In the absence of large-scale legislative reform, this Note considers whether enforcing more procedural options in courts may be the second-best alternative to mandatory arbitration. Permitting parties the same procedural options in courts that are already available in arbitration may influence companies to allow their consumer and employment disputes to be brought in courts, thus allowing courts to play their role in generating important public goods.

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## INTRODUCTION

Courts in the United States provide several important public goods.<sup>1</sup> Courts clarify the law by creating precedent; they encourage citizens to voluntarily comply with the law by impartially considering all sides of disputes and by providing reasoned decisions; and they educate citizens by hearing disputes that would otherwise go uninvestigated and by modeling democratic institutions. Courts can provide these public goods, however, only when disputes are brought before them.

Companies, through their form contracts, now routinely require consumers and employees to bring claims in arbitration rather than courts, partly because these companies have more freedom to choose particular procedures in arbitration than they do in courts. Consequently, a large swath of legal disputes appears less frequently on courts' dockets than it would in the absence of mandatory arbitration, and thus courts are less capable of providing important public goods in the context of these disputes.

Critics of mandatory arbitration have proposed large-scale legislative reforms that would limit when companies could unilaterally select dispute-resolution procedures through arbitration clauses in form contracts. Although a few of these initiatives have successfully insulated certain industries from mandatory arbitration, large-scale reforms have largely failed to make headway in Congress. Although it is impossible to know, recent history suggests that proposals to limit companies' procedural options in arbitration may not be politically feasible.<sup>2</sup>

In the absence of large-scale reforms to mandatory arbitration, this Note considers an unexplored alternative to those reforms. In particular, this Note considers whether enforcing *more* procedural options in *courts* may be the second-best option. That is, perhaps courts should be willing to enforce parties' attempts to make procedural law in the shadow of their bargains.<sup>3</sup> A

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1. The private goods of a transaction benefit only the parties to the transaction. The value of public goods, by contrast, "spills over" to parties outside of the transaction. Precedent, for example, is a public good because a precedent often benefits parties not involved in the precedent-setting case. *See infra* Section III.B.
  2. *See infra* notes 30-31 and accompanying text.
  3. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). For the origin of this play on Mnookin and Kornhauser's phrase, see Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 540-41 (2011). Procedural waivers permit parties to alter the set of rights they would otherwise have in a dispute resolution forum. In this sense, procedural waivers allow parties to make law through the process of bargaining.

legal regime that permits parties the same procedural options in courts that they already have in arbitration may influence companies to allow their consumer and employment disputes to be brought in courts. If so, this regime would allow courts to generate important public goods in these sorts of cases.

This Note proceeds in four parts. Part I explains that companies regularly require their consumers and employees to bring their claims in arbitration, where those same companies choose from a larger array of procedural options than they do in courts. Part II suggests that, if courts enforced the same procedural options already available in arbitration, companies might be influenced to allow consumer and employment disputes to be brought in courts. Part III contends that resolving consumer and employment disputes in courts would be an improvement over the current regime, because courts generate important public goods that arbitration does not. Part IV responds to objections that allowing companies to choose dispute-resolution procedures in courts would undermine the legitimacy of courts and would overwhelm the judicial fisc.

## I. “MANDATORY” ARBITRATION

As recently interpreted by the Supreme Court, the U.S. Arbitration Act of 1925—commonly known as the Federal Arbitration Act (FAA)—tends to limit the extent to which courts can provide public goods in the context of consumer and employment disputes.<sup>4</sup> The FAA allows companies to use their form contracts to choose whether to take disputes to court or to arbitration. Companies often select arbitration for their disputes with consumers and employees, but not for their disputes with other companies. Companies’ forum choices have created a Janus-faced dispute-resolution system: adjudication for corporate peers and arbitration for consumers and employees. Thus, courts are substantially disabled from providing public goods in the context of disputes between large companies and their consumers and employees.

### *A. Judicial Constructions of the Federal Arbitration Act*

The FAA provides that arbitration clauses “written . . . in any maritime transaction or a contract evidencing a transaction involving commerce” are “valid, irrevocable, and enforceable” subject only to “such grounds as exist at

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4. U.S. Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2006)).

law or in equity for the revocation of any contract.”<sup>5</sup> In the first sixty years after Congress enacted the FAA, courts respected parties’ choices about how their disputes would be resolved, but only when those choices were the product of genuine consent.

In *Wilko v. Swan*, the U.S. Supreme Court considered the enforceability of a predispute arbitration agreement in the context of a customer’s allegations that a brokerage firm had violated the federal securities laws by making false representations about a merger.<sup>6</sup> The Court held that the securities laws precluded the application of the FAA, because they were “drafted with an eye to the disadvantages under which buyers labor.”<sup>7</sup> In the majority opinion, Justice Reed concluded that arbitration’s lack of a “complete record of [the] proceedings” prevented courts and lawmakers from scrutinizing “arbitrators’ conception of the legal meaning of . . . statutory requirements.”<sup>8</sup> Accordingly, arbitration was inappropriate for protecting consumers who objected to the forum.

Following *Wilko*, the Court refused to enforce arbitration agreements in all of its cases between 1953 and 1983 in which an individual objected.<sup>9</sup> In the 1980s, however, the Court overruled *Wilko*. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court renounced its concerns that arbitration would permit strategic parties to “weaken[] the protections afforded in the substantive law to would-be complainants”<sup>10</sup> and held that an arbitration clause in a broker’s form agreement was enforceable against consumers who invested with the broker. In *Rodriguez de Quijas* and several other cases, the Court announced a new interpretive regime, according to which the FAA manifested “a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims.”<sup>11</sup>

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5. 9 U.S.C. § 2.

6. 346 U.S. 427, 428-29 (1953).

7. *Id.* at 435.

8. *Id.* at 436.

9. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971); *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167 (1963); *Wilko*, 346 U.S. at 438.

10. 490 U.S. 477, 481 (1989), *overruling Wilko*, 346 U.S. 427. *Rodriguez de Quijas* followed the Court’s reasoning established in two preceding cases, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

11. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Under current law, the Court interprets the “national policy favoring arbitration” to be expansive, mandatory, and self-contained. First, the FAA applies to the full extent of Congress’s power under the Commerce Clause.<sup>12</sup> Second, the FAA requires courts to enforce arbitration provisions even when the provisions do not mention costs and fees,<sup>13</sup> when parties have claimed federal statutory rights to bring lawsuits in courts,<sup>14</sup> and when the provisions appear in unnegotiated, boilerplate agreements—such as consumer<sup>15</sup> and employment contracts.<sup>16</sup> Third, although normal contract defenses apply to arbitration agreements under section 2 of the FAA, the Court has interpreted the FAA to prohibit states from discriminating against arbitration agreements vis-à-vis other types of agreements.<sup>17</sup> Congress may, of course, provide exceptions to the FAA. The Court’s decision in *CompuCredit Corp. v. Greenwood*, however, emphasizes that Congress must do so explicitly.<sup>18</sup> Finally, the arbitration process is, in important respects, self-contained. The Court has repeatedly endorsed the “separability doctrine,” according to which arbitrators, not courts, decide the enforceability of contracts, unless a challenge is brought against the arbitration clause itself.<sup>19</sup> Moreover, the Court recently held that the interpretation of an arbitration provision may be delegated to an

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12. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that the Federal Arbitration Act (FAA) applies to any agreement involving interstate commerce); see also *Preston v. Ferrer*, 552 U.S. 346 (2008) (holding that the FAA applies to disputes arising under contracts with arbitration agreements that would otherwise be decided by an administrative agency).
  13. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).
  14. See *Mitsubishi Motors*, 473 U.S. at 614; *Byrd*, 470 U.S. at 213. The Court subsequently began to enforce arbitration agreements even in cases involving discrimination under federal law. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
  15. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *But see In re Am. Express Merchs. Litig.*, 667 F.3d 204 (2d Cir. 2012) (holding that a class action waiver found in an arbitration clause was unenforceable because it would preclude federal antitrust claims against a charge-card issuer).
  16. See *Circuit City*, 532 U.S. at 105; *Gilmer*, 500 U.S. at 20.
  17. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987).
  18. See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (noting that claims must be “overridden by a contrary congressional command” (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987))).
  19. See, e.g., *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

arbitrator<sup>20</sup> and that parties may not contract for more searching review of arbitral awards in court.<sup>21</sup>

Parties seeking to resist arbitration provisions currently have few plausible legal arguments. Consequently, companies may now unilaterally decide whether to require consumers and employees to bring claims in courts or in arbitration.

### *B. How Often Companies Choose Arbitration*

The data on the prevalence of arbitration clauses suggest that companies prefer to arbitrate disputes with certain types of parties and to adjudicate disputes with others. In the leading study, Professors Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin report that the companies they studied required arbitration in 76.9% of their form consumer agreements and 92.9% of their employment contracts.<sup>22</sup> By contrast, those same companies required arbitration in less than 10% of commercial contracts.<sup>23</sup> Accordingly, one pair of scholars has noted that in the context of commercial agreements, “arbitration does not seem to compete strongly with well-functioning public courts.”<sup>24</sup>

The implications of studies in this area may be overstated. In a recent review of Eisenberg, Miller, and Sherwin’s study, Professors Christopher Drahozal and Stephen Ware criticize the set of companies studied. Eisenberg, Miller, and Sherwin studied the arbitration choices of telecommunications and

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20. *Cardegna*, 546 U.S. at 446.

21. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). *But see* *NAFTA Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95-98 (Tex. 2011) (holding that the Texas Arbitration Act permits parties to contract for more searching review of arbitral awards in court).

22. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 (2008) [hereinafter Eisenberg et al., *Summer Soldiers*]; see Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 120 (2008); see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62-64 (2004) (finding that 69.2% of financial services contracts contained an arbitration clause); Zachary Gima, Taylor Lincoln & David Arkush, *Forced Arbitration: Unfair and Everywhere*, PUB. CITIZEN 1-2 (Sept. 14, 2009), <http://www.citizen.org/documents/UnfairandEverywhere.pdf> (noting that 75% of consumer industry companies who took part in their survey included mandatory arbitration clauses in their form contracts).

23. Eisenberg et al., *Summer Soldiers*, *supra* note 22, at 876.

24. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 31 (2008).

financial services companies, which Drahozal and Ware maintain are “well known for using arbitration clauses . . . in their consumer contracts.”<sup>25</sup> Thus, Eisenberg, Miller, and Sherwin may have overstated the extent to which consumers and employees are affected by “mandatory arbitration.” On the other hand, Professor Drahozal has himself noted that the data scholars cite may actually *understate* the prevalence of arbitration clauses. In a 2009 study, he found that, although 82.9% of credit card issuers did *not* include arbitration clauses in their form agreements, loans representing 95.1% of the *value* of all outstanding credit card debt were subject to arbitration.<sup>26</sup> Although the data are still limited, they suggest that large companies often prefer to arbitrate their consumer and employment agreements.

Since large companies can use form contracts to require consumers and employees to take their disputes to arbitration, and since those companies generally prefer arbitration for those disputes, most consumers and employees often have no recourse to courts. The removal of large numbers of consumer and employment disputes from courts is a substantial harm. As Part III explains, courts produce several important public goods only in the context of cases that are brought before them. Thus, when a class of disputes appears far less frequently in courts, those courts are less able to produce public goods in the context of those disputes.

## II. SHIFTING CASES TO THE COURTS

Critics of mandatory arbitration have proposed reforms that would prevent companies from unilaterally selecting arbitration through form agreements. Professors Richard Bales and Sue Irion, for example, suggest amending the FAA to make predispute arbitration clauses in consumer and employment contracts unenforceable unless they are made knowingly and voluntarily, among other things.<sup>27</sup>

Proposals for this kind of reform, however, generally have not gained political traction. Although Congress has passed bills restricting mandatory

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25. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 437 (2010).

26. See Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT'L ARB. 163, 170 (2011).

27. Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1092 (2009). For another proposal, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 498 (2011).



arbitration for poultry farmers<sup>28</sup> and car dealers,<sup>29</sup> large-scale reforms to consumer and employment arbitration have not passed through legislative veto gates. The Arbitration Fairness Acts of 2007 and 2009, for example, would have prohibited predispute arbitration agreements for consumer, employment, and civil rights disputes.<sup>30</sup> Both bills, however, died in committee.<sup>31</sup>

In the wake of *AT&T Mobility LLC v. Concepcion*,<sup>32</sup> new coalitions in the House and Senate have formed to support amendments to the FAA that would prohibit binding arbitration clauses in consumer contracts in the absence of genuine consent.<sup>33</sup> However, the bill's supporters are not nearly numerous enough to secure its passage through both chambers of Congress. As with nearly all failed legislation, it is difficult to know why Congress has not passed these legislative reforms of arbitration. Section II.B suggests that the procedural options available in arbitration but unavailable in courts greatly benefit large companies. One may suspect, therefore, that reform legislation has proven difficult to pass in part because concentrated interests disfavor it. Whatever the explanation, this Note reflects on what might be done in the absence of large-scale legislative reforms of mandatory arbitration.

Instead of *coercing* companies to use courts in the absence of genuinely negotiated agreements to arbitrate, this Note considers whether enforcing procedural options in courts would create incentives for companies to *choose*

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28. See Food Conservation and Energy Act of 2008, Pub. L. No. 110-246, sec. 11005, § 210, 122 Stat. 1651, 2119 (codified at 7 U.S.C. § 197(c) (Supp. III 2009)).
  29. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (2002) (codified at 15 U.S.C. § 1226 (2006)) (requiring written consent from both parties for arbitration of motor vehicle franchise contracts).
  30. See Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007).
  31. See Amalia D. Kessler, Op-Ed., *Stuck in Arbitration*, N.Y. TIMES, Mar. 7, 2012, <http://www.nytimes.com/2012/03/07/opinion/stuck-in-arbitration.html>.
  32. 131 S. Ct. 1740 (2011) (upholding class arbitration waivers).
  33. As of October 2012, the 2011 version of the bill, the Arbitration Fairness Act of 2011, H.R. 1874, 112th Cong. (2011); S. 987, 112th Cong. (2011), had seventeen cosponsors in the Senate and eighty-one cosponsors in the House. See *Bill Summary & Status, 112th Congress (2011-2012), H.R. 1873, Cosponsors*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR1873:@@P> (last visited Oct. 31, 2012); *Bill Summary & Status, 112th Congress (2011-2012), S.987, Cosponsors*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00987:@@P> (last visited Oct. 31, 2012). Previous versions of the bill have died in committee. See *Bill Summary & Status, 111th Congress (2009-2010), H.R. 1020*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01020>: (last visited Oct. 31, 2012); *Bill Summary & Status, 110th Congress (2007-2008), H.R. 3010*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03010>: (last visited Dec. 14, 2012).

courts over arbitration for consumer and employment disputes.<sup>34</sup> In a way, this idea is similar to proposals for political reform that seek to “harness politics to fix politics.”<sup>35</sup>

For a company to choose courts over arbitration, courts must be beneficial vis-à-vis arbitration for that company. But notice that courts are already more attractive than arbitration in at least one respect: cost. Whereas buyers of arbitration services must pay for the whole good, “buyers” of court services receive a discount—i.e., a public subsidy.<sup>36</sup> Federal and state taxes pay a substantial portion of the costs of running the court system. In a 2002 report, consumer watchdog Public Citizen found that forum costs—that is, the fees a tribunal charges to decide a dispute—could be up to five thousand percent higher in arbitration than in courts.<sup>37</sup> The difference in fees is often due to a lack of competition between arbitration providers and a lack of economies of scale in spreading administrative costs.<sup>38</sup> By default, a large portion of these fees is split between the parties. Further, large companies often agree to pay some or all of their customers’ or employees’ shares of the fees.<sup>39</sup> From this perspective, then, it is puzzling that many companies currently choose to arbitrate their claims. Arbitration must provide companies with advantages that outweigh these costs. This Note’s strategy for encouraging companies to use courts, then, is to identify and counterbalance the differences that make arbitration more attractive than courts. If courts can provide the same advantages that currently make arbitration attractive, then companies will, at least in theory, prefer the forum that is more heavily subsidized—i.e., courts.

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34. In a recent Note in this *Journal*, Miles Farmer proposed yet another alternative. He suggested creating a cause of action that would “enable . . . government prosecutors to bring suit to impose monetary penalties on systematically biased arbitration providers and the businesses who hire them.” Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 *YALE L.J.* 2346, 2346 (2012).

35. Heather K. Gerken, *Getting from Here to There in Election Reform*, 34 *OKLA. CITY U. L. REV.* 33, 49 (2009).

36. See Drahozal & Ware, *supra* note 25, at 435. Subsidization is not an essential feature of courts. England, for example, pays for its courts largely through fees. See Civil Proceedings Fees (Amendment) Order, 2011, S.I. 2011/586 (Eng. & Wales); see also *About HM Courts & Tribunals Service*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/about/hmcts> (last visited Jan. 21, 2013) (reporting that Her Majesty’s Courts & Tribunals Service has an annual budget of around 1.7 billion pounds, approximately 585 million pounds of which is recovered in fees). Thanks to Samir Deger-Sen for this citation.

37. *The Costs of Arbitration*, PUB. CITIZEN 1 (Apr. 2002), <http://www.citizen.org/documents/ACF110A.pdf>.

38. *Id.* at 2.

39. See Brief of CTIA—The Wireless Association as Amicus Curiae Supporting Petitioner at 21, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3183858.

What *are* the relevant differences between courts and arbitration? The U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* provides some clues.<sup>40</sup> Writing for the majority, Justice White stated: "[B]y agreeing to arbitrate, a party 'trades the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'"<sup>41</sup> In other words, some parties choose arbitration because they favor the *procedures* used in arbitration. More specifically, parties may choose arbitration because it offers them more procedural options than courts do. The balance of this Part argues that parties have more procedural options in arbitration than they do in court, that those options can considerably benefit parties who choose strategically among them, and that procedural options are an important consideration when a company chooses between courts and arbitration. If these arguments are sound, they suggest that courts may encourage some companies to bring their consumer and employment disputes to court by allowing companies the same procedural options that are already available in arbitration.

The reader may wonder just how courts are supposed to do this. Without parties first contracting for court procedures, courts cannot enforce those contracts. And without courts first enforcing procedural optionality, parties will not contract for court procedures. This chicken-and-egg dilemma could be solved in two steps. First, judges could use dicta in opinions to signal to parties that they would be willing to enforce contract procedure, thereby inviting parties to contract for procedural optionality. These signals would encourage parties to invest resources into drafting contracts that attempt to alter the procedural rules in courts. Second, parties could draft conditional agreements that provide that disputes will be resolved in arbitration, *unless* courts enforce certain procedural terms. Once courts begin to enforce those procedural options, parties would then have sufficient assurance to remove the arbitration provisions from their contracts altogether.

#### A. Procedural Optionality in Arbitration and in Courts

The U.S. Supreme Court has broadly endorsed parties' freedom to select their own rules for arbitration. Adhering closely to the FAA's text, the Court has required only that arbitral awards not be the result of "corruption, fraud, or undue means," "evident partiality," "misconduct," or the result of arbitrators

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40. 500 U.S. 20 (1991).

41. *Id.* at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

“exceed[ing] their powers.”<sup>42</sup> Thus, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, Chief Justice Rehnquist wrote for the Court that “parties are generally free to structure their arbitration agreements as they see fit.”<sup>43</sup> Although lower courts have occasionally struck down particularly one-sided arbitration procedures, the overriding doctrinal stance is that parties may select their own arbitration procedures.<sup>44</sup>

Parties can modify arbitral rules only insofar as they can find arbitrators willing to abide by them. Thus, the arbitration providers themselves impose a second layer of limitations on the procedural options in arbitration. The two dominant players in the arbitration industry—the American Arbitration Association and JAMS—both promulgate “due process protocols” that limit the procedural options available to parties.<sup>45</sup> The two providers’ protocols afford

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42. U.S. Arbitration Act of 1925, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (2006)).
43. 489 U.S. 468, 479 (1989). This quotation from *Volt Information Sciences* illustrates nicely the contrast between the justification for and the reality of arbitration. The legitimacy of party-provided processes of dispute resolution, like that found in mediation and some forms of arbitration, is based on the consent of the parties. By contrast, the legitimacy of third-party-provided processes of dispute resolution, like that found in courts, depends on whether those processes provide their subjects with adequate reasons. See Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010). The myth of mandatory consumer and employment arbitration is the myth of the parties’ consent.
44. *But see* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008) (prohibiting parties from expanding the scope of review of arbitral awards).
45. See Comm’n on Healthcare Dispute Resolution, *Health Care Due Process Protocol*, AM. ARB. ASS’N (2011), [http://www.adr.org/aaa/faces/rules/codes?\\_afzLoop=425069547995108&\\_afzWindowMode=o&\\_afzWindowId=x7hlqc33s\\_77#%40%3F\\_afzWindowId%3Dx7hlqc33s\\_77%26\\_afzLoop%3D425069547995108%26\\_afzWindowMode%3Do%26\\_adf.ctrl-state%3D10scmkf10a\\_4](http://www.adr.org/aaa/faces/rules/codes?_afzLoop=425069547995108&_afzWindowMode=o&_afzWindowId=x7hlqc33s_77#%40%3F_afzWindowId%3Dx7hlqc33s_77%26_afzLoop%3D425069547995108%26_afzWindowMode%3Do%26_adf.ctrl-state%3D10scmkf10a_4); JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness, JAMS (July 15, 2009), <http://www.jamsadr.com/consumer-arbitration>; JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness, JAMS (July 15, 2009), [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Employment\\_Min\\_Stds-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Stds-2009.pdf); Nat’l Consumer Disputes Advisory Comm., *Consumer Due Process Protocol*, AM. ARB. ASS’N (2012), [http://www.adr.org/aaa/faces/rules/codes?\\_afzLoop=425069547995108&\\_afzWindowMode=o&\\_afzWindowId=x7hlqc33s\\_77#%40%3F\\_afzWindowId%3Dx7hlqc33s\\_77%26\\_afzLoop%3D425069547995108%26\\_afzWindowMode%3Do%26\\_adf.ctrl-state%3D10scmkf10a\\_4](http://www.adr.org/aaa/faces/rules/codes?_afzLoop=425069547995108&_afzWindowMode=o&_afzWindowId=x7hlqc33s_77#%40%3F_afzWindowId%3Dx7hlqc33s_77%26_afzLoop%3D425069547995108%26_afzWindowMode%3Do%26_adf.ctrl-state%3D10scmkf10a_4); Task Force on Alternative Dispute Resolution in Emp’t, *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, ALLIANCE FOR EDUC. IN DISP. RESOL. (1995), [http://www.ilr.cornell.edu/alliance/resources/Guide/Due\\_process\\_protocol\\_empdispute.html](http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html). Another arbitration provider—the National Arbitration Forum—also has its own set of safeguards, titled the “Arbitration Bill of Rights.” See *Arbitration Bill of Rights with Commentary*, NAT’L ARB. F. (2007), <http://www.adrforum.com/users/naf/resources/ArbitrationBillofRights3.pdf>.

the same basic protections. In particular, the providers require that arbitration agreements allow for a convenient hearing location, reasonable time limits for proceedings, the right to representation, discovery adequate to establish the underlying claims, and a fair hearing conducted by (at least formally) independent and impartial arbitrators.<sup>46</sup>

Within these broad limitations, parties, or more accurately, *drafting* parties, are free to alter the rules of arbitration.<sup>47</sup> Aside from necessarily waiving their right to a jury trial, parties in arbitration may also waive their rights, for example, to present particular evidence, to conduct certain discovery,<sup>48</sup> to appeal a final judgment,<sup>49</sup> and to form a class.<sup>50</sup> I call these procedural options “procedural optionality” or “contract procedure.”<sup>51</sup> While state and federal courts will enforce some procedural waivers—such as waivers of objections to personal jurisdiction<sup>52</sup>—courts are not nearly as willing to enforce parties’ attempts to change procedural law by contract.<sup>53</sup>

Some courts have permitted jury trial waivers, but only when parties seeking to enforce them can show that they were made knowingly and voluntarily or intentionally.<sup>54</sup> Some jurisdictions have raised this burden by

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46. See SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 21 (2009).

47. See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 433-34 (1988).

48. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (approving limitations on the scope of discovery in arbitration agreements).

49. The U.S. Supreme Court recently held that the FAA invalidates parties’ attempts to modify the standard of review. See *Hall St.*, 552 U.S. at 576.

50. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

51. This phrase originates in Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 598 (2005). Professor Resnik uses the phrase “contract procedure” to refer to both “government-based encouragement of dispute resolution through contract” and “government enforcement of parties’ agreements to contract out of litigation.” *Id.* This Note uses the phrase to refer to government enforcement of parties’ agreements to contract for *any* change in the procedural regime, including changes to how courts will resolve disputes.

52. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

53. Under current law, litigants in court may also waive the procedural rights discussed *infra* notes 54-63 and accompanying text, but only *after* litigation has begun.

54. See *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756-57 (6th Cir. 1985); *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *In re Reggie Packing Co.*, 671 F. Supp. 571, 573 (N.D. Ill. 1987); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982); *Howard v. Bank S., N.A.*, 433 S.E.2d 625, 628 (Ga. Ct. App. 1993).

creating a presumption against jury trial waivers.<sup>55</sup> Moreover, some courts have held that jury trial waivers, when contained in complicated form contracts, are unenforceable.<sup>56</sup> Finally, some states have even prohibited contractual jury trial waivers by statute.<sup>57</sup>

No cases have authoritatively addressed whether *ex ante* contractual provisions limiting the scope of discovery or the presentation of evidence in the event of a dispute are enforceable.<sup>58</sup> A few cases have addressed related issues pertaining to agreements reached *after* litigation has commenced,<sup>59</sup> but none address *predispute* discovery and evidentiary agreements.

Some courts have upheld contractual waivers of the right to appeal in the context of plea negotiations.<sup>60</sup> However, I have found no cases addressing whether waivers of the right to appeal or modifications to the standard of review are enforceable in the *predispute* context for civil matters.

Finally, though it is still unclear how courts will treat class action waivers in the wake of *AT&T Mobility v. Concepcion*, jurisdictions have historically treated them differently. A few jurisdictions, such as New York, have enforced them;<sup>61</sup> most jurisdictions, however, refuse to enforce them as either unconscionable<sup>62</sup> or contrary to public policy.<sup>63</sup>

55. See *Hendrix*, 565 F.2d at 258. *But see* *L&R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 755 (Conn. 1998) (explaining that express waivers of jury trial provisions contained in commercial contracts are presumptively enforceable).

56. See *Hendrix*, 565 F.2d at 258; *Gaylord Dep't Stores of Ala., Inc. v. Stephens*, 404 So. 2d 586 (Ala. 1981).

57. See, e.g., N.C. GEN. STAT. § 22B-10 (2011).

58. Several commentators, however, have discussed the possibility of these agreements. See, e.g., Davis & Hershkoff, *supra* note 3, at 511; Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 609-12 (2007); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 202-04.

59. See *Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302, 309 (2d Cir. 1974) (upholding the waiver of objections to the authenticity of documents).

60. See *United States v. Hahn*, 359 F.3d 1315, 1328-29 (10th Cir. 2004) (upholding a waiver of appeal rights contained in a plea agreement); *United States v. Navarro-Botello*, 912 F.2d 318, 321-22 (9th Cir. 1990) (upholding a waiver of the right to appeal a criminal sentence); *McCall v. U.S. Postal Serv.*, 839 F.2d 664, 666-69 (Fed. Cir. 1988) (upholding a waiver of the right to appeal a disciplinary action).

61. See *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478 (App. Div. 2004); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448 (App. Div. 2003).

62. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1100 (Cal. 2005).

63. See *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007).

Thus, arbitration permits parties much more latitude to change the procedural rules that will govern them in the event of a dispute. As the next Section makes clear, this procedural latitude can greatly benefit sophisticated parties.

*B. Why Companies Should Prefer Procedural Optionality in Theory*

In theory, procedural optionality is doubly beneficial to sophisticated parties. First, by contracting for procedural terms—as by contracting for substantive terms—parties can more narrowly tailor the terms of their agreements to their preferred levels of substantive liability and thus reach more efficient bargains. Second, because unsophisticated parties often cannot cost-effectively determine the value of procedural terms, sophisticated parties can, at least arguably, use contract procedure to extract contractual surplus from the weak and uninformed. This Section discusses each of these features of procedural optionality in turn.

Procedural optionality can allow parties to reach more efficient bargains in at least two ways. First, procedural optionality expands the number of terms over which parties may bargain, allowing parties to trade rights that would otherwise be inalienable. Rational actors can often exchange a procedural waiver that is more favorable to one party for terms that are more favorable to the other. For example, since a large company may value its customers' jury trial waivers more than the corresponding cost to consumers of losing their trial rights, the company and the consumers should rationally agree to waive in exchange for discounts equal to or slightly more than the procedural cost of waiver to consumers.<sup>64</sup> The same is true for class action waivers, agreements to limit the scope of discovery and evidence, and waivers of the right to appeal. Making these procedural rights alienable at the contracting phase, thus giving the parties more flexibility, would allow parties to adjust their bargains more finely to their preferences.<sup>65</sup>

Second, by reaching agreements to waive certain procedural rights at the contracting phase, rather than the litigation phase, parties can reduce their

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64. See Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 698; Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 701; Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 574-75 (2008).

65. See Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 732 (2011); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856-78 (2006).

litigation costs. To modify a phrase, the parties can “fit the fight to the fuss.”<sup>66</sup> For example, parties can reduce litigation costs by contracting to limit the scope of discovery in the event of a dispute. Enforcing contractual discovery limitations would prevent parties from defecting once litigation has commenced. Similarly, procedural agreements can save costs associated with formal evidentiary procedures, class action certification litigation, and appeals.

To be sure, procedural agreements could in theory be reached after litigation has commenced. But parties can reach certain agreements *ex ante* that they cannot reach *ex post*. *Ex ante*, parties have less information. They may not know the nature of disputes that will eventually arise between them. They may not know how they will behave under the contract, including whether they will perform or breach, how circumstances will change, or which party will be better situated during litigation. Moreover, *ex ante*, parties often have alternative buyers and sellers with whom they can contract, whereas *ex post*, they find themselves in a bilateral monopoly, either side of which can hold up cost-saving agreements. Finally, parties typically have more trust and less animosity *ex ante* than they do *ex post*. Mistrust and animosity may prevent the parties from coming to mutually advantageous agreements.<sup>67</sup> Thus, procedural optionality at the contracting phase can enable parties to reach more efficient bargains.<sup>68</sup>

Procedural optionality might also allow sophisticated parties to take advantage of informational and power asymmetries.<sup>69</sup> Procedural terms are complex, arcane, and probabilistic instruments, whose value consumers and employees often cannot cost-effectively determine.<sup>70</sup> Because unsophisticated parties do not assess the value of opaque procedural terms contained in form

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66. Cf. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 49 (1994).

67. See Stephen D. Susman & Johnny W. Carter, *Better Litigating Through Pretrial Agreements*, 38 LITIG. 22, 23 (2011) (“Once you are in the heat of battle, what appears to be good for one side is often assumed to be bad for the other – making it hard to reach an agreement.”).

68. Critics might worry that these efficiency gains would be offset by corresponding inefficiencies. Perhaps procedural agreements would increase litigation costs by engendering disputes about the meaning of procedural contracts. Rational parties will bargain for procedure, however, only when the benefits of doing so outweigh the transaction costs.

69. See generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 QJ. ECON. 488 (1970) (introducing the idea of power and informational asymmetries).

70. See Gillette, *supra* note 64, at 680. In fact, the vast majority of buyers do not read the terms sellers present to them. See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217 (2003); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983).



contracts,<sup>71</sup> companies can, under certain conditions,<sup>72</sup> use those terms to reduce the unsophisticated parties' share of the value of agreements without offering compensatory concessions. No wonder, then, that some scholars worry about procedural waivers in the context of boilerplate agreements between companies and their consumers or employees.<sup>73</sup> Indeed, the potential for procedural manipulation may be one reason why no scholar has explored the effects of expanding procedural optionality in courts in the context of disputes arising under form contracts.

Although I agree that, under certain conditions, arbitration can enable procedural exploitation, I note these features not to criticize arbitration but to highlight that procedural optionality gives companies a powerful incentive to require their consumers and employees to arbitrate their claims. To the extent

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71. Following Professor Arthur Leff, one might wonder whether these objects should even be called "contracts" at all. See Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132 (1970).
  72. It is difficult to predict when a company will find it worthwhile to use procedural terms to exploit unsophisticated parties. At least the following conditions would have to be met. First, the company would have to operate in a imperfectly competitive market; otherwise, competitors could either provide better procedural terms themselves or force the company to compensate its customers fully in the form of better products or better prices. Second, even in an uncompetitive market, the company would have to determine that exploiting along the dimension of dispute procedures is more profitable than exploiting along other dimensions. For example, a company who seeks to take advantage of informational and power asymmetries may determine that it is more profitable to concentrate its resources on cost savings in the form of less comprehensive warranties, less durable products, or less favorable financing. Thanks to Daniel Markovits for urging me to note these conditions explicitly.
  73. See, e.g., Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 748 (2009); Paul D. Carrington, *Self-Deregulation, The "National Policy" of the Supreme Court*, 3 NEV. L.J. 259, 274, 279, 282 (2002) (arguing that arbitration provisions in form contracts allow sophisticated parties to "self-deregulate"); Davis & Hershkoff, *supra* note 3, at 527-29; Dodge, *supra* note 65, at 757-64; Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 284 (2002); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167-68 (2012); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 175-82 (2006); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 598-608 (1990); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 517-18 (2007); 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, 37; David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1087 (2002). See generally BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Omri Ben-Shahar ed., 2007) (compiling essays discussing the merits and drawbacks of form contracts).

that procedural exploitation is possible in arbitration, this Note's proposal could better enable procedural exploitation in court.<sup>74</sup> If companies chose courts over arbitration, however, at least courts would be able to generate important public goods.<sup>75</sup>

*C. Selecting Procedural Options in Arbitration and in Court*

Companies appear to have realized the benefits of procedural optionality. In a series of articles, Professor Drahozal notes the reasons that companies prefer to arbitrate, rather than adjudicate, their consumer and employment disputes.<sup>76</sup> These reasons include the following: (1) arbitration permits relaxed discovery and evidentiary rules; (2) arbitration permits class action waivers; (3) arbitration uses arbitrators rather than juries; (4) arbitral awards are subject to less searching review than the judgments of district courts; and (5) arbitration is private and often confidential.<sup>77</sup>

In 2004, Professors Linda Demaine and Deborah Hensler studied the contracts to which the average consumer living in Los Angeles would be subject.<sup>78</sup> They noted how frequently companies used certain terms in their arbitration agreements. Although Demaine and Hensler conducted their study before several important decisions in arbitration law, their study offers some confirmation of the reasons for which, according to Professor Drahozal, companies choose arbitration. In particular, although arbitration permits companies to specify many procedural options, companies tend to make only a few affirmative procedural specifications, leaving arbitration service providers to supply the rest.

First, Demaine and Hensler found that companies included discovery and evidentiary rules in their arbitration agreements 32.7% and 21.2% of the time, respectively.<sup>79</sup> This finding supports the claim of some commentators that the

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74. See *infra* Section IV.A.

75. See *infra* Part III.

76. Drahozal, *supra* note 26, at 163; Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 77-78 (2008); Drahozal & Ware, *supra* note 25, at 451-52.

77. See Drahozal, *supra* note 26, at 163. Other considerations include that the parties seek a decisionmaker who is expert in the field and that arbitration allows disputes to be resolved according to trade rules. *Id.* at 174-75.

78. Demaine & Hensler, *supra* note 22, at 58.

79. *Id.* at 68.

reduction of discovery and evidentiary costs is one of the primary benefits some parties seek in arbitration.<sup>80</sup>

Second, Demaine and Hensler found that companies included class waivers in their arbitration agreements 30.8% of the time.<sup>81</sup> In specific industries, this figure is even greater. For example, Eisenberg, Miller, and Sherwin's study reported that the companies they studied included class arbitration waivers in their consumer agreements 80% of the time.<sup>82</sup> Moreover, Professor Drahozal and Quentin Wittrock's study of franchisee agreements found that the prevalence of class arbitration waivers has "increased substantially" from approximately 50% of the arbitration clauses studied in 1999 to nearly 80% in 2007.<sup>83</sup> Taken together, the data caution against drawing sweeping conclusions about the importance of class waivers across industries, but they suggest that a significant portion of companies choose arbitration partly to avoid class actions. Indeed, consumer arbitration is often likened to a "class action shield."<sup>84</sup>

Third, arbitration requires arbitrators—not juries—to resolve disputes. Studies show that jury trials are more expensive than bench trials,<sup>85</sup> and it is commonly believed that juries award greater damages than judges.<sup>86</sup> Since arbitrations are not conducted before juries, arbitration agreements that discuss jury trial waivers are scarce. The contracts that researchers have studied, however, provide some support for the hypothesis that companies choose arbitration partly to avoid jury trials. For example, Drahozal and Wittrock's study revealed that Dunkin' Donuts's standard franchise agreement allows franchisees to avoid arbitration on the condition that they waive their right to a jury trial.<sup>87</sup>

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80. See, e.g., Rutledge, *supra* note 64, at 575. But see Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1109 (2011) (finding that the incidence of discovery limitations in arbitration agreements remains static).

81. Demaine & Hensler, *supra* note 22, at 65.

82. Eisenberg et al., *Summer Soldiers*, *supra* note 22, at 885.

83. Drahozal & Wittrock, *supra* note 76, at 75.

84. E.g., Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).

85. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57-58 (2001).

86. See Christian N. Elloic, *Are Pre-Dispute Jury Trial Waivers a Bargain for Employers over Arbitration? It Depends on the Employee*, 76 DEF. COUNS. J. 91, 96 (2009); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1579 (2005).

87. Drahozal & Wittrock, *supra* note 76, at 77 n.32.

Fourth, arbitral awards are subject to less searching review than the judgments of trial courts. Here again, since finality is a widely known feature of arbitration, one might not expect to find many arbitration agreements specifying it. Demaine and Hensler, however, found that parties specified that arbitral awards could not be challenged in court in 40.4% of the arbitration agreements they studied and that another 36.5% specified either that the results would be “final” or the arbitration “binding.”<sup>88</sup>

Taken together, Professor Drahozal’s observations about companies’ motivations for choosing arbitration and Demaine and Hensler’s study suggest that the procedural options available in arbitration are a boon to some companies. Indeed, many companies appear to use certain procedural options to realize the theoretical benefits discussed in Section II.B and to avoid the procedural rigidity of courts. These observations make the *prima facie* case for the claim that courts would be more attractive to some companies if courts enforced the procedural options already available in arbitration.<sup>89</sup>

To be sure, companies choose arbitration for different reasons and in different contexts. Courts cannot provide every company with the particular set of benefits that it seeks in arbitration. Indeed, as Demaine and Hensler’s study implies, the majority of companies who choose arbitration select the same small set of procedural options, but *not every* company chooses arbitration for those reasons. Three alternative reasons for choosing arbitration are particularly relevant to consumer and employment disputes.<sup>90</sup>

First, some companies may choose particular arbitration providers because those providers side with companies an overwhelming percentage of the time. In one dramatic example, the National Arbitration Forum allegedly rendered decisions or recognized awards by settlement in favor of companies in consumer arbitration in 93.8% of California cases.<sup>91</sup> Companies that choose

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88. Demaine & Hensler, *supra* note 22, at 72. The FAA trumps such agreements, if the arbitral award violates one of the grounds for review specified in section 10 of the FAA. See Federal Arbitration Act § 10, 9 U.S.C. § 10 (2006).

89. Professors Kevin Davis, Helen Hershkoff, and Michael Moffitt have noted the possibility of this kind of argument. See Davis & Hershkoff, *supra* note 3, at 560; Moffitt, *supra* note 73, at 491.

90. Outside of the context of consumer and employment disputes, companies may choose arbitration for reasons unrelated to the subject of this Note—for example, some companies prefer arbitration because it ensures a decisionmaker expert in the industry standards. See Drahozal, *supra* note 26, at 174-75.

91. See *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUB. CITIZEN 15 (Sept. 2007), <http://www.citizen.org/documents/arbitrationtrap.pdf>.

arbitration to obtain a decisionmaker biased in their favor will not find courts an attractive alternative.<sup>92</sup>

Second, allowing consumers and employees to bring claims in courts may increase the number of cases that a company must defend. In some contexts, the arbitration providers' comparatively large forum costs<sup>93</sup>—that is, the fees that users must pay for the arbitration providers' services—serve as a shield to protect companies from lawsuits.<sup>94</sup> Companies that use arbitration in this way may find that the costs of allowing cases to proceed to courts—that is, the costs associated with the additional cases that they must defend—are too high.

Third, the publicity of courts may be costly for some defendants. As Part III explains, arbitration is always private and sometimes confidential. Third parties have no right to attend arbitrations, and providers only sporadically maintain records of hearings.<sup>95</sup> Indeed, Demaine and Hensler found that the companies they studied required some form of confidentiality in 13.5% of their arbitration agreements.<sup>96</sup> Companies that expect embarrassing claims to be brought against them may also find that the costs they incur as a result of litigation in a public forum are too high.<sup>97</sup>

Enforcing procedural options in court, therefore, would not lead every company to remove the arbitration provisions from their consumer and employment contracts. But some companies might. Companies would be more likely to use courts if: (1) they currently pay their customers' and employees' arbitration fees or their customers or employees are generally undeterred by

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92. Extant studies, however, do not show that the outcomes claimants receive in arbitration are generally worse than those they receive in courts. See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 852-62 (2010).

93. For a detailed chart of the forum costs of several arbitration providers, see *The Costs of Arbitration*, *supra* note 37, at 42.

94. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1249-53 (2001); Mark E. Budsinitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004); Melissa Briggs Hutchens, *At What Costs? When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599 (2002); R. Brian Tipton, *Allocating the Costs of Arbitrating Statutory Claims Under the Federal Arbitration Act: An Unresolved Issue*, 26 AM. J. TRIAL ADVOC. 325, 328 (2002).

95. See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 111 (2011); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 804 (2009).

96. Demaine & Hensler, *supra* note 22, at 69. Moreover, this figure no doubt understates the extent to which firms value privacy in arbitration, because arbitration is, by its very nature, private.

97. Thanks to both Judith Resnik and Robert Cobbs for urging me to consider this point.

forum costs;<sup>98</sup> (2) they estimate that the probability of bet-the-company class actions or protracted discovery battles is low; or (3) they are not particularly concerned by the possibility of embarrassing press. Under what conditions these companies would choose courts over arbitration is, of course, a question that could only be answered empirically. Enforcing more procedural agreements in courts, however, may have a significant effect on the forum choices of companies that fit the description above. And if so, then courts will be in a better position to provide important public goods.

### III. COURTS OVER ARBITRATION

By enforcing contract procedures, courts may influence companies to allow consumer and employment disputes to be brought in courts rather than arbitration. But what features make courts different from arbitration? And why prefer courts to arbitration? These inquiries are particularly important for this Note. In the absence of reforms limiting mandatory arbitration, this Note explores the possibility of making adjudication more like arbitration by permitting greater procedural optionality in courts. But perhaps these changes would eviscerate the difference between courts and arbitration.

Courts in the United States, this Note maintains, are essentially open, whereas arbitration is essentially closed. The Supreme Court has held that the First and Sixth Amendments guarantee that courts will generally be open to the public.<sup>99</sup> Some twenty-seven states have constitutional guarantees of open and public courts.<sup>100</sup> Thus, parties cannot contract for private trials. By contrast, arbitration is fundamentally private. Since arbitration's early inception, parties have used it to avoid public dispute resolution administered by the state.<sup>101</sup> In contemporary arbitration, the public can rarely access information about individual cases, third parties may not attend, providers usually do not publish opinions or maintain records, and parties are often subject to confidentiality

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98. See *supra* note 39 and accompanying text.

99. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2498 (2011) (noting that a right of public access is protected by the First Amendment's Petition Clause); *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010) (per curiam) (reversing a conviction because a "lone courtroom observer" was excluded from voir dire); see also Resnik, *supra* note 95, at 92 (noting *Duryea* and *Presley* as among the decisions that recognize the norm of openness of courts to the public).

100. See 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* 5-57 (4th ed. 2006).

101. See Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

requirements enforced on pain of hefty fines.<sup>102</sup> Moreover, information in the aggregate is scarce. Only a handful of states—most notably California—require arbitration associations to publish information concerning the results of their cases.<sup>103</sup> This Part maintains that openness allows courts to provide three important public goods that arbitration cannot.

### A. Voluntary Compliance with the Law

Courts can increase voluntary compliance with the law by creating positive perceptions of procedural justice. When psychologists speak of “procedural justice,” they mean something different from what lawyers typically mean. Whereas in legal parlance “procedural justice” often refers to the fairness of processes, in psychology, “procedural justice” refers to individuals’ *subjective assessments* of the fairness of processes.<sup>104</sup> Psychologists such as Tom Tyler and Allan Lind have shown that perceptions of procedural justice influence how people conceptualize and react to legal outcomes.<sup>105</sup> Individuals are more likely to be satisfied and to comply with legal commands when they think that those commands were issued on the basis of a fair process. These findings have been confirmed in multiple decisionmaking contexts, including arbitration.<sup>106</sup> Psychological procedural justice, then, affects how effective the law can be as a tool of social control. For in the absence of costly “command and control”

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102. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 402 (1999); Resnik, *supra* note 95, at 111; Sabbeth & Vladeck, *supra* note 95, at 804.

103. See CAL. CIV. PROC. CODE § 1281.96 (West 2004); D.C. Code § 16-4430 (2008); MD. CODE ANN., COM. LAW § 14-3903 (West 2011); ME. REV. STAT. ANN. tit. 10, § 1394 (2010); see also *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure*, CAL. DISP. RESOL. INST. 5 (2004), [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf) (“California enacted the Corbett Bill, . . . which requires private arbitration companies in California to provide quarterly publication of consumer arbitration information on their websites.”).

104. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3 (2011) (citing Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 117-18 (2000)).

105. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 63-65 (1988); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003); see also Davis & Hershkoff, *supra* note 3, at 547 (“Considerable empirical evidence suggests that people use the fairness of judicial procedures as criteria for forming beliefs about the trustworthiness and legitimacy of the courts.”).

106. See E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235-36 (1993).

regulation of daily life, legal authorities depend heavily on *voluntary* compliance with their commands. Decisionmaking processes that undermine psychological procedural justice undermine adherence to the law, making the legal system more costly for everyone.

Social scientists find that four factors influence individuals' perceptions of procedural justice.<sup>107</sup> They are: (1) voice—whether participants have an opportunity to present their side of a dispute;<sup>108</sup> (2) neutrality—whether the decisionmaker is unbiased, has gathered all of the appropriate information, conducts decisionmaking in the open, and makes decisions consistently across time and claimants;<sup>109</sup> (3) trustworthiness—whether the decisionmaker makes a bona fide effort to arrive at the right result;<sup>110</sup> and (4) courtesy and respect—whether the decisionmaker treats the parties with dignity.<sup>111</sup>

These findings suggest reasons to create incentives for companies to bring consumer and employment disputes to court. Although there may not be dependable metrics by which to evaluate whether consumers and employees *actually* receive worse outcomes in arbitration than they do in court,<sup>112</sup> arbitration may still undermine trust in, and therefore obedience to, legal authorities, including arbitrators and the courts that enforce their judgments.

107. See Hollander-Blumoff & Tyler, *supra* note 104, at 5-6 (identifying these four factors as voice, neutrality, trustworthiness, and courtesy and respect); see also E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES*, at ix (1989) (identifying factors such as "the perceived dignity of the procedure, comfort with the procedure, perceptions that procedures are unbiased, perceived control, and the perceived carefulness of the process").

108. See, e.g., Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108, 109 (1977); E. Allan Lind, Ruth Kafner & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985).

109. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163-64 (2006).

110. *Id.* at 164.

111. Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, in *APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS* 77, 78 (John S. Carroll ed., 1990).

112. See, e.g., Drahozal & Zyontz, *supra* note 92, at 852-62; William M. Howard, *Arbitrating Claims of Employment Discrimination, What Really Does Happen? What Really Should Happen?*, 50 DISP. RESOL. J. 40, 44-45 (1995); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 108-11 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 48 (1998); Rutledge, *supra* note 64, at 556-60.



Arbitration fares worse than courts on some measures of psychological procedural justice. Participants may perceive arbitrators as less neutral and trustworthy than courts for several reasons.<sup>113</sup> First, arbitrators are financially dependent on the parties whose disputes they decide. Unlike judges,<sup>114</sup> arbitrators financially depend on fees and membership dues that parties pay to arbitrate claims. And corporate repeat players make up a massive share of arbitrators' business. Second, arbitrators do not make decisions in the open or keep records that would allow third parties to evaluate whether their decisions are well reasoned and consistent across time and claimants. Since arbitration is closed, parties cannot be sure that arbitrators are held accountable; thus, they have less trust that their disputes are resolved fairly.<sup>115</sup>

Like other empirical questions surrounding arbitration, whether users trust arbitration providers is still underresearched. However, one recent study raises concerns about perceptions of justice in arbitration. Professors Jill Gross and Barbara Black surveyed 3,087 participants in securities arbitrations.<sup>116</sup> Most respondents found that their arbitrators were both competent and attentive. However, over seventy-five percent of respondents responded either "very unfair" or "somewhat unfair" when asked how fair arbitration was in comparison to courts.<sup>117</sup> These figures—together with more abstract observations about the procedures in arbitration—suggest that courts may perform better than arbitration on measures of psychological procedural justice. Moreover, if this premise is sound, the psychology of procedural justice

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113. See Hollander-Blumoff & Tyler, *supra* note 104, at 14-15.

114. Federal judges are guaranteed life tenure and undiminished pay during good behavior. U.S. CONST. art. III, § 1. Even in cases overseen by bankruptcy and magistrate judges, the U.S. Supreme Court has interpreted the Constitution to require review of certain claims by Article III judges. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Many state constitutions do not provide their judges with these same bulwarks against influence. However, the immediate livelihood of state court judges, unlike that of arbitrators, does not depend on attracting and maintaining business from a repeat customer base.

115. See LIND ET AL., *supra* note 107, at 64-65 (finding that procedures held in the open are seen as fairer than those held in private); Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI-KENT. L. REV. 463, 490-91 (2006).

116. See Jill I. Gross & Barbara Black, *Perceptions of Fairness of Securities Arbitration: An Empirical Study* (Univ. of Cincinnati Coll. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 08-01, 2008), <http://ssrn.com/abstract=1090969>. *But see Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, ERNST & YOUNG 11 (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf> (finding that sixty-nine percent of the 229 respondents surveyed were satisfied with the results of their arbitration).

117. See Gross & Black, *supra* note 116, at 46-48.

implies that arbitration may raise costs for the legal system to maintain high levels of compliance.

In the context of consumer and employment disputes, if claimants perceive arbitration as unfair, then the costs of enforcing arbitral judgments likely will be greater than they would be if arbitrators abided by the markers of psychological procedural justice. If so, then mass arbitration increases enforcement costs for all participants. Moreover, if companies must pay more to enforce arbitral awards, they will in turn pass those costs along to consumers, including those not involved in the initial disputes.

These observations more directly support proposals to reform arbitration itself rather than enforcing procedural optionality in courts. In particular, the psychological procedural justice of arbitration might be improved if arbitrators did not financially depend on the patronage of repeat players or if arbitrations were conducted in the open and on the record. Like other proposed reforms of arbitration, however, legislatures have not provided public funding of arbitration. Further, arbitration conducted in the open and on the record would arguably cease to be *arbitration*. As observed, one of arbitration's *raison d'être* is privacy. Thus, there are reasons to remain skeptical about the possibility of addressing arbitration's failings from within.

### *B. Precedent*

Adjudication in the United States serves not only a dispute resolution but also a legislative function.<sup>118</sup> Courts fill in the content of the law by creating precedent. Precedent is an important public good. Precedent promotes investment-backed expectations by making the legal system's commands clearer to potential investors and produces strands of reasoning that subsequent courts can follow, reducing the costs of clarifying open questions of law.

Courts create precedent when they provide reasoned explanations for their decisions and subsequent courts are properly influenced by those decisions. Precedent, therefore, is not possible in arbitration. Even if arbitration panels provided parties with written decisions, publishing those opinions would impede arbitration's inherently private nature. Moreover, arbitration panels do not have the requisite political legitimacy to bind subsequent parties. Federal judges exercise legitimate political authority in part because the President, with the advice and consent of the Senate, has chosen them. Similar social facts

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118. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979) (noting that court systems produce a "rule formulation" service).

account for the legitimacy of state court judges. By contrast, arbitrators' authority derives from the consent of the parties to a particular dispute. Subsequent parties do not bestow earlier arbitration panels with the authority to interpret the law in their particular case. Thus, arbitral precedent would lack the requisite political legitimacy to make it compelling.

The current procedural regime has led companies to require that consumer and employment disputes proceed to arbitration rather than to courts. Since arbitration does not generate precedent, this pattern leads to a loss of meaningful precedent related to consumer and employment disputes.<sup>119</sup> Thus, the current regime engenders the loss of another important public good.

One might protest at this point. If companies choose arbitration over adjudication in part to contract for finality, then an increase in procedural optionality in courts might lead to less appellate litigation and therefore less precedent. But even if companies contracted for finality en masse, precedent making would not necessarily grind to a halt. To be sure, if parties never brought cases before appellate courts, there would be no binding precedent for subsequent courts to follow. Courts pay attention to one another, however, even when they are not bound to do so. Indeed, decisions are precedents in a practical sense only because subsequent courts follow them, not because they originate from a particular kind of court. Even "binding" decisions are not precedent, in any fully fledged sense, unless courts subsequently follow them.<sup>120</sup> As Professor Donald Elliott has noted, no case is a "precedent on the day it is decided."<sup>121</sup>

In the absence of binding appellate authority, persuasive lower-court decisions could function as precedents in the sense that other lower courts could follow them. Of course, binding authority may be a more reliable

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119. See Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 297 (1999).

120. As a formal matter, of course, courts of appeals are bound by the earlier majority decisions of their own circuits or of the U.S. Supreme Court. But this description of the formal doctrine obfuscates important aspects of how judges think they should decide. Plenty of cases are "good law" in the sense that they have never been overruled, despite opportunities to do so, even though courts never follow them and do not think they are bound to do so. Similarly, opinions that are not found in binding decisions often exert precedent's force. Consider, for example, the influence of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Practically speaking, what matters is whether courts follow a precedential decision, not whether it issues from a particular source. Thanks to Justin Collings, Farah Peterson, and Brian Soucek for encouraging me to take this point seriously.

121. E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 149 (citing Jan G. Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process*, 66 GEO. L.J. 1339, 1340 (1978)).

foundation for investment than persuasive authority. That is a claim that could only be confirmed empirically. The point remains: precedent—and its value to the public—may survive even in a world where parties rarely appeal their cases and courts rarely publish.<sup>122</sup> Even if companies *did* uniformly contract for finality, influencing those companies to allow their consumer and employment disputes to be brought in court would still help courts generate precedent.

*C. Democratic Participation and Education*

Courts are important institutions in a healthy democracy. They provide information about how the law works in practice and whether it serves the interests of the electorate. The electorate must know what the law is to make informed judgments about whether the law serves their interests. Unlike private arbitration, open courts provide citizens with information about how the law is administered. Even if dispute resolution were entirely private, of course, the texts of statutes and regulations would still be public. But information about the texts of statutes and regulations does not illuminate the law's meaning in practice. As Professors Kathryn Sabbeth and David Vladeck note: “[R]ights that are not enforced publicly vanish from the public’s eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the law’s violations.”<sup>123</sup> Courts discover and disseminate information that helps policymakers and citizens understand social problems and whether current laws work to address them.<sup>124</sup> In the case of consumer and employment disputes, courts provide citizens and policymakers with important glimpses into how those cases are decided, and thus, how the procedural and substantive law potentially affects *their own* interests.<sup>125</sup>

Courts also provide public information not gathered by private investigatory agencies. While the press generally only investigates and informs the electorate about subjects that are interesting enough to sell copy, courts must hear any dispute brought before them, no matter how mundane.

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122. For a critique of precedent setting in the context of unpublished decisions, see Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS (forthcoming 2013), <http://ssrn.com/abstract=2113917>.

123. Sabbeth & Vladeck, *supra* note 95, at 807.

124. See Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 494-513 (2009) (maintaining that increasing the availability of information from courts would help legislators and the public monitor how courts implement statutes).

125. A side benefit is that witnessing how procedural optionality works in courts would also provide observers better information about how it should work in arbitration. See Davis & Hershkoff, *supra* note 3, at 511.

Professor Judith Resnik explains why information about the mundane is significant. The mundane “is where people live and . . . where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen.”<sup>126</sup> Professor Resnik’s concerns come vividly to the fore in the case of disputes arising out of consumer and employment contracts. Such contracts are the mundane stuff of everyday life, which, in the aggregate, affect a large portion of the economy. Yet the resolution of disputes arising under those contracts has been, to a great extent, hidden from public view.

Courts can also fuel debate and prompt social movements.<sup>127</sup> High-profile cases on issues such as abortion,<sup>128</sup> affirmative action,<sup>129</sup> and campaign finance<sup>130</sup> have spawned large-scale social movements.<sup>131</sup> In the context of consumer and employment litigation, smaller-scale social movements have mobilized around the Supreme Court’s recent decisions in *AT&T Mobility LLC v. Concepcion*<sup>132</sup> and *Wal-Mart Stores, Inc. v. Dukes*.<sup>133</sup> By providing information to the public, courts thus enable salutary exchanges between the electorate and the political branches, possibly leading to reform.

Courts promote democracy in other ways as well. Courts are themselves models of democratic institutions and thus educate citizens about how to participate in a democracy. Of course, courts are not democratic in the sense that they make decisions by majority vote.<sup>134</sup> Rather, courts manifest the

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126. Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1, 56 (2011).

127. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

128. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

129. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

130. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

131. See Resnik, *supra* note 126, at 60.

132. 131 S. Ct. 1740 (2011); see also FAIR ARBITRATION NOW, <http://www.fairarbitrationnow.org> (last visited Oct. 30, 2012) (advocating against mandatory arbitration).

133. 131 S. Ct. 2541 (2011); see also *Legal Advocacy Fund Cases—Wal-Mart Stores Inc. v. Dukes*, AAUW, <http://www.aauw.org/act/laf/cases/DukesWalMart.cfm> (last visited Oct. 30, 2012) (explaining the American Association of University Women’s position on the availability of class action suits against employers).

134. One court-based institution—the jury trial—relies on citizens’ direct participation. The putative democratic benefits of that institution are widely known. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81-118 (1998); LARRY D.

principle underlying democratic aspirations toward a one-person, one-vote system of government: namely, that every citizen deserves to be treated equally and with dignity. Unlike the political branches, in which concentrations of wealth can greatly influence the attention that citizens receive, courts must hear the claims of any citizen with standing, regardless of her status within society.<sup>135</sup> Thus, access is more equally distributed in courts than it is in the political branches. Further, courts instantiate equal treatment under the law by striving to achieve “participatory parity” through formal rituals such as pleading, the presentation of evidence, and oral argument.<sup>136</sup> Finally, adjudication models how to resolve disputes appropriately in a pluralist society. Adjudication demonstrates how citizens can communicate and reconcile claims using rigorously and impartially obtained facts, publicly accepted principles, and logically valid reasoning, rather than resort to violence or illicit influence. Here again, arbitration cannot provide these benefits, because it is not open for the public to witness. Thus, another public good is locked behind arbitration’s doors.

#### IV. THE INTEGRITY AND THE AFFORDABILITY OF COURTS

Even if enforcing procedural optionality in courts would lead a substantial number of companies to bring their consumer and employment disputes to court, one may still worry that that benefit is not worth the drawbacks of contractually modified court procedures. In particular, critics may worry about the integrity of courts and about the affordability of running a court system with so many small claims.

##### *A. The Integrity of Courts*

This Note explores expanding the scope of procedural optionality into a new frontier. But perhaps this change would undermine the very reasons that proceduralists favor courts in the first place. One could argue that if courts enforced streamlined discovery and evidentiary procedures, for example, courts would have more difficulty discerning the facts and thus more difficulty offering compelling reasons for decisions. Critics may thus worry that contract

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KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 3-4, 28-29 (2004).

135. See Resnik, *supra* note 126, at 53.

136. See *id.* at 61-64.

procedure would undermine the legitimacy of courts, or contrariwise, lend legitimacy to procedural exploitation.<sup>137</sup>

To be sure, before fully endorsing procedural optionality in courts, one should take into account all of its costs, including its symbolic costs. For example, if enforcing procedural optionality in courts would substantially undermine the extent to which courts could educate citizens about fair and impartial decisionmaking,<sup>138</sup> then officials should weigh those costs against the remaining benefits of procedural optionality in courts. In partial reply, however, two features of this Note's argument are worth mentioning here.

First, this Note has not considered enforcing every conceivable procedural agreement—only those that constitute the reasons why companies choose arbitration. None of these contract procedures—class action waivers, jury trial waivers, reasonable discovery and evidentiary limitations, and waivers of the right to appeal—undermine the very function of a dispute resolution institution. The Supreme Court has held that adhesive arbitration agreements are enforceable only insofar as arbitration provides an adequate mechanism for enforcing statutory rights,<sup>139</sup> yet the Court has not prohibited any of these procedures. Indeed, the arbitration providers have a financial incentive to ensure that their processes are not so unfair as to instigate large-scale reform. Yet the procedures listed above are the most salient procedural differences between arbitration and courts. Moreover, some public forums, such as small claims courts, already limit the extent to which parties can present and discover evidence, seek relief as a group, or appeal a final judgment.

Second, and more importantly, it is incorrect to think that the current regime does not *already* legitimize procedural exploitation. The majesty of fair and impartial courts currently serves as a smokescreen for the reality of consumer and employment dispute resolution. Consumer and employment disputes are already decided by procedures chosen by companies. In arbitration, companies may already invoke class action waivers, discovery and evidentiary limitations, jury waivers, and waivers of meaningful appellate review.<sup>140</sup> Proponents of formal procedures have already lamented the

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137. See Davis & Hershkoff, *supra* note 3, at 541-42. Thanks to *The Yale Law Journal's* Notes Committee for urging me to address this objection.

138. See *supra* Section III.C.

139. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-37 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 222-23 (1985).

140. Even in courts, some forms of procedural optionality—such as forum-shopping clauses—are *already* available. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

“demise” of jury trials and class actions.<sup>141</sup> Enforcing more procedural options in courts is not a perfect solution to mandatory arbitration, but at least it would bring procedural optionality out in the open. And thus, it may be a second-best alternative to mandatory arbitration.

*B. Access and Fiscal Challenges*

Finally, critics may worry that enforcing procedural optionality in courts will lead to too few or, conversely, too many claims in courts. On the one hand, plaintiffs who currently bring claims in arbitration may be unwilling to bring claims in courts. If these plaintiffs would instead choose not to bring their claims at all, then enforcing procedural optionality in courts could lead to less dispute resolution than the current regime. As Professor Theodore St. Antoine writes, “Unless one can secure [an accessible forum], the theoretically superior qualities of a particular tribunal amount to nothing but a beguiling mirage.”<sup>142</sup>

Plaintiffs may find courts an inaccessible forum because they are unable to find representation.<sup>143</sup> Formal and technical procedures make retaining counsel more important in courts than in arbitration. Litigants who are unable to retain counsel can typically represent themselves more easily in arbitration than they can in courts.<sup>144</sup> Moreover, formal procedures often make trying a case in court (especially on a contingency-fee basis) less attractive than trying a case in arbitration.

This criticism potentially cripples this Note’s proposal. If consumers and employees do not bring their claims in courts, then courts cannot provide the public goods described in Part III. But the objection may overstate the cost difference between arbitration and litigation. Arbitration is reportedly becoming more judicialized<sup>145</sup>—that is, more formal—and therefore is reportedly becoming more expensive. Further, enforcing procedural optionality in courts would presumably close the gap between arbitration and courts from

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141. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (class actions); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 670-71 (2001) (jury trials).

142. Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008).

143. See *id.* at 790-92.

144. *Id.* at 791.

145. See Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Attorneys as Arbitrators*, 39 J. LEGAL STUD. 109, 119 (2010); Gerard F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 38-39 (2003).



the other direction, by making some of arbitration's more streamlined procedures available in courts. It seems fair to say, however, that enforcing procedural optionality in courts would cause some fortunes to change. If companies removed the arbitration clauses from their form contracts, some consumers and employees would be worse off and some would be better off. Some new claimants would emerge, and some old claimants would vanish.<sup>146</sup>

On the other hand, critics may worry that enforcing procedural optionality in courts would put considerable strain on the public fisc. If companies brought their consumer and employment disputes back to courts, taxpayers would have to pay for it. And if there were not a corresponding increase in public subsidies devoted to running public courts, courts' dockets would be even more overloaded than they already are.<sup>147</sup> In 2010, approximately 360,000 cases and more than 1.5 million bankruptcy petitions were filed in federal district courts.<sup>148</sup> Yet those courts reportedly remain underpaid and understaffed.<sup>149</sup> State court filings, moreover, dwarf those in the federal courts.<sup>150</sup> One could plausibly argue that the "vanishing trial[s]"<sup>151</sup>—those that have migrated to private dispute resolution services and administrative agencies—are what have made the *actual* trials fiscally possible.<sup>152</sup>

These are trenchant criticisms to which, without knowing more, it is difficult to reply. Creative system designers may or may not find ways to help the courts cope with a rise in filings short of increasing public funding for courts. Whether they could do so would depend on a complex set of

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146. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

147. See Bales & Irion, *supra* note 27, at 1084.

148. See JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (Dec. 31, 2010), <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

149. See, e.g., WILLIAM H. REHNQUIST, 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2003), <http://www.supremecourt.gov/publicinfo/year-end/2002year-endreport.aspx>; WILLIAM H. REHNQUIST, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2001), <http://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.aspx>; JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2007), <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>.

150. Setting aside traffic, juvenile, and domestic relations cases, the National Center for State Courts reports that forty million civil and criminal cases were filed in the state courts in 2008. R. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads*, NAT'L CENTER FOR ST. CTS. 20 (2010), <http://www.courtstatistics.org/Other-Pages/~Media/Microsites/Files/CSP/EWSC-2008-Online.ashx>.

151. Galanter, *supra* note 146, at 459.

152. See Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of Solution?*, 79 CONN. B.J. 1, 5-6 (2005).

contingencies that would be nearly impossible to predict. Thus, these criticisms illustrate more generally the hydraulic nature of legal reform and the web of contingencies on which the prudence of enforcing procedural optionality in courts ultimately depends. Pushing on one edge of the legal system produces tension on the others. Influencing companies to remove arbitration clauses from their form contracts may overburden the courts or may lead to a loss in private justice, forcing courts and legislatures to evaluate the merits of this Note's proposal in light of those effects. But this is a problem endemic to the business of designing a legal system. It is a trading business—one set of pathologies for another.<sup>153</sup>

## CONCLUSION

Against the backdrop of the increasingly popular cost-saving technique of mandatory arbitration and unavailing attempts to fix it by ordinary political means, this Note considers whether contract procedure may be the next best option. By enforcing more contract procedures, courts may encourage some companies to bring their disputes back to courts. That result may be better than the current regime because openness allows courts to generate important public goods that arbitration cannot provide.

I say “may” be better, because large-scale changes to civil procedure do not occur in a vacuum. Permitting parties more procedural options in courts may have the benefits this Note outlines in Part III, but, as the objections discussed in Part IV make clear, corresponding drawbacks may also ensue. How those benefits and drawbacks would interact and what responses they would engender are anyone's guess. This Note has tried to show, however, that it is an alternative that deserves to be taken seriously.

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153. I owe this expression to Professor Anne Alstott, who used it in conversation to characterize the interconnectedness of the tax code. The metaphor seemed apt here as well.