

The Centrist Case for Enforcing Adhesive Arbitration Agreements

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The Politics of Arbitration Law and Centrist Proposals for Reform explained how issues surrounding consumer, and other adhesive, arbitration agreements became divisive along predictable political lines (progressive vs. conservative) and proposed an intermediate (centrist) position to resolve those issues. However, The Politics of Arbitration Law did not argue the case for this centrist position. It left those arguments for two more articles: (1) The Centrist Case against Current (Conservative) Arbitration Law, which argued against the overly-conservative parts of current arbitration law; and (2) this article, which argues against progressive proposals to repeal not only the overly-conservative parts of current arbitration law, but also the parts of current arbitration law that should be retained. While progressives would prohibit enforcement of individuals' adhesive arbitration agreements, this article argues that such agreements generally should be enforced, except when they are, to use an analogy from elsewhere in consumer law, "unsafe."

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I. INTRODUCTION

Litigation is the default process of dispute resolution in the United States. Parties can contract into alternative processes of dispute resolution—such as arbitration—but if they do not, then each party retains the right to have the dispute resolved in litigation.¹ In other words, parties start with the right to litigate but can trade away this right by agreeing to arbitrate.

Sometimes parties with an existing dispute contract to submit that dispute to arbitration, but such *post-dispute* arbitration agreements are relatively rare. More common are *pre-dispute* arbitration agreements. These are contracts containing a clause providing that, if a dispute arises, the parties will resolve that dispute in arbitration rather than in court. These arbitration clauses typically are written broadly to cover any dispute the parties’ relationship might produce,

1. Stephen J. Ware, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 1.5(b) (3d ed. 2016) [hereinafter Ware, PRINCIPLES].

but can be written more narrowly to cover just some potential disputes. Arbitration clauses appear in a wide variety of contracts including those relating to employment, credit, goods, services, and real estate.²

While arbitration clauses appear in many contracts between businesses,³ they are also common in the “contracts of adhesion”⁴ businesses draft and present on a take-it-or-leave-it basis to individuals—typically consumers or employees. Until the 1980’s, such “adhesive arbitration agreements” were generally unenforceable.⁵ From 1984 to 2006, however, the U.S. Supreme Court decided many cases that changed the law to result in routine enforcement of adhesive arbitration agreements.⁶ The Court’s pro-enforcement majorities nearly always included justices appointed by Democratic presidents, as well as justices appointed by Republican presidents.⁷ This bi-partisan support indicates that these Supreme Court decisions making adhesive arbitration agreements enforceable were, although opposed by many progressives and plaintiffs’ lawyers, well within the political mainstream of that Reagan-Bush-Clinton-Bush era. Since then, however, the political center on consumer law has moved somewhat to the left while the Supreme Court’s decisions on adhesive arbitration law have moved further right, resulting in governing decisions that sometimes diverge from the political mainstream.⁸

2. *Id.* § 2.3(a).

3. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 463–66 (2010) (observing that businesses frequently include arbitration clauses in contracts with other businesses, particularly in contracts for the sale of goods, construction, and joint ventures).

4. For the classic definition of “contract of adhesion,” see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176–80 (1983). Some lawyers use the term “contract of adhesion” “to refer to a contract that is not only adhesive but also grossly unfair. This misuse of the term creates confusion. Probably most contracts of adhesion are simple and reasonable.” JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.43, at 348 n.3 (6th ed. 2009).

5. WARE, *Principles*, *supra* note 1, at § 2.7.

6. *Id.* §§ 2.27–2.28.

7. Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. LEGIS. 711, 721–22, nn.49–58 (2016) [hereinafter Ware, *Politics*].

8. Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1229–30 (2016) [hereinafter Ware, *Against Conservative*]. A similar telling of this history says “By the early 2000s, an equilibrium had developed in the arbitration war,” but this equilibrium was upset by “polarizing” 2010–2013 Supreme Court decisions in *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011), and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 70–75 (2015) [hereinafter Horton & Chandrasekher,

The Supreme Court's post-2006 enforcement of adhesive arbitration agreements is controversial, and these controversies divide along largely predictable political lines. Republican Supreme Court appointees vote to enforce adhesive arbitration agreements in decisions from which Democratic Supreme Court appointees dissent.⁹ Bills to overturn or reduce the scope of these decisions, such as the Dodd–Frank Act of 2010, receive little support from Republicans and heavy support from Democrats.¹⁰ In July 2017, the Consumer Financial Protection Bureau (CFPB), directed by a Democrat,¹¹ issued an important rule that would have further reduced the scope of these Supreme Court decisions,¹² but the Republican President and Congress overturned both that rule and several Obama-era regulations reducing enforcement of adhesive arbitration agreements.¹³

The core of these controversies, as I detailed in *The Politics of Arbitration Law*,¹⁴ is a debate about the level of consent the law

Revolution]. See also Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 36 (2016) (describing *AT&T* and *Amex* as “Phase III” of the Supreme Court's arbitration jurisprudence).

9. Ware, *Politics*, *supra* note 7, at 713–74.

10. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1414(e), 124 Stat. 1376, 2151 1964 (2010) (“No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.”).

11. See 158 CONG. REC. E1419, E1420 (daily ed. Aug. 3, 2012) (remarks of Rep. Kaptur) (“Attorney General Richard Cordray, a Democrat”).

12. See CFPB Arbitration Agreements Rule, 82 Fed. Reg. 33,210, 1 (Jul. 19, 2017) (to be codified at 40 C.F.R. pt. 1040), http://files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf [hereinafter, CFPB, *Arbitration Agreements Rule*] (“[T]he final rule prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service. Second, the final rule requires covered providers that are involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau and also to submit specified court records.”). The Dodd-Frank Act authorized the CFPB to “prohibit or impose conditions or limitations on the use of” pre-dispute arbitration agreements in all consumer financial services contracts. 12 U.S.C. § 5518 (a)–(c).

13. Sylvan Lane, *Trump repeals consumer arbitration rule, wins banker praise*, THE HILL (Nov. 1, 2017), <http://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking>; Perry Cooper, *Arbitration Update: CFPB Rule Uncertain, Mixed Fates for Others*, BLOOMBERG NEWS, (June 1, 2017), <https://www.bna.com/arbitration-update-cfpb-n73014451803> (“A half dozen Obama-era rules to limit mandatory arbitration have met a variety of fates in the four months since Donald Trump became president.”).

14. Ware, *Politics*, *supra* note 7, at 712.

the possible disputes that might arise and assess how a duty to arbitrate, rather than litigate, will affect each of them.”¹⁸

In contrast, parties forming post-dispute arbitration agreements are much more likely to know that they are agreeing to arbitrate and to appreciate some of the differences between arbitration and litigation.¹⁹ This heightened knowledge is dispositive for advocates of the Very Progressive Position. For instance, Jean Braucher asserted that “[c]onsumer ‘choice’ of arbitration can only be meaningful if it is a post-dispute choice, when the consumer is represented by counsel. . . . The best way to reform arbitration systems is to make pre-dispute arbitration clauses unenforceable in consumer contracts.”²⁰ This position, opposition to enforcing individuals’ pre-dispute arbitration agreements, is the Very Progressive Position on arbitration agreements. It would require post-dispute consent for all individuals’ arbitration agreements, and thus would enforce no adhesive arbitration agreements because post-dispute arbitration agreements are not adhesive.²¹

18. Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 63–64 (2014).

19. Ware, *Politics*, *supra* note 7, at 732.

20. Jean Braucher, *Common Sense and Contracts Symposium: The Gateway Thread—AALS Contracts Listserv*, 16 *TOURO L. REV.* 1147, 1167 (2000). *See also* Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to Concepcion*, 46 *U. MICH. J.L. REFORM* 1203, 1210 (2013) (“[T]he better view recognizes that pre-dispute arbitration clauses in contracts of adhesion can never be truly voluntary”); Charles Knapp, *Common Sense and Contracts Symposium: The Gateway Thread—AALS Contracts Listserv*, 16 *TOURO L. REV.* 1147, 1173 (2000) (“I think Jean Braucher has hit the nail in precisely the right place—if arbitration is so economically sound for everybody, then let the consumer be persuaded ‘once the dispute has arisen’ that arbitration is in her best interests too. The argument that ‘but then the consumer might have a lawyer’ obviously proves too much.”); Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 *FORDHAM L. REV.* 2119, 2145 (2017) (advocating following rule “if firms wish to engage in binding arbitration with consumers and employees, these firms could be limited to using binding arbitration agreements that are entered into separately from the primary contract, after a dispute has arisen.”).

21. *See* Rakoff, *supra* note 4, at 1177 (defining “contract of adhesion” with seven elements). A post-dispute arbitration agreement does not fit the seventh element of the definition (“The principal obligation of the adhering party in the transaction considered as a whole is the payment of money”), and probably fits neither the third element (“[t]he drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine”), nor fourth element (“[t]he form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document.”). *Id.*

While the Very Progressive Position opposes enforcement of all individuals' pre-dispute arbitration agreements, a somewhat lower standard of consent, the Moderately Progressive Position, would enforce pre-dispute arbitration agreements when those agreements are not adhesive.²² However, consumers rarely form non-adhesive pre-dispute contracts,²³ and this is largely true of other individuals,²⁴ so nearly all pre-dispute arbitration agreements formed by individuals are adhesive. Therefore, the Moderately Progressive Position's prohibition on individuals' adhesive arbitration agreements would change current consumer and employment arbitration law almost as much as the Very Progressive Position's prohibition on individuals' pre-dispute arbitration agreements.

In contrast, the Centrist Position advocated in this article would continue to enforce most adhesive arbitration agreements. The basic principle underlying this Centrist Position is congruity. Arbitration law should largely conform to non-arbitration law. In particular, adhesive arbitration agreements should (with a few exceptions²⁵) be as enforceable as other adhesion contracts, not more or less so. Accordingly, the Centrist Position defends current arbitration law's use of contract law's low standards of consent, which enforce most adhesive contract terms, including most adhesive arbitration agreements.²⁶

However, the Centrist Position does not defend current arbitration law in its entirety, which is overly conservative as it enforces adhesive arbitration agreements more broadly than other adhesive contracts. Current law not only uses contract law's low standards of consent, but also: (1) generally prevents courts from hearing defenses to enforcement of contracts containing arbitration clauses; (2) exempts arbitration agreements from otherwise-applicable legal limits relating to class actions; and (3) generally prevents vacatur of legally-

22. For an example of a hypothetical non-adhesive pre-dispute arbitration agreement, see Ware, *Politics*, *supra* note 7, at 735.

23. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (“[T]he times in which consumer contracts were anything other than adhesive are long past.” (footnote omitted)); John E. Murray, Jr., *The Judicial Vision of Contract: The Constructed Circle of Assent and Unconscionability*, 52 DUQ. L. REV. 263, 265 (2014) [hereinafter, Murray Jr., *Judicial Vision*] (“[V]irtually all consumer contracts are ‘contracts of adhesion.’” (footnote omitted)); Zachary M. Rupiper, Note, *Enforcement Upon the Unwitting: The Overreaching Ability of Courts to Appoint Substitute Arbitration Forums Under the Federal Arbitration Act*, 100 IOWA L. REV. 411, 424 n.88 (2014) (“It is important to note that most consumer contracts are contracts of adhesion, so negotiation generally does not occur.”).

24. Some high-level employees have individually-negotiated, rather than adhesive, employment contracts.

25. See *infra* Section II.C.2.

26. See *infra* Section II.

erroneous decisions. For these three reasons, current law reflects the Very Conservative Position,²⁷ and violates the principle that adhesive arbitration agreements should be as enforceable as other adhesion contracts, not more or less so. The Centrist Position advocates the following three changes to current law: (1) repeal the separability doctrine; (2) treat arbitral class waivers like non-arbitral class waivers; and (3) vacate arbitrators' legally-erroneous decisions on mandatory-law claims.

This article is the third of three related articles that together articulate a Centrist Position on adhesive arbitration law and argue for that position over the Conservative and Progressive Positions. In the first article I explained how issues surrounding consumer, and other adhesive, arbitration agreements became divisive along predictable political lines (progressive vs. conservative) and proposed an intermediate (centrist) position to resolve those issues. I argued against current law's Very Conservative Position in the second article, *The Centrist Case against Current (Conservative) Arbitration Law*.²⁸ Finally, this article argues for the Centrist Position over the Progressive Positions.²⁹

27. Ware, *Politics*, *supra* note 7, at 743–44, 746 (“[T]he Very Conservative Position exempts arbitration agreements from limits relating to (1) appealing legally-erroneous decisions, and (2) class actions. By removing these limits, the Very Conservative Position effectively converts some adhesive arbitration agreements into exculpatory clauses and enforces them in circumstances in which comparable non-arbitration agreements would be unenforceable. . . . Current law adopts the Very Conservative Position.”). The Moderately Conservative Position prevents courts from hearing defenses to enforcement, but would subject arbitration agreements to otherwise-applicable legal limits relating to appealing legally-erroneous decisions and to class actions. *Id.* at 746–48.

28. Ware, *Against Conservative*, *supra* note 8.

29. Others taking positions fairly characterized as “centrist” include Sarah Cole and Jill Gross. Cole argues for prohibiting class waivers while continuing to enforce consumers' arbitration agreements. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 470–71 (2011) (“[T]he primary objection to consumer arbitration agreements is not that they fail to provide justice to most consumers, but that these clauses preclude access to justice for those consumers, typically with low-value claims, who would only be able to pursue their claim if they join with other consumers.”); *id.* at 498 (advocating “legislation will permit consumers with low-value claims, who are bound by arbitration agreements, to pursue class processes in either arbitration or court.”). Cole's publications neither support nor oppose the separability doctrine or deferential judicial review of arbitrators' decisions on claims arising under mandatory law.

Similarly, Gross fears current law's enforcement of class waivers will have an “adverse impact on consumer arbitration, as it effectively eliminates the states' ability to preserve class arbitration as a procedural method of aggregating low-value claims.” Jill Gross, *AT&T Mobility and FAA Over-Preemption*, 4 Y.B. ON ARB. & MEDIATION

This article's basic thesis is that adopting the Centrist Position is likely to address progressives' valid criticisms of current law. The Progressive Positions generally rest on two assertions: (1) that adhesive arbitration agreements are "forced" on consumers; and (2) have effects that are, on balance, bad for consumers. While each of these assertions has some validity under current law's Very Conservative Position, neither of these assertions would likely remain valid under the Centrist Position of largely treating adhesive arbitration agreements like other adhesion contracts.

The first assertion on which the Progressive Positions rest is that adhesive arbitration agreements, or arbitrations arising out of such agreements, are "forced" or "mandatory." Section II of this article rebuts these assertions by explaining that adhesion contracts are contracts; and contracts are consensual, not forced or mandatory. As noted above, an adhesive arbitration agreement is nearly always an arbitration clause in broader contract that also contains several other clauses. Section II explains that the arbitration clause is, with one exception, no more "forced" on the consumers than are most of the contracts' other clauses. The one exception is arbitration law's separability doctrine, which generally prevents courts from hearing defenses to enforcement of contracts containing arbitration clauses. This at least possibly requires courts to enforce some "forced" arbitration clauses, such as arbitration clauses formed under duress. The Centrist Position would enforce arbitration clauses only in contracts not formed under duress, or other circumstances constituting a contract-law defense to enforcement, and thus would end the one current legal doctrine sometimes justifying assertions that adhesive arbitration agreements are "forced" or "mandatory."³⁰

25, 36 (2012); *id.* at 26 (criticizing "FAA over-preemption, [that] unduly shifts arbitration law-making power away from the states, in violation of the FAA's savings clause"). However, Gross endorses enforcement of at least one (federally regulated) type of adhesive arbitration agreement. Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1178 (2010) ("[B]ecause securities arbitration is markedly different from other forms of consumer arbitration, the SEC should not exercise its new power to ban PDAAs in securities customer account agreements, nor should Congress, if it passes the AFA, extend it to encompass arbitration of securities customer disputes"). Gross's publications neither support nor oppose the separability doctrine or deferential judicial review of arbitrators' decisions on claims arising under mandatory law.

30. Current law has at least one other category of truly "mandatory" arbitration, but it does not involve adhesion contracts. See *infra* Section II.A.3 n.51.

The second assertion underlying the Progressive Positions is that the effects of enforcing adhesive arbitration agreements are, on balance, bad for consumers. This assertion generally rests on two more-specific assertions:

- 1) Consumers with disputes against businesses tend to fare worse in arbitration than they do in litigation;³¹ and
- 2) Enforcing adhesive arbitration agreements does not tend to reduce the prices consumers pay for the goods and services covered by such agreements.³²

The first of these more-specific assertions, Section III explains, is not supported by the most relevant empirical data. That data does not show consumers with disputes against businesses tend to fare worse in arbitration than they do in litigation. And if new and more relevant empirical data shows that consumers with claims against businesses tend to fare worse in arbitration than litigation, such data would not significantly support prohibiting enforcement of consumers' adhesive arbitration agreements because such data would necessarily be about what occurs under existing law, as distinguished from what would occur if the law adopted centrist reforms. Adopting centrist reforms would likely improve arbitration's outcomes for consumers with disputes against businesses.³³ Enacting these reforms and then gathering new data showing consumers with disputes against businesses nevertheless still tend to fare worse in arbitration than they do in litigation would be the data necessary to significantly support prohibiting enforcement of consumers' adhesive arbitration agreements.

In other words, empirical studies of consumer arbitration yield data about arbitration's outcomes under existing law—which includes widespread enforcement of arbitral class waivers and deferential judicial review of arbitrators' rulings on mandatory law,³⁴ as well

31. See *infra* Section III. That is, suppose enforceable arbitration agreements result in fewer successful claims by consumers against businesses and lower settlement and award payments on claims that are successful, as well as more successful claims by businesses against consumers and higher payments to businesses on their successful claims.

32. See *infra* Section IV.

33. See *infra* Section III.B.2.

34. See *infra* Sections II.C.1., III.B.2.

A mandatory (or "nonwaivable") rule creates rights that cannot be traded away in a pre-dispute contract, but can be traded away in a post-dispute contract (such as a settlement agreement). In contrast, a default rule creates rights that can be traded away in a pre- or post-dispute contract. For example, in a sale of goods under the Uniform Commercial Code, the default rule is that the seller's place of business is the place for delivery of the goods, but

as the separability doctrine. All three of these Very Conservative aspects of current law would be changed by the Centrist Position, and these changes would likely make arbitration's outcomes more favorable to consumers than they are now. So even if empirical data showed that enforceable adhesive arbitration agreements now tend to produce worse (than litigation) outcomes for consumers, that would not be a reason to prohibit consumers' adhesive arbitration agreements. That hypothetical data would instead be a reason to try the Centrist Position—(1) repeal the separability doctrine, (2) treat arbitral class waivers like non-arbitral class waivers, and (3) vacate arbitrators' legally-erroneous decisions on mandatory-law claims—and see if these three reforms bring arbitration's outcomes in line with litigation's.

Section IV of this article counters assertions that enforcing adhesive arbitration agreements has no effect on the prices consumers pay. In contrast to these assertions, the standard view among economists across the ideological spectrum is that anything that lowers businesses' costs tends over time to reduce the prices those businesses charge. This analysis is supported by voluminous evidence from a wide variety of sources.³⁵ While the standard economic analysis has not been shown empirically with respect to adhesive arbitration agreements, no reasoning suggests why it should apply any less to adhesive arbitration agreements than to anything else that tends to lower businesses' costs. Although some suggest that the CFPB has empirically shown the absence of a price-reducing effect from adhesive arbitration agreements, the CFPB study they cite was not conclusive, and was followed by the CFPB repeatedly endorsing the standard economic analysis's conclusion that enforcement of adhesive arbitration agreements tends to lower prices.³⁶

Instead of denying that businesses' savings from enforceable adhesive arbitration agreements tend to lower consumer prices, Section

the parties can opt out of that default with a pre-dispute contract term requiring delivery at some other location.

Default rules are very common in contract and commercial law. Mandatory rules are common in many other areas of law, particularly in areas of law—such as consumer, employment, labor, securities, and franchise law—replete with statutes and regulations prohibiting various arguably oppressive contract terms.

See Ware, *Politics*, *supra* note 7, at 731.

35. *See infra* notes 196–206 and accompanying text.

36. *See infra* Section IV.E.

V explains that the more sophisticated economic argument is that adhesive arbitration agreements (and other non-salient adhesive contract terms³⁷) lower consumer prices too much. Rather than deny that non-price contract terms (such as arbitration clauses) affect prices, sophisticated economic scholarship on adhesion contracts generally begins with that tradeoff among price and other contract terms and asks which legal rules tend to produce the best mix of price and non-price (or salient and non-salient) contract terms. So the debate between the Centrist and Progressive Positions is not about whether markets and unregulated adhesive terms are perfect, but how we should shape the legal rules that police adhesion contract terms to make markets more effective and balance the interests of consumers who benefit from enforceable arbitration clauses against the interests of consumers who do not.

The Centrist Position in this debate should appeal to progressives because it adopts the approach to consumer protection progressives have taken for a century.³⁸ That is to protect consumers from transactions with a significant risk of harming them (unsafe transactions), while permitting reasonably safe transactions. Similarly, the Centrist Position on adhesive arbitration advocates enforcing adhesive arbitration clauses that are safe for consumers, while prohibiting those that are unsafe. “Unsafe” adhesive arbitration clauses include arbitration clauses:

- 1) in contracts induced by duress, misrepresentation, or other contract defense;
- 2) that deprive consumers of class actions; or
- 3) that preclude correction of legally-erroneous decisions of mandatory law.

This list derives from current non-arbitration law. In other words, centrist arbitration law does not try to reinvent the wheel by developing new bodies of law on these three complex topics, but instead defers to the conclusions established areas of law have already reached after a long period of evolution and testing through litigated cases.

First, the Centrist Position does not require arbitration law to make the many difficult policy judgments required to develop nuanced contract defenses, like duress and misrepresentation. To the

37. A non-salient contract term is one “buyers do not consider” so it “will not affect buyers’ purchasing decisions.” Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) [hereinafter Korobkin, *Bounded Rationality*]. See *infra* Section V.A.

38. See *infra* Section V.B.

contrary, centrist arbitration law defers to contract law on its defenses and merely applies them to the right to litigate, by repealing the separability doctrine. Second, the Centrist Position does not try to resolve the long-running debate over class actions. Instead, centrist arbitration law allows that debate to continue outside arbitration law, which centrist arbitration law flexibly accommodates by making arbitral class waivers as enforceable as comparable non-arbitral class waivers. Third, the Centrist Position does not require arbitration law to make the many difficult policy judgments about when paternalism or externalities are severe enough to justify any of the many mandatory rules of consumer law, employment law, and the like. Rather, centrist arbitration law defers to such non-arbitration law on which rules are mandatory by ensuring that arbitrators' errors on such law can be vacated *de novo*, while arbitrators' errors on law consisting of default rules can be vacated only under the deferential standards of current arbitration law, such as FAA § 10.³⁹

In sum, the Centrist Position incorporates the accumulated wisdom of large bodies of non-arbitration law to prohibit the categories of adhesive arbitration agreements that contract, consumer, employment, and other non-arbitration law has already determined pose a significant risk of harming consumers, while facilitating courts' nuanced judgments about particular remaining adhesive arbitration clauses by allowing courts to determine on a case-by-case basis which of these remaining clauses unconscionable, for example, because their procedures are claim-suppressing. As a result, adopting the Centrist Position is likely to address progressives' valid criticisms of current law governing adhesive arbitration agreements. However, the Centrist Position's Burkean deference to current non-arbitration law may disappoint some progressives who are displeased with current non-arbitration law. Such progressives should channel their displeasure with current non-arbitration law toward efforts to reform that law, or at least forthrightly acknowledge that their disappointment with the Centrist Position on arbitration law is merely an application of their displeasure with broader non-arbitration law.

39. See *infra* note 91 (citing Ware, *Against Conservative*, *supra* note 8, at 1259).

II. ADHESIVE ARBITRATION AGREEMENTS IN THE CONTEXT OF ADHESIVE AGREEMENTS

A. Adhesion Contracts Are Not “Forced” or “Mandatory”

1. Generally

Progressives and plaintiffs’ lawyers often describe adhesive arbitration agreements, or arbitration arising out of such agreements, as “forced arbitration”⁴⁰ or “mandatory arbitration.”⁴¹ This rhetoric is

40. See Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration*, 24 LOY. CONSUMER L. REV. 586, 612 (2012) (Arbitration Fairness Act “would prohibit forced arbitration in all consumer contracts and make it illegal for employers to force arbitration on their employees.”); Peter A. Alces & Michael M. Greenfield, *They Can Do What!?! Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1136 (2010) (“a cellular phone service provider added a forced-arbitration clause to its existing contracts”); Paul Carington, *The Dark Side of Contract Law*, Trial, May 2000, at 73, 76 (referring to “examples of how forced arbitration can hurt workers, consumers, and victims, which can be used in educating the public and others about abuse of arbitration”); Mara Kent, *“Forced” vs. Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95, 116 (2005) (“Forced arbitration clauses are contested in the consumer lending context as well.”); Adam Levitin, *Mandatory Arbitration Offers Bargain-Basement Justice*, AMERICAN BANKER, (May 13 2014, 10:00 AM), <http://www.americanbanker.com/bankthink/mandatory-arbitration-offers-bargain-basement-justice-1067419-1.html> (“[T]he financial services industry . . . would like to continue its current widespread practice of eliminating consumer access to courts, including the right to bring class actions. Consumers are instead forced to resolve disputes in individual arbitrations.”); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 268 (2007) (“[T]he forced arbitration of consumer, employment, civil rights, statutory disputes, and other matters implicating public policy is what has concerned commentators critical of the perceived excesses of the modern new arbitration regime.”); J. Burton LeBlanc, *Leveling the Playing Field*, Trial, October 2013, at 6 (the Arbitration Fairness Act would “eliminate predispute forced arbitration clauses in employment, consumer, and civil rights cases, while still allowing consumers and workers to choose arbitration after a dispute occurred.”); Press Release, Nat’l Assoc. of Consumer Advocates, NAT’L CONSUMER L. CTR., Pub. Citizen, U.S. P.I.R.G., *During National Consumer Protection Week, Consumer Advocates Warn About Harms of Forced Arbitration* (Mar. 7, 2013), <http://www.nclc.org/images/pdf/arbitration/pr-npcpw7-mar-2013.pdf>; Department Inside the American Association for Justice, *Public Education Effort Works to End Forced Arbitration*, Trial, December 2013, at 54 (“forced arbitration limits [consumers’] access to the courts.”); Nancy A. Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. 381 (2017) (“[O]pponents of the clauses have worked to increase public awareness by coining the term ‘forced arbitration.’”).

41. See, e.g., Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 2(4) (2013) (“Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.”); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 831 n.1 (2002) (“I cannot understand how a person can be said to have ‘voluntarily’ accepted arbitration when it is part of a small print contract of

inapt because the arbitration clause of an adhesion contract is no more “forced” or “mandatory” than most of that contract’s other clauses.⁴²

An example is the mortgage (or security interest), a common clause of loan agreements and what enables the lender to take collateral from the borrower if the borrower defaults on the loan. I recently borrowed \$220,000. The lender insisted that I grant it a mortgage on my home. This clause was non-negotiable, take-it-or-leave-it. I am confident that other lenders, when faced with my request for a loan of that amount, would also have insisted on this same non-negotiable clause. I am also confident that the vast majority of other people borrowing that amount of money would have no choice but to accept this clause as well. Does that make my [mortgage or] mortgage payments involuntary or mandatory? Of course not. I could have rented a home or perhaps bought a smaller home without borrowed funds. There are always alternatives, albeit more and less attractive ones. I consented, in the absence of duress, to a contract containing the lending industry’s take-it-or-leave-it clause, just as countless people consent, in the absence of duress, to contracts containing take-it-or-leave-it arbitration clauses. Calling the results of these routine transactions mandatory arbitration is no more sensible than referring to mandatory mortgages. Both the arbitration and the mortgage are entirely voluntary.⁴³

Most ordinary individuals granting mortgages are more likely to realize the document they are signing is a “mortgage” than such individuals agreeing to arbitrate are to realize the document they are signing is an “arbitration agreement.” However, this difference of labeling is

adhesion.”); Hope B. Eastman & David M. Rothenstein, *The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground*, 20 EMP. REL. L.J. 595, 595 (1995) (finding that “a growing number of . . . courts have upheld and enforced mandatory agreements to arbitrate between employers and employees”) (emphasis omitted).

42. In contrast, the rare cases in which manifestations of agreement are truly forced—as when “A grasps B’s hand and compels B by physical force to write his name” above the signature line on a paper contract—result in contracts that are voidable on the ground of duress. RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a, illus. 1 (1981). In the absence of duress, it is exaggerated and dramatic to say that a contract containing an arbitration clause results in arbitration that is forced or mandatory. See Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 42–43 (2003) [hereinafter, Ware, *Contractual Arbitration*].

43. Ware, *Contractual Arbitration*, *supra* note 42, at 43.

less important than the substantive similarity that ordinary individuals likely tend to be as ignorant of the differences in remedies available to secured creditors (like mortgagees) and unsecured creditors as the differences between arbitration and litigation.

In discussing adhesive arbitration agreements, the rhetorically-loaded phrases “forced arbitration” and “mandatory arbitration” are inapt because they “ignore[] altogether the consensual element in contracts” and “resolve[] linguistically the issues of the reality of consent and the effect to be given to consent by fiat, rather than by analysis revealing the nature of the issues.”⁴⁴

2. Separability Doctrine

Analysis of these issues shows that describing adhesive arbitration as “forced” or “mandatory” is accurate only in cases of duress and perhaps conduct satisfying other defenses to contract enforcement. While contract defenses (such as duress and misrepresentation) protect most rights that can be traded away by adhesion contracts, arbitration law’s separability doctrine largely removes contract defenses’ protection from the main right traded away by an arbitration agreement—the right to litigate.⁴⁵ The separability doctrine, as reflected in the three Supreme Court decisions addressing it,⁴⁶ treats the arbitration clause as a separately enforceable agreement from the contract containing it: If the alleged defense is not focused on the arbitration clause in particular, then the court enforces that clause to require arbitration of whether the contract containing it is enforceable, as well as arbitration of the merits of the claims asserted by one party against the other.⁴⁷ For example, if a contract containing an arbitration clause was formed under duress—imagine the contract’s drafter pointing a gun at the other party and threatening to shoot if the victim of duress does not sign the contract—then the separability doctrine likely requires the victim to arbitrate her claim to rescind the contract.⁴⁸ We might plausibly call this “forced” or “mandatory”

44. See Ian R. Macneil, Richard E. Speidel, Thomas J. Stipanowich, & G. Richard Shell, *FEDERAL ARBITRATION LAW* 2:36 n.5 (1995).

45. Ware, *Against Conservative*, *supra* note 8, at 1231; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440, 449 (2006); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010).

46. See *id.*

47. Ware, *Politics*, *supra* note 7, at 743.

48. See Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 122–23 (2007) (“[T]he separability doctrine is highlighted by the hypothetical case of an individual who signs an arbitration agreement with a gun to her head. If an arbitration claim is brought against this

arbitration because, but for the duress, the victim would have been free to litigate, rather than arbitrate, her rescission claim. With more of a stretch, we might even use the words “forced” or “mandatory” to describe arbitration arising out of agreements formed under circumstances that satisfy other contract defenses covered by the separability doctrine, such as undue influence, misrepresentation, and perhaps even unconscionability. So to the extent critics of “forced” or “mandatory” arbitration focus their criticism on the separability doctrine, they have a point against current (conservative) arbitration law.⁴⁹ However, the Centrist Position rejects the separability doctrine, so law reform adopting the Centrist Position would fully respond to this criticism of current law enforcing adhesive arbitration agreements.⁵⁰

3. *Adhesion Contract v. No Contract*

Other types of arbitration that can be described as “forced” or “mandatory” do not relate to adhesion contracts, but instead arise out of statutes requiring parties to arbitrate, rather than litigate, even though they never contracted for arbitration. For example, the Federal Insecticide, Fungicide, and Rodenticide Act requires chemical manufacturers to arbitrate certain disputes with each other, even though they did not contract for arbitration.⁵¹ Such non-contractual

individual and she moves the court to stay arbitration on the ground that ‘the making of the agreement for arbitration . . . is . . . in issue,’ the separability doctrine requires the court to deny her motion and compel arbitration.”).

49. The separability doctrine, I have long argued, undermines the voluntariness of arbitration agreements and should be repealed. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 131 (1996) (“The separability doctrine is a legal fiction pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts. In addition to the contract really alleged to have been formed, the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms. Enforcing this fictional contract deprives arbitration of its basis in voluntary consent, because the fictional contract lacks a basis in voluntary consent.”).

50. Ware, *Against Conservative*, *supra* note 8, at 1234–48.

51. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136a(c)(1)(F)(iii) (2012). FIFRA requires arbitration not only of parties who did not contract for it, but of parties who may not have contracted with each other at all. FIFRA requires manufacturers of new pesticides to register with the EPA and submit data including data from manufacturers of older pesticides when there is an overlap in the ingredients used by the two manufacturers. See also *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 571–72 (1985); 7 U.S.C. § 136a (c)(1)(F)(iii) (2012). The new registrant must compensate the original data submitter, and if they cannot agree on the amount of that compensation, FIFRA requires binding arbitration. 7 U.S.C. § 136a (c)(1)(F)(iii) (2012). See also *Thomas*, 473 U.S. at 573 (1985). Nothing in FIFRA

arbitration is “mandatory,”⁵² unlike arbitration arising out of an adhesion contract, which is as consensual as the rest of the adhesion contract.⁵³ For example, as noted above, almost no one refers to “mandatory” or “forced” mortgages, even though most home buyers face essentially all lenders’ take-it-or-leave-it insistence on substantially similar adhesive mortgage clauses. We do not commonly speak of mortgages, and most other adhesion contract terms used by entire industries, as “forced” or “mandatory” because we understand that consumers choose, under no duress, whether to buy the goods and services those industries offer. Consumers may not know much about the terms of the adhesion contracts they accept, but choosing to do something while largely ignorant is quite different from being forced to do it.

While one might imprecisely say a cellphone, for example, is a “necessity” nowadays and all the major cellular providers’ contracts include arbitration clauses, so circumstances “force” an average consumer to agree to arbitrate; that is the sort of “force” contract law

conditions this duty to arbitrate on an existing contractual relationship between registrant and the original data submitter.

52. As is some arbitration that involves a contract. Many examples of “non-contractual” arbitration do involve a contract, such as an employment contract or a contract for the sale of an automobile. So in these contexts the duty to arbitrate is, in a sense, assumed by contract. The difference between “contractual” and “non-contractual” arbitration is whether it is possible to form a contract of the relevant sort without assuming the duty to arbitrate. For example, in transportation industries governed by the Railway Labor Act, it is not possible to form an employment contract without assuming the duty to arbitrate. In contrast, it is possible to form such an employment contract elsewhere in the private sector. Accordingly, transportation employment arbitration is “non-contractual,” while other labor and employment arbitration is “contractual.” STEPHEN J. WARE & ARIANA R. LEVINSON, PRINCIPLES OF ARBITRATION LAW §78(a) at n.22 (2017). *See also* Stephen J. Ware, *What Makes Securities Arbitration Different from Other Consumer and Employment Arbitration?*, 76 U. CIN. L. REV. 447, 454 (2008) (quotations omitted) (“What has just been said about transportation employees governed by the Railway Labor Act is also true of securities employees. Forming a contract of the relevant sort (securities employment) without assuming the duty to arbitrate is impossible.”).

53. *See also* Christopher R. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 706 [hereinafter, Drahozal, *Unfair*] (“A frequent criticism of arbitration in consumer contracts is that it is ‘mandatory.’ The criticism is rhetorically powerful because viewing arbitration as ‘mandatory’ is contrary to the whole idea of arbitration: that it is the product of an agreement between the parties. But as Richard Speidel explained, this label is ‘misleading’ because it connotes arbitration that is compelled by law regardless of consent.’ Arbitration is mandatory when required by law, such as mandatory arbitration of public-employee grievances. No law requires that parties to consumer contracts arbitrate disputes.”) (quoting Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998)).

generally accepts as legitimate. Contracts formed under such circumstances are consensual, rather than forced, because the consumer has no right to a cellphone, let alone a cellphone with litigation rather than arbitration. Having to choose between a cellphone with an arbitration clause and no cellphone at all (or perhaps a prepaid cellphone⁵⁴) hardly resembles Jean Valjean's choice (in *Les Misérables*) between stealing bread and his child starving to death.⁵⁵

Adhesion contracts are consensual because they are contracts. Contracts are consensual because "manifestation of assent" is required to form a contract.⁵⁶ Adhesion contracts are contracts, and thus consensual, even when they are drafted by a business's lawyers and presented, on a take-it-or-leave-it basis, to a less-sophisticated and less-powerful party, like an ordinary consumer. Although this is the long-established law throughout the United States, some scholars critique it. For example, David Slawson wrote in 1971 that "practically no standard forms, at least as they are customarily used in consumer transactions, are contracts. They cannot reasonably be regarded as the manifested consent of their recipient because an issuer could not reasonably expect that a recipient would read and understand them."⁵⁷ This view that an ordinary individual's consent to an adhesion contract exists only to the extent she understands the agreement's terms may continue to resonate with some progressive scholars,⁵⁸ but it is not the law.⁵⁹

54. Last I checked, prepaid cellphones were available without arbitration clauses.

55. Victor Hugo, *Les Misérables* 147–48 (Isabel F. Hapgood trans., Planet eBook) (1862) (ebook) <https://www.planetebook.com/ebooks/Les-Miserables.pdf>.

56. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981). For a thoughtful argument that consideration subsumes manifestation of assent, see Val Ricks, *Assent Is Not an Element of Contract Formation*, 61 KAN. L. REV. 591 (2013).

57. W. David Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529, 544 (1971).

58. See Braucher, *supra* note 20; Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006) ("The liberal theory of voluntary exchange transactions between autonomous individuals is now vestigial. The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent, then to mere efficient rearrangement of entitlements without any consent or assent."); Todd D. Rakoff, *supra* note 4, at 1237 ("[E]nforcing boilerplate terms trenches on the freedom of the adhering party."); *id.* at 1180–83 (arguing that form terms should be presumptively unenforceable).

59. See Korobkin, *Bounded Rationality*, *supra* note 37, at 1204 ("Contract law generally provides for the enforcement of the terms in form contracts, thus essentially allowing the drafting party (almost always the seller in consumer contracts but sometimes the buyer in commercial contracts) to create its own private law to govern its transactions. If the non-drafting party indicates his general assent to the form, courts

Courts around the United States enforce most adhesion contracts' terms because, under contract law's standards of consent, most adhesion contracts' terms are the products of mutual consent.⁶⁰ Consent in contract law is generally objective rather than subjective.⁶¹ Specifically, contract law does not require knowing consent to

will enforce the terms contained therein whether or not that party approves of the terms provided, understands those terms, has read them, or even has the vaguest idea what the terms might be about. Limited exceptions are made to this rule, most notably if the terms are found to be 'unconscionable.');

Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward A Theory of Justification*, 61 CASE W. RES. L. REV. 17, 50 (2010) ("[M]ost courts, regard even take-it-or-leave-it, standard form agreements, formed between powerful legal entities and relatively powerless natural persons, as not only prima facie valid, but moreover as boons for social utility.").

60. See, e.g., Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472 (2008) ("[C]ourts focus narrowly on particular terms and conditions in standard form contract cases, and refuse to enforce only a limited number of provisions in a limited number of cases."); *id.* at 471–72 ("Courts almost always find the requisite outward manifestation of assent based on the act of signing a standard form contract. In cases in which the contracting parties have unequal bargaining power, courts refuse to enforce standard form contract terms only when the court concludes that both substantive and procedural unconscionability were present when the parties signed the contract. Most contracts between parties with relatively equal bargaining power are enforced."); see also Alan M. White & Cathy L. Manfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 250–51 (2002) ("[J]udiciary's response to adhesion contracts . . . still is to assume manifestation of assent and to apply the 'you signed it, you're bound' rule.").

61. See, e.g., Peter A. Alces, *Unintelligent Design in Contract*, 2008 U. ILL. L. REV. 505, 527 (2008) ("Contract is animated by objective consent, then, because we cannot reliably determine subjective consent and we need to be able to determine consent . . ."); Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1133 (2006) ("[U]nder the now-dominant objective theory of contracts, subjective intention is irrelevant, and the lack thereof should not prohibit the formation of a contract."); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 252 (2007) [hereinafter Barnes, *Fairer*] ("The objective theory of contracts is the dominant theory of mutual assent in modern contract law . . ."); Korobkin, *Bounded Rationality*, *supra* note 37, at 1205 ("[G]iven the complexity of modern commerce . . . [a]ctual [subjective] assent to each contract term in a transaction of any complexity simply is not possible."); Lauren E. Miller, *Breaking the Language Barrier: The Failure of the Objective Theory to Promote Fairness in Language-Barrier Contracting*, 43 IND. L. REV. 175, 177 (2008) ("Since the late nineteenth century, courts have applied the objective theory to determine which manifestations amount to assent to form a contract."); W. David Slawson, *supra* note 57, at 542–43 ("Of course, a consensual theory of contract does not require actual subjective consent to make a contract binding. It is enough that both parties act, verbally or nonverbally, so as to give each other the reasonable expectation that they understand the meaning which is manifested by either of them. That a person may inadvertently manifest what he does not intend is a possibility which may produce unwanted contracts but which does not reduce the consensual character of contract law. All consensual processes are grounded on manifested rather than unmanifested thoughts, as, indeed, they must be.") (emphasis omitted).

each term on an adhesion contract, but rather routinely enforces most contract terms the adhering party probably did not know about, let alone understand, when forming the contract.⁶² Courts generally conclude that even though the business insisting on its adhesion contract form document does not reasonably expect the consumer to read, let alone understand, the pre-printed (“fine print” or “boiler-plate”) terms on the document, the consumer nevertheless manifests her consent to the document’s terms when she signs it, performs it, or clicks “agree” on a website containing it.⁶³ Such manifestations of assent, plus consideration, are well established as contract law’s requirements to form a contract.⁶⁴

In short, while individuals presented with adhesion contract form documents typically do not read most of the document’s terms, let alone negotiate (for different terms) with the business that drafted the document,⁶⁵ the individual can choose not to manifest assent to

62. See Warkentine, *supra* note 60 at 470–71. See also Melissa T. Lonegrass, *Finding Room for Fairness in Formalism - The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 10 (2012) (“[W]hile recognizing that an imbalance in bargaining power, the use of standard forms, and lack of an opportunity to negotiate are all indications of procedural unconscionability, most courts employing a conventional approach to procedural unconscionability will not find a typical consumer form contract, which meets these criteria, to be procedurally unconscionable per se . . . Only those form contracts that suffer from additional procedural deficiencies will be subjected to special scrutiny.”) (emphasis omitted); *id.* at 11 (“The prevailing understanding is that courts will not invalidate a provision as substantively unconscionable absent clear evidence of extreme unfairness. The standard parroted by most courts requires the offending provision be one that ‘no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other,’ a formulation that has remained unchanged for 250 years. Thus, according to the conventional view, the offending provision must not merely be ‘unreasonable,’ but must be ‘harsh’ or ‘oppressive’ in nature, or the terms so one-sided as to ‘shock the conscience.’”).

63. See, e.g., Francis J. Mootz III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, 4 J.L. & POL’Y FOR INFO. SOC’Y 271, 284 (2008) (“[C]ourts have readily concluded that clicking an ‘I agree’ icon next to an electronic presentation of the seller’s terms forms a contract and manifests the purchaser’s assent to those terms.”); Juliet M. Moringiello, *Signals, Assent, and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1323 (2005) (“Many courts analyzing click-wrap agreements have found the act of clicking an ‘I agree’ button to be an explicit manifestation of assent to contract terms.”).

64. See *supra* note 42 (citing Restatement and Ricks).

65. David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 747 (2012) (referring to “the widespread belief that adherents ignore dispute resolution terms in standard form contracts”); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 671 (2011) (Summarizing the “scant” empirical work available and concluding “Even when the standard form contract is available, very few people read it.”).

the document, and thus not to form a contract.⁶⁶ Adhesion contracts, like other contracts, are not formed (do not exist) unless the party against whom enforcement is sought manifested his or her consent to the contract's terms by signing, clicking, performing, or similar volitional action. This simple and hugely important fact refutes assertions that adhesive arbitration agreements, or arbitration arising out of such agreements, is "mandatory" or "forced" arbitration. What some call *mandatory* or *forced* arbitration is better called *adhesive* arbitration, recognizing that it is subset of *contractual* arbitration, because it, unlike some other arbitration,⁶⁷ does not occur unless the parties have contracted to arbitrate the dispute, and contracts are—in the absence of duress or perhaps other defense—consensual, not forced or mandatory.⁶⁸

B. *Adhering Party's Manifestation of Assent May Not Extend to the Entire Document, and Even If It Does, Some of the Document's Terms May Be Unenforceable*

As just explained, when a business presents its adhesion contract form document to a consumer who signs, clicks, or performs it, the consumer manifests her consent to the document's terms, generally. However, contract law recognizes exceptions. To put it another way, the contract's terms may include some, but not all, of the words on the document. This distinction was explained by Karl Llewellyn, lead drafter of Uniform Commercial Code Article 2, which is perhaps contract law's most important statute. Llewellyn described the typical buyer's assent to the typical seller's form document as "specific" assent to the "few dickered terms" buyer and seller discuss, and

66. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 205 (2005) (in contract cases "the parties had the ability to walk away from the deal altogether. This 'walk-away' power represents the ultimate caveat to claims of inequality of bargaining power—there is always a choice, always an alternative to entering the deal. That choice may be one among relatively unpleasant choices, but that alone cannot defeat the meaningfulness of the choice. But courts rarely acknowledge the power simply to do without or to seek alternatives to the proffered bargain.").

67. See *supra* text at notes 5156. See also Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 398 (2009) ("This form of arbitration is 'mandatory' only in the sense that it is imposed by the stronger party as a precondition to transacting with the weaker party. It is, therefore, both more accurate and user-friendly to name this form of arbitration "adhesionary" or "disparate-party" arbitration."); *id.* ("[T]o describe this process as "mandatory arbitration" is at least misleading, if not wholly inaccurate. The use of that phrase is likely to create confusion with so-called court-annexed arbitration. The latter is indeed mandatory because state legislatures obligate litigants to undergo this process before they can proceed with their lawsuits.").

68. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

“blanket” assent “to any not unreasonable or indecent term the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.”⁶⁹

Similarly, the Restatement (Second) of Contracts says:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. . . . Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.⁷⁰

Among these limitations, the customer does not assent to a term on the seller’s form document if the seller “has reason to believe that the [customer] would not have accepted the agreement if he had known that the agreement contained the particular term.”⁷¹ This reasoning protects consumers and other adhering parties from a document term that:

- is “bizarre or oppressive,”
- “eviscerates the non-standard terms explicitly agreed to,” or
- “eliminates the dominant purpose of the transaction.”

because such a term is not part of the contract.⁷²

While only a few states have expressly adopted this Restatement section,⁷³ its core idea (just summarized) is widely endorsed,⁷⁴ and is

69. Karl Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

70. *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt. b (1981).

71. *Id.* § 211 cmt. f.

72. *Id.*

73. See, e.g., *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 396–97 (Ariz. 1984) (adopting section 211(3)); *Sutton v. Banner Life Ins. Co.*, 686 A.2d 1045, 1050 (D.C. 1996) (“We agree with the Arizona Supreme Court’s approach in *Darner Motor* adopting section 211(3)”); *Berkson v. Gogo LLC*, 97 F.Supp.3d 359, 391 (E.D.N.Y. 2015) (citing *RESTATEMENT (SECOND) OF CONTRACTS* § 211(3)) (“Courts do not enforce terms of agreements that are unconscionable. It is recognized that where the offering party has reason to believe ‘that the party manifesting assent’ to a contract ‘would not do so’ if she ‘knew that the writing contained a particular term, the term is not part of the agreement.’”) (internal citations omitted). See also Barnes, *Fairer*, *supra* note 61, at 263 (2007) (“Subsection 211(3) . . . was incorporated into the second Restatement but then promptly discarded by a substantial majority of courts and commentators.”); James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997) (most cases decided under section 211(3) came from Arizona); Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 736 (2016) (“The mystery of section 211 is its overwhelming absence from modern contract law cases. Section 211 is rarely cited

very much embodied in the widely-recognized unconscionability doctrine, because the sorts of adhesive terms just listed are especially likely to be held unconscionable, and thus unenforceable.⁷⁵ The adhesiveness of a contract greatly increases the likelihood a court will find it “procedurally unconscionable,” and some courts go as far as “equat[ing] the finding of a contract of adhesion with the finding of procedural unconscionability.”⁷⁶ But a court’s finding of procedural

with respect to any standardized contract dispute, and even where cited, it rarely provides relief to the non-drafting party.”) (footnote omitted).

74. It is consistent even with a libertarian commitment to freedom of contract. As libertarian contracts scholar Randy Barnett writes,

[P]arties who sign forms or click ‘I agree’ are manifesting their consent to be bound by the unread terms in the forms. They would rather run the risk of agreeing to unread terms than either (a) decline to agree or (b) read the terms. Refusing to enforce all of these terms would violate their freedom to contract. But parties who click ‘I agree’ are not realistically manifesting their assent to radically unexpected terms. Enforcing such an unread term would violate the parties’ freedom from contract.

Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 639 (2002). *See also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 *VA. L. REV.* 821, 889–90 (1992) (“unless the presence of a clause that deviates from commonsense expectations is brought to the attention of the other party by its prominence and even by a requirement of some additional formality, the drafting party has no reason to believe that the other party consented to it.”).

75. The rule of Restatement § 211(3) “is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.” *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt. f (citing *id.* §§206 & 208) (1981). *See also* Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743 (2002) (internal citations omitted).

[C]ontract law has ample ammunition when sellers become too greedy. Although the evolved judicial strategy has many labels, the tools employed by courts largely reflect Llewellyn’s idea that courts should presume express consumer assent to any negotiated terms and, so long as the consumer has had a reasonable opportunity to read the standard terms, courts should find tacit or “blanket” assent to conscionable standard terms. Courts should also be empowered to strike any “unreasonable or indecent” boilerplate. Two of the most prominent judicial avenues for accomplishing these goals are the doctrine of unconscionability and section 211(3) of the Restatement (Second) of Contracts.

Id. at 748.

76. Warkentine, *supra* note 60, at 547 (noting that California courts “equate the finding of a contract of adhesion with the finding of procedural unconscionability”). *See also* Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 *N.Y.U. J. INTELL. PROP. & ENT. L.* 106, 120 (2013) (“Habitually, courts assume procedural unconscionability in contracts of adhesion”); Korobkin, *Bounded Rationality*, *supra* note 37, at 1258 (“In some cases, courts point to the adhesive nature of form contracts as evidence that the terms therein are ‘involuntary’ and thus procedurally unconscionable.”) (footnote omitted); *id.* at 1258 n.201 (“The majority of courts, however, find that the fact that a contract is adhesive is not alone enough for a finding of procedural unconscionability.”) (citation omitted).

unconscionability is generally insufficient to prevent enforcement of a contract term.

Most statements of the law of unconscionability now hold that both procedural and substantive unconscionability are required before courts will grant relief from a challenged term. Judicial decisions have not consistently followed this principle, however, and some courts have suggested a vaguely mathematical metaphor in which a large amount of one type of unconscionability can make up for only a small amount of the other.⁷⁷

So contract law's dispositive question in policing adhesion contracts is usually whether the challenged contract term is substantively unconscionable. That determination, as John Murray aptly summarizes, "is concerned with whether a contract, or a term of a contract, is overly harsh, one-sided, or manifests an outrageous degree of unfairness."⁷⁸ While this determination can be difficult to predict—and surely varies from court to court, perhaps depending somewhat on the judge's ideology or temperament⁷⁹—one can safely

77. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17–18 (1993) (footnotes omitted); see also Lonegrass, *supra* note 62, at 11–13 (discussing conventional requirement to make a strong showing of both forms of unconscionability, and sliding scale's similar requirement that both forms be present, however a lesser showing of one form may be acceptable with a large amount of the other form present); John E. Murray, Jr., *Revised Article 2: Eliminating the "Battle" and Unconscionability*, 52 S. TEX. L. REV. 593, 606–08 (2011) (discussing requirement of most courts that both substantive and procedural unconscionability be present, and a "sliding scale" approach that allows a large amount of one form of unconscionability to make up for a lack of the other). E. Allan Farnsworth, *CONTRACTS* § 4.28 (2d ed. 1990); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); Murray, Jr., *Judicial Vision*, *supra* note 23, at 265 ("Procedural' unconscionability is concerned with the circumstances under which the contract was negotiated and formed including the conspicuous or inconspicuous form in which the allegedly unconscionable term is found and, in particular, whether a genuine negotiation occurred, versus a take-it-or-leave-it demand that precluded any choice by the party with inferior bargaining power. Where only one party dictates the terms, the agreement is a 'contract of adhesion' which is 'procedurally' unconscionable.").

78. Murray, Jr., *Judicial*, *supra* note 23, at 266 (footnote omitted). See also Farnsworth, *supra* note 77. See also Unconscionable Contract or Term., Unif. Commercial Code §. 2-302 cmt. 1 ("The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."); RESTATEMENT (SECOND) OF CONTRACTS §208 cmt. c (1981) ("[G]ross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable.").

79. Anthony Niblett, *Tracking Inconsistent Judicial Behavior*, 34 INT'L REV. L. & ECON. 9, 9 (2013) (studying 174 California appellate decisions determining unconscionability of arbitration clause in a standard-form contract and finding inconsistency in about 23% of case-precedent pairs; "We find that conflicting political ideology of the benches that hear the two cases is highly correlated with inconsistency. That is, when we can directly compare pairs of cases, conservative judges are more likely to enforce

conclude that only a tiny portion of the terms on common adhesion contract form documents are unconscionable, or otherwise unenforceable due to Restatement § 211(3) or any other doctrine of contract law.⁸⁰

Perhaps for this reason, legislatures and administrative agencies have supplemented contract law's policing of adhesion contracts with statutes and regulations prohibiting various terms that had appeared in adhesion contracts (because courts often enforced them) until enactment of the statute or regulation.⁸¹ Indeed, most of consumer law consists largely of statutes and regulations prohibiting various adhesion contract terms,⁸² as do fundamental doctrines of employment,⁸³ labor,⁸⁴ securities,⁸⁵ and franchise law.⁸⁶ The enormous growth over

a contract as written and decide inconsistently with precedents delivered by liberal judges; liberal judges are more likely to hold an arbitration provision unconscionable and decide inconsistently with precedents delivered by conservative judges.”) *See also* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 66668 (1999) (Alabama Supreme Court justices who receive campaign funding from business are less likely than justices receiving campaign funding from plaintiffs' lawyers to hold arbitration clauses unconscionable).

80. *See* Lonegrass, *supra* note 62, at 10.

81. Max Helveston & Michael Jacobs, *The Incoherent Role of Bargaining Power in Contract Law*, 49 WAKE FOREST L. REV. 1017, 1054 (2014) (“Examples abound of laws and regulations aimed at resolving the very concerns that have led courts to turn to bargaining-power analysis. In a number of different areas, legislatures and agencies have prohibited contracts from including terms deemed abusive to one of the parties.”).

82. *See, e.g., id.* at 1054–55 (“State usury laws limit the amount of interest that lenders can charge to certain types of borrowers. The Federal Trade Commission (‘FTC’) has issued regulations dictating terms that must, and must not, be included in payday loans, credit card agreements, and other consumer-oriented financial contracts.”) (footnotes omitted). Consumer law is replete with mandatory rules prohibiting various contract terms such as holder-in-due-course clauses, 16 C.F.R. 433.2(a), waivers of exemptions, *id.* 444.2(a)(2), assignments of wages, *id.* 444.2(a)(3), and many nonpossessory security interest in household goods, *id.* 444.2(a)(4).

83. *See, e.g.,* Helveston & Jacobs, *supra* note 81, at 1055 (“The Occupational Safety and Health Act and minimum wage laws establish mandatory requirements for employment contracts.”) (footnotes omitted).

84. An employee's right to join a labor union may not be contracted away pre-dispute; so-called “yellow dog” contracts are unenforceable under federal labor law. 29 U.S.C. § 103 (2012); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

85. *See* 15 U.S.C. § 77n (2012) (Securities Act anti-waiver provision); 15 U.S.C. § 77cc(a) (2012) (Securities Exchange Act anti-waiver provision: “Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.”).

86. *See, e.g.,* Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659, 680–81 (2013) (“[M]ost state statutes regulating franchise relationships prohibit franchisors from requiring their franchisees to waive the franchisor's liability for a violation of those state franchise laws when entering into a franchise agreement.”) (footnote omitted); Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J.

the last hundred or so years of such legislation and regulation is largely the result of policymakers' decisions to prohibit enforcement of adhesive contract terms that would have been enforced had contract-law doctrines been the only grounds on which to deny enforcement.

C. *Conforming Adhesive Arbitration Law to Law Governing Adhesion Contracts Generally*

1. *Overview and the Case for Centrism over Conservatism*

The previous two subsections explained that adhesive contracts are consensual, not forced or mandatory, but are subject to contract law's defenses to enforcement (such as duress and misrepresentation); and particular adhesive terms may be beyond the scope of the adhering party's consent under reasoning summarized in Restatement § 211(3) or, although consensual, too harsh for law to enforce, under either contract law's unconscionability defense or non-contract law. Therefore, to treat adhesion contracts' arbitration clauses like adhesion contracts' other clauses, arbitration law must use contract law's low standards of consent—which allow a signature, click, or other manifestation of assent to make adhesive arbitration agreements presumptively enforceable—but then override this presumption when the arbitration clause is:

- 1) part of a contract induced by duress, misrepresentation, or other conduct constituting a defense to contract enforcement;
- 2) beyond the scope of the adhering party's assent under reasoning like that of Restatement § 211(3); or
- 3) so harsh that it is analogous to non-arbitration adhesive terms prohibited by law.

In other words, to conform adhesive arbitration law to law governing adhesion contracts generally, arbitration law must apply the general contract law governing adhesion contracts and serve as an analog to the large body of statutes and regulations (in consumer law, employment law, and similar areas) prohibiting various adhesive terms.

This task is better performed by the Centrist Position than by the Conservative or Progressive Positions. Both the Moderately and

857, 912 (2014) (“Although similar to contracts, franchises differ because franchise law entails certain mandatory rules (e.g., limitations on termination) and attempts to deter renegotiation in ways that contract law generally does not.”) (footnote omitted); UTAH CODE ANN. §§ 13-14-201 (“A franchisor may not in this state . . . require a franchisee to prospectively agree to a release, assignment, novation, waiver, or estoppel that would . . . relieve a franchisor from any liability . . .”).

Very Conservative Positions endorse the separability doctrine (discussed above⁸⁷) and thus fail the first just-listed criterion for treating adhesive arbitration clauses like other adhesive contract clauses—not enforcing a contract induced by duress, misrepresentation, or other conduct constituting a defense to contract enforcement. By separating an arbitration agreement from the larger contract containing it, the separability doctrine largely removes contract defenses’ protection from the main right traded away by an arbitration agreement—the right to litigate—and thus fails to police adhesive arbitration agreements as much as our law polices other adhesion contracts.⁸⁸

In addition, the Very Conservative Position adopted by current law fails the third criterion because it exempts adhesive arbitration agreements from otherwise-applicable legal limits protecting against arguably-harsh terms related to legally-erroneous decisions and class actions. Both of these anomalies in current arbitration law would be fixed by law adopting the Centrist Position. The following two paragraphs explain.

Current (Very Conservative) law facilitates enforcement of arbitrators’ legally-erroneous decisions. While outside the arbitration context courts do not enforce adhesion contracts prohibiting appeal, and thus trading away the right to correct the initial adjudicator’s legally-erroneous decisions on mandatory-law claims,⁸⁹ courts routinely enforce adhesive arbitration agreements effectively trading away that right.⁹⁰ In contrast, the Centrist Position would vacate arbitrators’ legally-erroneous decisions on mandatory-law claims when

87. *See supra* text at notes 45–50.

88. *Id. See also* Ware, *Against Conservative*, *supra* note 8, at 1239.

89. *Id.* at 1249 (noting virtually no authority outside the arbitration context for enforcing pre-dispute contract provision prohibits appeal).

90. *Id.* at 1251 (“[C]ourts routinely enforce [contract clauses prohibiting appeal] in adhesive arbitration agreements. That is, courts routinely enforce adhesive arbitration agreements that trade away the right to correct legally erroneous decisions by the initial adjudicator, the arbitrator. In fact, most every arbitration agreement does this. Most every arbitration agreement trades away the right to correct legally erroneous decisions by the initial adjudicator, as there is generally no right to correct legally erroneous arbitration awards.”); *see* Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 *CARDOZO J. CONFLICT RESOL.* 491, 500 (2009) (“Arbitration typically does not have an appeals process, unless the parties agree by contract to create one. Courts review arbitration awards only on narrow, usually procedural, grounds, and the United States Supreme Court has curtailed the ability of parties to expand that review by contract.”); Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 6 *Y.B. ON ARB. & MEDIATION* 59, 62–63 (2013) (“Arbitration awards are virtually unreviewable on the merits and are rarely vacated.”).

the award arises out of adhesive or other pre-dispute arbitration agreements.⁹¹

Also, current (Very Conservative) law enforces adhesive arbitration agreements' "class waivers"—provisions trading away the right to participate in a class action.⁹² In contrast, before such enforcement was approved by the Supreme Court's 2011 *AT&T v. Concepcion*⁹³ decision, courts rarely enforced non-arbitration adhesion contracts purporting to trade away the right to participate in a class action.⁹⁴ While courts now generally enforce adhesive arbitral class waivers, the Centrist Position would treat arbitral class waivers like other class waivers, so the right to participate in a class action would be no more easily traded away in an adhesive arbitration agreement than

91. Ware, *Against Conservative*, *supra* note 8, at 1259 ("Courts could give de novo review to arbitrators' decisions on questions of mandatory law. I have long supported this and propose the following law reform, whether enacted by Congress, the CFPB, or perhaps the Supreme Court: In addition to other grounds for vacating arbitration awards, a state or federal court shall vacate an award arising out of an agreement providing for arbitration of any future dispute between the parties where the award was based on the arbitrators' error of law and, at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law. The final clause—at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law' ensures that only awards arising out of *pre-dispute* agreements to arbitrate would be subject to de novo review, and ensures that de novo review would apply only to questions of mandatory, not default, law. This rule would fix the anomaly of enforcing pre-dispute arbitration agreements, even adhesive arbitration agreements, but not other pre-dispute contracts trading away the right to appeal legally erroneous decisions. This rule would make arbitration agreements as enforceable as other agreements, but not more so.")

92. *Id.* at 1232 ("[F]ollowing the Supreme Court's 2011 *AT&T Mobility LLC v. Concepcion* decision, courts generally enforce adhesive arbitral class waivers."). See *Concepcion*, 131 S. Ct. at 1753; *American Express Co.*, 133 S. Ct. at 2310–11 (2013).

93. Ware, *Against Conservative*, *supra* note 8, at 1264. ("In sum, the conservative Justices comprising the majorities in *Stolt* and *Concepcion* see "bilateral" arbitration—the simple type of arbitration contemplated by the FAA—as the norm and see class arbitration as a strange process that a few parties might choose, but which should not be imposed on parties who have agreed to arbitrate without specifically addressing class arbitration. And *Concepcion* strongly suggests that courts may not consider it a strike against the enforceability of an arbitration agreement that the agreement provides only for arbitration and not for class arbitration, even if that has exculpatory effect. *Concepcion* reads the FAA as preempting state law—even state law categorized as "unconscionability" or some other ground for the revocation of any contract—that "[r]equir[es] the availability of classwide arbitration." (citing *Concepcion*, 131 S. Ct. at 1750–53).")

94. *Id.* at 1266–67 (citing and summarizing cases).

in an adhesive non-arbitration agreement.⁹⁵ In other words, arbitration law under the Centrist Position would defer to other law in deciding when, if ever, class waivers are enforceable.

2. *Unless Unconscionable, Enforce Arbitration Agreements' Limitations on Discovery, Evidence, and Identity of Adjudicator*

The previous paragraphs summarize how the Centrist Position rejects the three important and controversial parts of current law—(1) separability doctrine (contract defenses), (2) correction of legally-erroneous decisions, and (3) class waivers—that enforce adhesive arbitration agreements more broadly than other adhesion contracts. On these three topics, the Centrist Position advances the principle that arbitration law should be congruous with non-arbitration law, so adhesive arbitration agreements are only as enforceable as other adhesion contracts.

However, this principle of congruity should not be taken to the extreme. In a few ways—relating to discovery, evidence, and the jury—adhesive arbitration agreements should remain more enforceable than other adhesion contracts.⁹⁶ In other words, courts should continue enforcing adhesive arbitration agreements reducing parties' access to discovery, evidentiary rules, and juries, even when courts would not enforce analogous reductions in non-arbitration adhesion contracts.

To see why, consider the alternative—a rule enforcing arbitration agreements only when they provide for the same discovery, evidence rules, and juries available in litigation. For example, if to be enforceable an agreement to “arbitrate” had to use (1) the Federal Rules of Civil Procedure on discovery, (2) the Federal Rules of Evidence, and (3) have juries, then so-called “arbitration” would be

95. *Id.* at 1270 (“[W]e have three non-arbitration-law fora—amendments to rules of civil procedure, statutes, and case law—in which to make law about class actions generally and class waivers specifically. Any or all of these fora are better suited to making that law than is arbitration law. Accordingly, arbitration law should be agnostic about class waivers and should defer to these other bodies of law. This article’s centrist proposal does exactly that. The proposal in the Appendix states that if any arbitration “agreement requires claims to be brought on an individual, rather than class, basis then such requirement shall be as enforceable as such a requirement in a non-arbitration agreement would be under similar circumstances.” This does not say that arbitral class waivers should or should not be enforceable. It says that arbitration law should follow other law on the circumstances in which they are enforceable. In short, it says arbitration law should defer to other law in deciding whether a class waiver is enforceable.”).

96. *Id.* at 1271.

nearly identical to civil litigation in federal courts.⁹⁷ Therefore, enforcing adhesive arbitration agreements that reduce discovery, evidentiary rules, and juries is necessary to preserve “arbitration” as private adjudication, significantly different from the governmental adjudication we call “litigation,” and thus to preserve “arbitration” as that term is used in the Federal Arbitration Act,⁹⁸ other governing law, and ordinary speech.⁹⁹

97. *Id.* at 1277.

98. 9 U.S.C. § 2 (2012). Some contend “the Federal Arbitration Act was never intended to permit companies to impose arbitration on unknowing consumers and employees, but rather was merely intended to allow two sophisticated businesses to enter into predispute arbitration agreements.” Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 729–30 (2001). *See also* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 308 (2015) (Congress “intended the FAA to allow enforcement only of arbitration agreements between merchants. Congress did not intend the FAA to apply to consumer contracts.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 111–12 (2006) (“The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength.”); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118 (2016) (The FAA “was enacted to cover privately-negotiated arbitration agreements between merchants . . . the Supreme Court has expanded the statute to . . . compel arbitration of . . . consumer disputes . . .”).

However, the text of the FAA did not make enforceable only arbitration agreements between “merchants” or “businesses.” It made enforceable all arbitration agreements “involving commerce” between all sorts of parties, except for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. (2012). While the legislative history reflects concerns about non-employment adhesion contracts, *see* Moses, *supra*, at 106 (citing Senator Walsh), these concerns did not find their way into the statute. Congress knew how to except individuals from the FAA and chose to except some employees but not any consumers.

When the FAA was enacted “very few transactions between large merchants and individual consumers . . . would have involved interstate commerce and thus fallen under the jurisdiction of the FAA.” Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. REV. 637, 647 (1996) [hereinafter, Sternlight, *Panacea*]. The vast increase in consumer transactions now held to involve commerce under the FAA reflects not only an increase in long-distance consumer transactions, but also the Supreme Court’s expansion of the Commerce Clause to cover transactions previously considered beyond the reach of federal legislation. *See* Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 459 (1992). “If applying the FAA to consumer contracts is inconsistent with the intent of the Congress that enacted it, that inconsistency is more properly blamed on the Court’s interpretation of the Commerce Clause than on the Court’s interpretation of the FAA.” Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. L. REV. 167, 180 n.76 (2004).

99. Ware, *Against Conservative*, *supra* note 8, at 1271.

In addition, allowing adhesive arbitration agreements to reduce discovery, evidentiary rules, and juries is good policy. Arbitration should, within the bounds of the unconscionability doctrine, be free to compete against litigation by offering different adjudicators and different rules of discovery and evidence.¹⁰⁰ The United States is the only major nation to make extensive use of jury trials in civil cases,¹⁰¹ and “the civil jury bears a large share of responsibility for: (1) the cost and intrusiveness of U.S. discovery; (2) the theatrics of U.S. trials; and (3) the complexity of U.S. evidence law.”¹⁰² So arbitration’s lack of a jury fits with arbitration’s tendency to reduce discovery¹⁰³ and evidentiary rules; and the whole package is quite mainstream and reasonable to all but only an oddly provincial American. Among these oddly provincial Americans “who place a high value on the procedural rights lost by substituting arbitration for litigation” are, I suspect, “a disproportionately large number of lawyers.”¹⁰⁴ The procedures more prevalent in litigation than arbitration tend to create paid work for lawyers, so many lawyers may think they have a financial interest in discouraging arbitration, and some probably do have such an interest.

In sum, lawyers lobbying against enforcement of adhesive arbitration agreements may vindicate Upton Sinclair’s observation that, “It is difficult to get a man to understand something, when his salary depends on his not understanding it.”¹⁰⁵ And even if lawyer-self-interest plays no role, lawyers may be especially likely to value litigation’s more elaborate procedures over arbitration’s less elaborate

100. *Id.* at 1274–75.

101. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 193–94 n.1 (1996) (referring to the abolition of the civil jury as “a course that the rest of the civilized world took long ago”); KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 267 (1977); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357 (2003).

102. Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 U. MIAMI L. REV. 865, 868 (2002).

103. *See infra* Section IV.F.

104. Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With A Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 221 (1998) [hereinafter, Ware, *Exceptional*].

105. Upton Sinclair, I, *CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED* 100 (1935).

procedures simply because lawyers are trained in litigation's procedures and accustomed to them, or because lawyers tend by temperament to be comfortable with "process values,"¹⁰⁶ and thus less comfortable with the "rough justice" associated with arbitration.¹⁰⁷ All of which should guide lawyers to temper their fondness for the procedures more abundant in litigation than arbitration with a humble acknowledgment that "Procedural excess has long been the bane of many legal decision systems, and commonly has served as the justifiable basis for public dissatisfaction with the institutions of the law."¹⁰⁸

The previous paragraphs argued that adhesive arbitration agreements should be allowed to reduce parties' access to discovery, evidentiary rules, and juries. That said, such agreements should be subject to contract-law defenses, such as unconscionability, so courts can police arbitration agreements' fairness on these three procedural topics. In other words, the Centrist Position (like current law) allows parties substantial freedom of contract on discovery, evidence, and identity of the adjudicator, but not complete freedom of contract, so courts can protect consumers, employees, and others from overly-harsh adhesion contracts.¹⁰⁹ This should meet the concerns of progressives and plaintiffs' lawyers that claimants in complex cases need litigation's more elaborate procedures, particularly its more extensive discovery, because "proof is relatively complex and the pre-

106. John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 659 (1994) ("Process values, that is, the goals and positive contributions of good procedure, are of both the instrumental and the noninstrumental variety. Instrumental values are those associated with the quality of the decision that emerges from the process. Noninstrumental values are those inherent in the procedure itself."); Nancy A. Welsh, *What Is "(Im)-partial Enough" in A World of Embedded Neutrals*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 495, 534 (2010) ("Procedural justice matters because if people perceive a dispute resolution or decision-making process as procedurally fair, they also are more likely to perceive the outcome as substantively fair. Perceptions of procedural justice also strongly influence compliance and perceptions of the legitimacy of the institution that provides or sponsors the process.")

107. Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 163 (2013) ("The availability of flexible 'rough justice' is a vaunted feature of arbitration."); Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 338 (2003) ("[H]arsh formalities of litigation . . . may fall particularly hard upon less sophisticated, less well-represented parties to a dispute. Consequently, arbitration may provide more satisfactory results when it accords these parties rough justice.")

108. John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1135 (1993).

109. Ware, *Against Conservative*, *supra* note 8, at 1274-75.

litigation distribution of evidence is largely in the possession of the defendant. Therefore, extensive discovery is required for the plaintiff to meet his burden of proof.”¹¹⁰ In sum, contractual freedom tempered by unconscionability-policing is centrist moderation that allows arbitration to differ from litigation on discovery, evidence, and identity of the adjudicator, but not differ in such a harsh way as to be unconscionable.

3. *Progressives’ Assertions About Adhesive Arbitration’s Evils*

Progressives would go farther than the centrist reforms summarized above. Progressives would completely prohibit enforcement of individuals’ adhesive arbitration agreements. Progressives generally justify this position with assertions that adhesive arbitration agreements are “forced” on consumers and have effects that are, on balance, bad for consumers. The previous subsections explained that moving from current (Very Conservative) law to the Centrist Position would fix the one aspect of current law—the separability doctrine—at least possibly requiring courts to enforce some “forced” arbitration clauses. But what of progressives’ other assertion—that adhesive arbitration agreements’ effects tend, on balance, to be bad for consumers? This assertion generally rests on two more-specific assertions:

- 1) consumers with disputes against businesses tend to fare worse in arbitration than they do in litigation;¹¹¹ and
- 2) enforcing adhesive arbitration agreements does not tend to reduce the prices consumers pay for the goods and services covered by such agreements.¹¹²

If these two assertions—(1) worse consumer outcomes and (2) no price reduction—are true, then the case for an exception to the law’s usual presumption for enforcing adhesive contract terms might well have been made. If these two assertions are true, then enforcing consumers’ adhesive arbitration agreements might help one party to the agreement (the business), but harm the other party, the consumer. While businesses are ultimately owned by people and one can plausibly believe that helping business owners is as good as helping consumers, this article is written for those who may not share that

110. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* 239, 240 (2012) [hereinafter Schwartz, *Claim-Suppressing*].

111. See *infra* Section III. That is, suppose enforceable arbitration agreements result in fewer successful claims by consumers against businesses and lower settlement and award payments on claims that are successful, as well as more successful claims by businesses against consumers and higher payments to businesses on their successful claims.

112. See *infra* Section IV.

belief,¹¹³ so I set it aside. Instead, the next two sections of this article question the evidence for the two more-specific assertions.

Section III shows that the most relevant empirical data does not support the belief that consumers with disputes against businesses tend to fare worse in arbitration than they do in litigation. And even if newer empirical data showed that enforceable adhesive arbitration agreements tend to produce worse (than litigation) outcomes for consumers, that would not be a reason to prefer a prohibition of consumers' adhesive arbitration agreements to the Centrist Position's enforcement of them. That newer data would instead be a reason to try the Centrist Position—(1) repeal the separability doctrine, (2) treat arbitral class waivers like non-arbitral class waivers, and (3) vacate arbitrators' legally-erroneous decisions on mandatory-law claims—and see if these three reforms bring arbitration's outcomes in line with litigation's.

Section IV rebuts assertions that enforcement of adhesive arbitration agreements tends not to reduce the prices consumers pay. In contrast to these assertions, the standard view among economists across the ideological spectrum is that anything that lowers businesses' costs tends over time to reduce the prices those businesses charge. This analysis is supported by voluminous evidence from a wide variety of sources. While the standard economic analysis has not been shown empirically with respect to adhesive arbitration agreements, no reasoning suggests why it should apply any less to arbitration agreement than to anything else that lowers businesses' costs. While some suggest that the CFPB has shown the absence of a price-reducing effect from adhesive arbitration agreements, the CFPB study they cite was not conclusive, and was followed by the CFPB repeatedly endorsing the standard economic analysis's conclusion that enforcement of adhesive arbitration agreements tends to lower prices.¹¹⁴

113. See, e.g., Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 85 (2007) (“The gist of my idea is that ‘little’ guys (consumers and certain lower level employees) would be provided, by statute, with an opportunity to take their disputes to binding arbitration rather than litigation. If the ‘little guys’ chose arbitration over litigation, post-dispute, companies would have to agree to such arbitration, and the results of the arbitration would then be binding on both ‘little guy’ and company. If on the other hand the ‘little guys’ preferred to litigate their disputes, they would reserve that right.”).

114. CFPB, *Arbitration Agreements Notice of Proposed Rulemaking*, http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf [hereinafter CFPB, *Proposed Rule*]; (“To the extent providers would pass these costs through to consumers, providers’ costs would be lower.”).

III. EFFECTS OF ADHESIVE ARBITRATION AGREEMENTS ON DISPUTE OUTCOMES

A. *Empirical and Other Approaches to Comparing Outcomes in Arbitration and Litigation*

1. *Beliefs and Knowledge*

a. *Arbitration Should Be Compared to Litigation of Similar Cases*

As I wrote a decade ago, compared to litigation, “[i]t is possible that adhesive arbitration results in . . . generally lower awards for adhering parties like consumers and employees.”¹¹⁵ More broadly, it is possible that consumers and other individuals with disputes against businesses tend to experience worse outcomes in arbitration than they do in litigation. “Worse outcomes” include fewer successful claims by consumers against businesses and lower settlement and award payments on claims that are successful, as well as more successful claims by businesses against consumers and higher payments to businesses on their successful claims. For example, if consumers subject to enforceable arbitration agreements leave more of their meritorious claims unpursued because these claims could only be cost-effectively pursued as part of class litigation precluded by an arbitral class waiver, that would constitute “worse outcomes” for consumers, even if consumers fare as well in disputes that are arbitrated as they do in disputes that are litigated.

While I continue to acknowledge the possibility that consumers and other individuals with disputes against businesses tend to experience worse outcomes in arbitration than they do in litigation, belief that this is not merely possible, but established, seems common.¹¹⁶

115. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 259 (2006) [hereinafter Ware, *Class Actions and Arbitration Fees*]; Drahozal, *Unfair*, *supra* note 53, 743–44 (A “possible difference between arbitration and litigation is the expected outcome. The individual may expect to be more (or less) likely to prevail in arbitration than in court, and may expect to recover more (or less) in damages. Conversely, the corporation may expect to be more (or less) likely to prevail in arbitration than in court, and may expect to pay more (or less) in damages.”).

116. For example, New York Times news articles (not editorials) contend arbitrators “commonly consider the companies their clients” and “have twisted or outright disregarded the law” to rule favorably towards the companies. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>. “[T]he rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show.” Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere*,

However, this belief is not supported by the most relevant empirical data. That “most relevant empirical data” is discussed below, after a discussion of less relevant data and other less valid ways of assessing the belief that individuals with disputes against businesses tend to experience worse outcomes in arbitration than they do in litigation.

That belief cannot be shown by anecdotes about particular consumers who fared badly in arbitration.¹¹⁷ Litigation has its own horror stories,¹¹⁸ and it is “essential not to analyze arbitration in isolation, but instead, to compare it to the alternatives.”¹¹⁹ The relevant alternative to arbitration is litigation because, as discussed above, non-enforcement of consumers’ arbitration agreements would allow litigation by consumers who otherwise would be held to have traded away their right to litigate.¹²⁰

Even as debate rises from anecdotes to empirical studies, the need to compare arbitration with litigation remains. Therefore, studies that gather data on arbitration, but not litigation, cannot by themselves support or contradict the belief that consumers and other

Stacking the Deck of Justice, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1. See also Levitin, *supra* note 40 (“When arbitrators make plain legal or factual errors, their rulings still stand. As a result, arbitration is more likely to produce erroneous outcomes than the court system. This problem is exacerbated by the fact that the financial firm picks the arbitrator. The major arbitration associations get their business from the financial firms, not consumers, and are thus incentivized to cater to the financial firms in order to get repeat business.”). David Lipsky writes that “the Times series is a seriously biased and one-sided attack on” arbitration. David B. Lipsky, *The New York Times’ Attack on Arbitration*, DISP. RESOL. MAG., Summer 2016, at 6.

117. For such anecdotes, see, e.g., PUBLIC CITIZEN, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, (Sept. 2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

118. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2815–16 (2015).

119. Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL’Y 549, 551 (2008).

120. As two of the leading empirical researchers on arbitration write, “the proper basis for comparison is to similar cases in court. Court adjudication is the default means of dispute resolution. Parties that agree to arbitrate contract out of that default. To evaluate arbitration meaningfully thus requires a comparison to the likely means by which the disputes otherwise would be resolved” Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 80 (2011) [hereinafter, Drahozal & Zyontz, *Creditor Claims*]. See also Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 918 (2010) [hereinafter, Drahozal & Zyontz, *Empirical Study*] (“[O]ne must have a baseline for comparison to evaluate the cost, speed, and outcomes of consumer arbitrations; data on arbitration proceedings alone are not enough.”).

individuals tend to experience worse outcomes in arbitration than litigation.¹²¹ For example, Alexander Colvin's *Empirical Study of Employment Arbitration*¹²² reports an employee win rate in arbitration and says this rate is "lower than employee win rates in litigation,"¹²³ but does not cite any source of data on employee win rates in litigation, let alone any basis for assessing the extent to which the litigation cases studied are comparable to the arbitration cases studied.¹²⁴ As Colvin acknowledges, "we may be comparing apple and oranges here in that the characteristics of cases in arbitration may differ systematically from those in litigation."¹²⁵ Similarly, a study by David Horton and Andrea Cann Chandrasekher finds that consumers win 35% of the arbitration cases they filed,¹²⁶ but does not analyze cases consumers file in court, let alone comparable cases consumers file in court.¹²⁷ As Horton and Chandrasekher acknowledge, "to truly assess arbitration, one must be able to contrast its output with results in litigation. Unfortunately, though, there are little data on civil verdicts, let alone consumer cases specifically."¹²⁸

b. *Arbitration's Repeat Player Effect Should Be Compared to Litigation's Repeat Player Effect*

The inability of studies that gather data on arbitration, but not litigation, to support or contradict the belief that consumers tend to experience worse outcomes in arbitration than litigation extends to studies finding that businesses who arbitrate often ("repeat-players") do better in arbitration than businesses who arbitrate rarely.¹²⁹

121. Important studies of consumer arbitration are listed in Horton & Chandrasekher, *Revolution*, *supra* note 8, at 76–77, and older empirical studies of consumer, employment, and securities arbitration are listed in Drahozal & Zyontz, *Empirical Study*, *supra* note 120, at 919–29.

122. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

123. *Id.* at 7.

124. *Id.* See also David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 462 (2016) [hereinafter Horton & Chandrasekher, *Employment Arbitration*] ("[E]mployees 'win' — defined as recovering \$1 or more — 18% of [employment arbitration] matters. These successful plaintiffs recovered an average of \$203,362, with a median of \$52,129."). We conclude that employees are less likely to be victorious when they face a "high-level" or "super" repeat-playing employer (collectively "extreme repeat players").

125. Colvin, *supra* note 122, at 7.

126. Horton & Chandrasekher, *Revolution*, *supra* note 8, at 63.

127. *Id.*

128. *Id.* at 77.

129. Colvin, *supra* note 122, at 17–20; Horton & Chandrasekher, *Revolution*, *supra* note 8, at 102–15; *id.* at 113 ("[C]onsumers facing high-level and super repeat-

Since at least 2000, opponents of adhesive arbitration have cited this “repeat player bias” to impugn the neutrality of “arbitrators who depend for their livelihood on repeat business.”¹³⁰ However, the repeat-player effect may be at least as prevalent in litigation as in arbitration.¹³¹ As Horton and Chandrasekher write, parties “who are regularly embroiled in litigation,” have long exploited a “variety of ways” to “capitalize on their experience to gain the upper hand over one-shotters.”¹³² So litigation may have a “repeat-player effect” that equals or even exceeds arbitration’s. That is, businesses who litigate often may do better in litigation than businesses who litigate rarely, and the gap between repeat players and “one-shotters” in litigation may be wider than the analogous gap in arbitration.¹³³ Consequently, evidence of a “repeat-player effect” in arbitration has little relevance without evidence showing whether litigation has a comparable repeat-player effect.¹³⁴

playing defendants are strongly disadvantaged in the arbitral forum relative to consumers facing one-shot defendants”); see also Horton & Chandrasekher, *Employment Arbitration*, *supra* note 124, at 462 (concluding “employees are less likely to be victorious when they face a ‘high-level’ or ‘super’ repeat-playing employer”); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238–39 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 205–10 (1997).

130. Letter from John Vail, AMERICAN TRIAL LAWYERS ASSOCIATION, to the United States Department of Commerce and Federal Trade Commission (Mar. 21, 2000), at 4, <https://docgo.org/us-federal-trade-commission-vail>; see also Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN’S L.J. 267, 269 n.8 (1998) (“[A]rbitration companies, for the sake of their own profit margins, may abandon fair procedural protections and instead cater to the employers who have hired them to perform a service.”).

131. Research revealed no published studies addressing this.

132. Horton & Chandrasekher, *Revolution*, *supra* note 8, at 68 (quoting “Marc Galanter’s canonical article, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change”).

133. See Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 752 (2001) [hereinafter Ware, *Gilmer*] (“The most important point about the repeat-player effect, however, is that this effect may be at least as prevalent in litigation as in arbitration.”)

134. Zev Eigen and David Sherwyn make the same point with respect to employment disputes. Zev J. Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J.L. & PUB. POL’Y 217, 265 (2016) (“[T]he proper comparison for repeat player employers in arbitration is repeat player employers in litigation. We know of such studies.”).

c. *Epistemological Humility Outside the Natural Sciences*i. *Isolating a Single Variable*

More fundamentally, arbitration and litigation cannot be compared with the rigorously empirical method of the natural sciences—studies that control for all variables except the one being tested.¹³⁵ In particular, studies of how consumers fare in arbitration and litigation cannot control for the many variables among cases. The facts of each case are unique, so no study can control for every variable that might distinguish the studied cases in arbitration from the studied cases in litigation. As Carrie Menkel-Meadow writes, “[r]esearch concerning the effects of ADR programs is especially difficult due to the problems of developing control groups; indeed, how can one case be subjected to both ADR and litigation?”¹³⁶ In other words, because the same cases cannot be sent to both arbitration and, in an otherwise parallel universe, litigation, we cannot know whether the forum variable (“arbitration or litigation”) or something else, like cases’ merits, caused any difference in outcomes between arbitrated cases and litigated cases.¹³⁷

135. Geoffrey C. Hazard, Jr., *Not the City of God: The Multiplicity of Wrongs and Rules*, 42 AKRON L. REV. 1, 3 (2009) (“The scientific model seeks to identify specific variables, to isolate one variable from the cluster of other variables with which it is embedded, and then to evaluate the effect or significance of that variable.”); Barry C. Scheck, *Convicting the Guilty, Protecting the Innocent*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 233, 234 (2006) (“[S]cientists control one variable so as to observe the impact of that variable on the entire process.”); Barry Sullivan, *On the Borderlands of Chevron’s Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, 62 LA. L. REV. 317, 429 (2002) (“Law is not a laboratory science, and it is not possible in law to isolate a single variable, preserving an otherwise controlled environment.”).

136. Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1924 (1997).

137. Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 100 (2014) (“[T]here is no natural way to make cases heard in arbitration identical in all respects to cases heard in civil litigation. Can the observed variance be attributed to inequities inherent in the arbitral forum or are there material differences in cases being adjudicated between the forums?”); see also David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1287 (2009) [hereinafter, Schwartz, *Fairness*] (“Differences in underlying case merit (whether the plaintiff should win) and case value (how much) can undermine the accuracy and even the meaning of numbers that report mere outcomes.”).

ii. *Experiments and Surveys*

As a way around this problem, a researcher trying to determine the effects of forum (arbitration or litigation) could conduct experiments that mimic arbitration and litigation of the same mock case. However, we could never know how different the results of such mock arbitrations and litigations would be from the results of real arbitrations and litigations because the mock arbitrators, mock judges, and mock jurors might not behave like real arbitrators, real judges, and real jurors—even if they are same people who really serve in those roles—because participants would know the case was mock, not real.

Also problematic in learning the effects of forum are surveys asking lawyers and parties to report data about their cases in arbitration and litigation.¹³⁸ Surveys are notoriously vulnerable to inaccuracies due to respondents' ignorance, dishonesty, and self-deception. As Robert Glicksman and Dietrich Earnhart write,

There is a risk when conducting any survey that the respondents will not provide accurate information, either because they do not have it or because they intentionally supply inaccurate or misleading information. Survey respondents may provide dishonest responses, for example, because they want to make a good impression on those asking the questions (and believe that accurate answers will not do so) or because they are convinced that inaccurate responses are in their self-interest. These kinds of responses may bias the results of any survey.¹³⁹

These inaccuracy problems with surveys are widely recognized across a range of research areas.¹⁴⁰ Moreover, these inaccuracy problems

138. See, e.g., Gough, *supra* note 137, at 102–03 (“[A] survey of approximately 1,890 attorney members of the National Employment Lawyers Association (“NELA”) . . . the largest organization of practicing plaintiff-side employment attorneys in the country” had a response rate of thirty-seven percent.)

139. Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 STAN. ENVTL. L.J. 317, 331 (2007).

140. See, e.g., Cindy M. Meston et al, *Socially Desirable Responding and Sexuality Self-Reports*, 35 J. SEX RES. 148, 148 (1998) (“Socially desirable responding, the tendency to tailor responses for the purpose of looking good, has been a topic of concern in self-report assessment for over six decades The tendency for respondents to present themselves in a favorable light can undermine the validity of self-report indices of sexuality”); Adam J. Berinsky, *Can We Talk? Self-Presentation and the Survey Response*, 25 POL. PSYCHOL. 643, 644–45 (2004) (“If surveys are used as measures of the public will, then failure to account for the social consequences of the survey interview will distort the political information that they transmit. For example, some respondents could feel uncomfortable discussing certain ‘sensitive’ topics such as racial issues and, as a result, may give answers that are somewhat less than forthright. In the aggregate, such behavior could lead to polling results that misrepresent underlying public sentiment.”).

are especially troubling when the survey's response rate is low and those who do respond have a stake in the survey's results,¹⁴¹ like businesses and lawyers surveyed about arbitration versus litigation.¹⁴²

2. *Empirical Studies Should Try to Compare Similar Cases (Apples to Apples)*

With experiments and surveys so problematic in learning the effects of forum (arbitration or litigation), the best empirical researchers can do is try to find similar cases in arbitration and litigation and then compare the results, while acknowledging that similarity is a matter of degree and will never be perfect, so no study can entirely eliminate the possibility that differences between the arbitration

141. See, e.g., Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. LOUIS U. PUB. L. REV. 243, 273–74 (1993) (“Kleck’s estimate of the number of self-defensive uses of guns is a projection based on surveys, and is subject to a serious criticism. The respondents were gun owners who have a vested interest in exaggerating both the need for self-defense, and the effectiveness of their guns in providing it Even more likely than deliberate dishonesty among respondents to surveys is self-deception and outright error concerning the need to use a gun in self-defense.”); Rosa L. Matzkin, *Nonparametric Survey Response Errors*, 48 INT’L ECON. REV. 1411, 1414 (2007) (“Self-reported health may generate biases not only because it is a subjective measure, but also because older workers may use poor health to justify decreasing the amount of hours worked, when their true reasons for decreasing hours of work are less socially acceptable. In fact, Ettner (1997) provides evidence that women report health less frequently than men as a reason for retirement, which is consistent with the fact that it is more socially acceptable for women to retire due to reasons other than health.”).

142. See, e.g., Mei Bickner et al., *Developments in Employment Arbitration*, 52 DISPUTE RESOL. J. 10, 15, 78–79 (1997) (survey of 36 companies with implemented arbitration plans, asking basic questions about their plans’ development, coverage, features, and the parties’ experiences under them; the 36 employers surveyed reported a 45% response rate); Alexander Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 85 (2014) (survey of 480 attorneys who specialize in representation of employees; surveyed what percentage of potential clients with employment claims the attorneys agreed to represent, and whether those clients were covered by mandatory arbitration agreements or were free to proceed to litigation); Gough, *supra* note 137, at 10203 (“[A] survey of approximately 1,890 attorney members of the National Employment Lawyers Association (“NELA”) . . . the largest organization of practicing plaintiff-side employment attorneys in the country” had a response rate of thirty-seven percent.”); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 38–42 (2003) (survey of 288 attorneys, made up of two sub-groups: 41 plaintiff attorneys and 247 defense attorneys, representing a response rate of 31%; the survey asked both plaintiffs’ and defense lawyers “their opinions as to whether arbitrators, judges, and juries are: (1) more likely to give employees or employers their desired results; (2) better able to understand complex legal issues; and (3) better able to understand complex factual issues.”).

cases studied and the litigation cases studied might explain any differences in outcomes between the two sets of cases. As the Consumer Financial Protection Bureau (CFPB) explains

[T]he disputes that are filed in arbitration differ from the disputes that are filed in litigation. . . . [T]hese differences result from decisions that the parties make about arbitration and litigation, such as the company's decision to have an arbitration clause, the consumer's willingness to initiate either arbitration or litigation, the company's or consumer's decision to invoke the arbitration clause in a given litigation, and the parties' decision to settle or litigate. Disputes, in short, are not randomly assigned to the two different fora. They exist in one forum or the other because of purposeful decisions by one or both parties. And the known outcomes — principally the cases resolved through an arbitrator's or court's decision — likewise reach that form of outcome, at least in part because of purposeful decisions by one or both parties.¹⁴³

For these reasons, no empirical study can eliminate the possibility that differences between the arbitration cases studied and the litigation cases studied might explain any differences in outcomes between the two sets of cases. Therefore, scholars and policymakers should scrutinize empirical studies' efforts to control for variables that might plausibly correlate with parties' decisions about arbitration and litigation, and no matter how thorough those controls, should remain somewhat skeptical toward empirical studies' conclusions—because of irremovable doubt about the extent to which the studied arbitration cases are similar on the merits to the studied litigation cases.

With controlling for the merits of cases in arbitration and litigation such a “redoubtable task,”¹⁴⁴ it is unsurprising that few studies undertaking this task have been published. Even the CFPB seems to have found this task too daunting. The CFPB's 2013 preliminary report on arbitration listed under the heading “future work” that it “will consider how—if at all—we might meaningfully compare the disposition of cases across arbitration and litigation (including class

143. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), § 5 at 7 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter CFPB, ARBITRATION STUDY]; see also Ware, *Gilmer*, *supra* note 133, at 756 (“[C]ases go to arbitration when, and only when, there is an arbitration agreement. The [parties that] use arbitration agreements may be systematically different from the [parties that] do not use arbitration agreements.”).

144. Gough, *supra* note 137, at 102 (describing “controlling for merits of cases presented to decision-makers in various forums” as a “redoubtable task”).

litigation), both in terms of substantive outcome and in terms of procedural variables like speed to resolution.”¹⁴⁵ However, the CFPB’s 2015 report of its study shows it did not attempt such a comparison.¹⁴⁶

a. *The One Study Comparing Consumer Arbitration and Litigation*

Research revealed only one study attempting to identify similar consumer cases in arbitration and litigation and then compare them.¹⁴⁷ In that study, Christopher Drahozal and Samantha Zyontz compared debt collection cases brought by business claimants in arbitration to debt collection cases brought by business claimants in court. They found

- In the court cases studied, creditors won some relief as often, or more often, than in the arbitration cases studied (i.e., consumers prevailed more often in arbitration than in court). . . .
- In the court cases studied, prevailing creditors were awarded as high a percentage, or a higher percentage, of what they sought than in the arbitration cases studied (i.e., consumers fared better, or at least no worse, by this measure in arbitration than in court). . . .
- The rate at which debt collection cases were disposed of other than by award or judgment (e.g., by dismissal, withdrawal, or settlement) did not appear to differ systematically between arbitration and litigation. . . .

145. CFPB, ARBITRATION STUDY: PRELIMINARY RESULTS, SECTION 1028(A) STUDY RESULTS TO DATE, Section 6, p. 130 (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

146. See, e.g., CFPB, ARBITRATION STUDY, *supra* note 143. Nevertheless, interest groups have used the CFPB’s March 2015 report’s data to draw their own comparisons. See, e.g., CFPB, *Letter to CFPB Director Cordray from The American Bankers Association, the Consumer Bankers Association and The Financial Services Roundtable*, 8, (July 13, 2015), <http://www.cfpbmonitor.com/files/2015/07/March-10-2015-Consumer-Arbitration-Study-Comment-Letter.pdf>.

According to the Study, in arbitrations where customers obtained relief on affirmative claims and the Bureau could determine the amount of the award, the customer’s average recovery was \$5,389 (an average of 57 cents for every dollar claimed). By contrast, based on 73 of 74 individual federal court claims in which a judgment was entered for the customer, the average amount awarded to the customer was \$5,245.17 At the other end of the spectrum are class members in consumer class action settlements. The Study states that cash payments to “at least 34 million consumers” during the period studied were “at least \$1.1 billion.” This means that the average class member’s recovery was a mere \$32.35.

Id.

147. Drahozal & Zyontz, *Creditor Claims*, *supra* note 120, at 80.

- The rate at which consumers responded (i.e., did not default) also did not appear to differ systematically between arbitration and litigation. . . .¹⁴⁸

In sum, the one study attempting to identify similar consumer cases in arbitration and litigation, and then compare them, does not support the belief that consumers tend to fare better in litigation than arbitration.¹⁴⁹

B. *What if Empirical Studies Showed Consumers Tend to Fare Worse in Arbitration?*

1. *Distinguish Class Actions from Individual Claims and Distinguish Claims by Consumers from Claims against Consumers*

While the most relevant empirical study does not show consumers faring worse in arbitration than litigation, suppose it did? More broadly, suppose the best empirical data showed consumers experiencing worse outcomes in arbitration than litigation? Such hypothetical data can plausibly be envisioned by distinguishing among various disputes businesses have with individuals. First, distinguish class actions from individual (non-class) claims. And then distinguish individual claims brought by consumers against businesses from individual claims brought by businesses against consumers. While the last of these types of claims (Business v. Consumer) is the subject of the one empirical study (Drahozal and Zyontz) attempting to identify similar consumer cases in arbitration and litigation, that study may not be very relevant to the other two types of claims: Consumer v. Business, and especially Class Action of Consumers v. Business.

Much as my writing on the outcome effects of forum (arbitration or litigation) distinguishes among various types of disputes businesses have with individuals,¹⁵⁰ thoughtful critics of adhesive arbitration agreements also make such distinctions. For example, while

148. *Id.* at 80–81.

149. Similarly, the one study attempting to identify similar employment cases in arbitration and litigation does not support the belief that employees tend to fare better in litigation than arbitration. See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 53 (2004) (“The results are consistent with arbitrators, at least those participating in AAA-sponsored arbitration, not acting in a materially different fashion than in-court adjudicators.”).

150. Ware, *Class Actions and Arbitration Fees*, *supra* note 115, at 274 (distinguishing “aggregatable” claims—claims that, if litigated, could be pursued as part of a class action—from other claims); *id.* at 268 (distinguishing “small-yet-meritorious claims” from “claims that could lead to a big-dollar jury award.”); Stephen J. Ware,

David Schwartz suggests “the simpler procedures and presumably lower process costs of arbitration”¹⁵¹ may be fine for individuals’ simple disputes with businesses, Schwartz says arbitration is worse than litigation for plaintiffs in “complex individual employment disputes and both employment and consumer class actions.”¹⁵² In these more-complex cases, Schwartz says claimants need litigation’s more elaborate procedures, particularly its more extensive discovery, because “proof is relatively complex and the pre-litigation distribution of evidence is largely in the possession of the defendant. Therefore, extensive discovery is required for the plaintiff to meet his burden of proof”¹⁵³

Jean Sternlight draws a similar distinction when she says that “while individual arbitration may work well for ‘procedurally easy’ claims, it does not work well for those many consumer claims that are ‘procedurally difficult’ (specifically claims of which individual consumers are not aware or that they cannot reasonably present on their own).”¹⁵⁴ Sternlight states that, while “consumers almost never initiate individual claims against companies in arbitration,”¹⁵⁵ consumer class actions are very important. So:

Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. DISP. RESOL. 89, 98–99 (2001) [hereinafter Ware, *Judicial Regulation*] (distinguishing claims by a consumer against a business from claims by a business against a consumer).

151. Schwartz, *Claim-Suppressing*, *supra* note 110, at 241 n.5.

152. *Id.* at 240.

153. *Id.* at 242 (arguing “[d]efendants’ keen interest in arbitration of high-cost/high-stakes cases is . . . the hope that tamping down process costs—primarily by severely limiting discovery—will translate into tamping down ultimate liability costs”); *see also* Levitin, *supra* note 40 (“[A]rbitrations are not subject to standard rules of evidence and procedure, including the right to obtain information about the other party related to the case. This can make arbitrations more streamlined, but it also affects outcomes. The defendant often holds most of the evidence relevant to the case, but plaintiffs are often not allowed to get the evidence necessary to prove their cases by requesting documents or taking depositions.”).

154. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 93 (2012) [hereinafter, Sternlight, *Difficult Claims*]. Sternlight defines procedurally difficult

(i) the consumer does not realize she has potentially been injured; (ii) the consumer does not realize that an injury she has suffered may be legally cognizable; (iii) the consumer’s claim is difficult and expensive to present, relative to the anticipated recovery; or (iv) the consumer seeks injunctive or other group relief.

Id. at 97–101.

155. *Id.* at 99 (“JAMS Executive Vice President and General Counsel Jay Welsh reported to this author that JAMS handles at most a few hundred consumer arbitration claims. He further explained that most of these are from claims alleging that certain credit card companies violated federal collections statutes, asserted to fend off potential collections actions by those companies. The AAA handles a broader range of

By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued. In many contexts, if plaintiffs cannot join together in a class action, lack of knowledge, lack of resources, or fear of retaliation will prevent them from bringing any claims at all.¹⁵⁶

In sum, Sternlight and Schwartz argue that, in Schwartz's words, "the economically rational motivation for" businesses to use adhesive arbitration agreements is to require arbitration of what would otherwise have been litigation of "high-cost/high-stakes claims," especially class actions.¹⁵⁷ This emphasis on class actions by opponents of adhesive arbitration is not new; in 2000 Sternlight published an article

disputes than does JAMS, but even AAA handles quite few claims brought by consumers against companies. While precise numbers are hard to obtain, in one informal report AAA stated it handled roughly 1,000 claims by consumers per year.").

156. Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704–05 (2012). See also Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 173–74 (2015) ("I thought the Supreme Court would decide *Concepcion* the way it did, and that doing so would take us down a road that could lead to the end of class actions against businesses. [A]re class actions headed for demise? I continue to fear that they very well might be."); Myriam Gilles and Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (describing "the coup de grace administered to consumer class actions by [*Concepcion*]. All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to [*Concepcion*]'s game-changing edict that companies with possible exceptions that warrant close scrutiny may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts with consumers (or employees or others)); Horton & Chandrasekher, *Revolution*, *supra* note 8, at 63 ("After *Concepcion*, some plaintiffs' lawyers, whom we call "arbitration entrepreneurs," have tried to overcome their inability to aggregate disputes by bringing scores of discrete proceedings against the same company. Nevertheless, they have been unable to prosecute enough matters to replicate the deterrent or compensatory functions of the traditional class action.").

157. Schwartz, *Claim-Suppressing*, *supra* note 110, at 240–42 (citing Schwartz, *Fairness*, *supra* note 137, at 1264–83. See also Levitin, *supra* note 40 ("[M]ost importantly, binding mandatory arbitration provisions are often crafted so as to preclude class actions, including class arbitrations. Class actions are the only practical recourse for addressing widespread, small-dollar harms—the category under which most consumer claims fall. Preventing class actions is a license for unscrupulous businesses to steal from their consumers. If a bank overcharged all of its 25 million depositors \$30 annually, the bank would have pocketed \$750 million in unauthorized fees, but no individual consumer would bother litigating or even arbitrating. As one federal judge colorfully put it, the class action is an essential tool for justice because "only a lunatic or a fanatic sues for \$30.").

expressing her concerns about whether the class action would survive the spread of adhesive arbitration agreements.¹⁵⁸

Supporting the belief that class claims are central to the debate over enforcing consumers' adhesive arbitration agreements is the sense that consumers seem to bring very few non-class claims against businesses in arbitration or litigation. The CFPB found "that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief."¹⁵⁹ So in the debate over enforcing consumers' adhesive arbitration agreements, perhaps consumers' individual claims are merely a sideshow, while class actions are the main event. This hypothesis about the centrality of class actions is consistent with the

158. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 9 (2000) [hereinafter, Sternlight, *Class Action*] ("[P]otential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable. The potential defendants also believe that, should plaintiffs choose to pursue individual claims in arbitration, defendants' exposure still will be much lower than it would have been in class action litigation.").

159. CFPB, *Proposed Rule*, *supra* note 114, at 4; Levitin, *supra* note 40 ("Arbitration's 'efficiency,' however, largely derives from the fact that it prevents small-dollar claims from ever being heard. If one were to compare the cost of a single class action that decided millions of claims versus the cost of individually arbitrating each of those claims, arbitration would be utterly inefficient. Eliminating meritorious claims is cheaper, but not efficient.").

Professor Sternlight emphasizes the paucity of individual arbitration claims brought by consumers, noting that the two major arbitration providers handle "roughly 1,000 claims by consumers per year" (American Arbitration Association) and "at most a few hundred" (JAMS). Sternlight, *Difficult Claims*, *supra* note 154, at 99–100. However, she compares this number of individual consumer arbitration claims, not to the number of individual consumer litigation claims, but to the higher number of consumers covered by class actions and the very high number of consumers who complain to entities ranging from eBay and PayPal to credit card issuers to the Federal Trade Commission. *Id.* at 101–03. So this data is consistent with the CFPB's finding suggesting that both individual litigation and individual arbitration are relatively unattractive to most aggrieved consumers. *See also* CFPB, *Proposed Rulemaking*, *supra* note 114, at 99 ("[T]he relatively small number of arbitration, small claims, and Federal court cases reflects the insufficiency of individual dispute resolution mechanisms alone to enforce effectively the law for all consumers.") On the hand, Ramona Lampley argues "it is premature to conclude that the class action is a more effective dispute resolution platform than individual arbitration." Ramona L. Lampley, *The CFPB Proposed Arbitration Ban, the Rule, the Data, and Some Considerations for Change*, BUS. L. TODAY, May 2017, at 1, 4 (suggesting improvements to individual arbitration the CFPB could mandate).

behavior of the CFPB, which engaged an exhaustive study of consumer arbitration in financial services and ended up issuing a rule that would significantly affect only one aspect of it—class actions.¹⁶⁰

Perhaps class claims are central to the debate over adhesive arbitration agreements. Perhaps businesses gain little by shifting individual claims (by or against consumers) from litigation to arbitration, and businesses' primary reason for seeking enforceable adhesive arbitration agreements with consumers is to prevent class actions.¹⁶¹ Perhaps some businesses even go so far as to write adhesive arbitration agreements that make arbitration of individual claims better for consumers than litigation of individual claims would have been. And perhaps businesses add this pro-consumer sweetener to persuade courts to enforce these arbitration agreements—because that pro-consumer sweetener costs the businesses much less than they save by eliminating class actions.¹⁶²

160. See CFPB, *Arbitration Agreements Rule*, *supra* note 12 (“[T]he final rule prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service.”). See *supra* note 13.

161. Alan S. Kaplinsky & Mark J. Levin, *CFPB Is Attacking Arbitration Via Class Action Waivers*, LAW 360 (October 13, 2015) (“[Alan] Kaplinsky testified the following at the hearing: Although the CFPB’s proposal reflects an inclination not to outright prohibit the use of arbitration, let’s make it perfectly clear. By requiring companies to insert in their arbitration provisions language excepting class actions from arbitration, the bureau is in reality proposing an outright ban. If this proposal becomes a final regulation, most companies will simply abandon arbitration altogether. That’s because the cost-benefit analysis of using arbitration will shift dramatically.”); Sternlight, *Class Action*, *supra* note 158, at 9 (“[D]efense counsel and other arbitration advocates readily observe that arbitration can be used to deter the filing of a class action suit, or secure dismissal of a class action that was nonetheless brought. The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable. The potential defendants also believe that, should plaintiffs choose to pursue individual claims in arbitration, defendants’ exposure still will be much lower than it would have been in class action litigation.”).

162. David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 664–65 (2012) (“For the individual claimant, the [AT&T] agreement makes pursuing a claim a lucrative undertaking. A \$100 claim litigated to judgment can result in a \$7,600 award against AT&T, with AT&T paying double the claimant’s attorneys’ fees. Why would a profit-maximizing corporation provide outsized incentives for individuals to assert claims against it? The answer involves the possibility that by doing so, the corporation could also eliminate plaintiff-favoring features of aggregate litigation through the aggregation ban. . . . Stated differently, agreements such as AT&T’s reflect a bet that the settlements, judgments, premium payments, and attorneys’ fee awards that result from encouraging individuals to sue will be less than the company’s liability exposure if aggregation is permitted.”). See also Horton & Chandraseker, *Revolution*, *supra* note 8, at 74 (“Like legislatures, which prod plaintiffs to bring certain lawsuits by offering bounties such as treble damages, companies

The hypothesis that class actions are central to the debate over enforcing consumers' adhesive arbitration agreements is consistent with the centrality of class actions to the broader debate over civil justice reform.¹⁶³

amended their class arbitration waivers to encourage individual customers to arbitrate small-bore complaints. For example, Verizon Wireless promises to pay any consumer who wins an arbitral award that exceeds its settlement offer at least \$5,000 and reimburse her attorneys' fees. AT&T Mobility LLC pledges \$10,000 and doubles attorneys' fees to any consumer who recovers more in bilateral arbitration than it offers to resolve the case”). *Id.* Arpan A. Sura and Robert A. DeRise, *Conceptualizing Conception: The Continuing Viability of Arbitration Regulations*, 62 KAN. L. REV. 403, 434 (2013) (“In *Conception*, AT&T’s adhesive arbitration agreement “contain[ed] so many pro-consumer terms that the Court had characterized it as ‘essentially guaranteeing’ consumers the ability to press meritorious claims that would make them whole.”).

163. See, e.g., Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL. F. 71, 71 (2003) (“Though on its face the class action appears to be nothing more than an elaborate procedural joinder device, in recent years it has become the focal point of much political and legal debate.”); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1771 (2013) (“[D]efendants fought back [against growing class actions], not only by vigorously defending lawsuits but also by launching broad political and public relations efforts.”); *Class Action Reform*, AM. TORT REFORM ASS’N (ATRA), <http://www.atra.org/class-action-reform/> (last visited Nov. 22, 2017) (describing class actions as “a means of defendant extortion and national policy-making by local court judges” and advocating legislative reforms); *Class Actions*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (ILR), <http://www.instituteforlegalreform.com/issues/class-actions> (last visited Nov. 22, 2017) (describing “frivolous” class actions “which cry out for reform” and advocating “enactment of the Fairness in Class Action Litigation Act”); *Class Actions*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=369> (last visited Nov. 22, 2017) (“Public Citizen believes in preserving the availability of class actions as a means of vindicating the rights of people who could not effectively bring suit on an individual basis. Accordingly, the Litigation Group participates in cases aimed at preserving the ability of plaintiffs to maintain class actions in both state and federal courts.”); *Issue Advocacy*, AM. ASS’N FOR JUSTICE (AAJ), <https://www.justice.org/what-we-do/advocate-civil-justice-system/issue-advocacy> (last visited Nov. 22, 2017) (“The American Association for Justice (AAJ) protects the civil justice system by advocating on issues before Congress and federal agencies with the goal of ensuring that people have a fair chance to receive justice through the legal system – even when it means taking on the most powerful corporations. . . . Class actions allow individuals who have been harmed to join together to hold even the largest corporations accountable for violating the law, but this important right is under attack. AAJ advocates to preserve class actions to ensure that corporations cannot evade accountability through the civil justice system.”); *Class Action Preservation*, TRIAL LAWYERS FOR PUB. JUSTICE, <http://www.publicjustice.net/what-we-do/access-to-justice/class-action-preservation/> (last visited Nov. 22, 2017) (“Public Justice is the only public interest organization in the country that both aggressively prosecutes a wide range of class actions and has a special project to preserve class actions and prevent their abuse. . . . Class action lawsuits are a powerful legal device. Properly used, they are often the only way to achieve justice. Abused, they can impose enormous injustice – and support corporate wrongdoers’ attempts to eliminate them entirely.”).

Class actions have been controversial since they first proliferated in the 1970s—a time when Professor Arthur Miller described a “holy war” in which one side saw the class action as a knight in shining armor, while the other side saw it as a “Frankenstein” monster. Not much has changed throughout several decades of this “holy war,” and this war is not likely to end anytime soon. As Professor Deborah Hensler et al., explain, whether the benefits of class actions outweigh their costs “is a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society. . . . [T]his political question is . . . unlikely to be resolved soon.”¹⁶⁴

In short, debate over adhesive arbitration may be little more than a rather predictable application of the broader debate about class actions.

If this is accurate then we may yet see empirical data of the sort hypothesized above.¹⁶⁵ That is, we may see studies of Consumer v. Business claims that do as well as the Drahozal and Zyontz study of Business v. Consumer claims at ensuring that the arbitration claims studied are comparable to the litigation claims studied. And we may see studies of actual and potential Class Actions of Consumers v. Business that do as well at ensuring that the potential arbitration claims studied are comparable to the potential litigation claims studied.

For example, such a study might examine two large, competing businesses like Hertz and Avis, or Hilton and Marriott. Suppose that each business violated the same consumer law in the same way at about the same time. And suppose each business has thousands of customers who each have similar small claims against the business, but only one of the two businesses’ consumer contracts includes an arbitration clause. The study might find that the consumers not subject to arbitration received an average of, say, fifty dollars from a class action settlement but the average recovery of consumers subject to arbitration was lower because most of those consumers left their claims unpursued and thus recovered zero.

164. Ware, *Against Conservative*, *supra* note 8, at 1267–68 (quoting Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979), and DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS 471–72 (2000)).

165. See *supra* text at notes 149–50 (“While the most relevant empirical study does not show consumers faring worse in arbitration than litigation, suppose it did? More broadly, suppose the best empirical data showed consumers experiencing worse outcomes in arbitration than litigation?”).

Research revealed no such study, although the CFPB and Professors Horton and Chandrasekher have perhaps taken steps in this direction. CFPB Director Cordray writes “that group lawsuits [class actions] get more money back to more people. In five years of group lawsuits, we tallied an average of \$220 million paid to 6.8 million consumers per year. Yet in the arbitration cases we studied, on average, 16 people per year recovered less than \$100,000 total.”¹⁶⁶ However, the CFPB study from which these numbers come did not generally attempt to compare similar disputes (actual or potential disputes) covered by arbitration agreements and not so covered.¹⁶⁷ Like Director Cordray of the CFPB, Professors Horton and Chandrasekher argue that consumer recoveries are reduced by enforceable arbitral class waivers. Horton and Chandrasekher write that plaintiffs’ lawyers’ post-*Concepcion* attempts to bring lots of similar individual arbitration claims against the same business have failed “to replicate the deterrent or compensatory functions of the traditional class action.”¹⁶⁸ But Horton and Chandrasekher, like the CFPB, do not try to compare similar disputes (actual or potential disputes) covered by arbitration agreements and not covered.

In sum, we currently lack empirical studies of actual or potential class or individual claims by consumers against business that do as well as the Drahozal and Zyontz study of *Business v. Consumer* claims at ensuring that the potential arbitration claims studied are comparable to the potential litigation claims studied. But it is plausible to anticipate such studies showing what Cordray, Horton, and Chandrasekher suggest—that enforceable adhesive arbitration agreements, especially if they include class waivers, tend to produce worse outcomes for consumers with (actual or potential) claims against businesses even if, as Drahozal and Zyontz found, arbitration outcomes are at least as good as litigation outcomes for consumers defending businesses’ claims against consumers.

166. Richard Cordray, *Let Consumers Sue Companies*, N.Y. TIMES (Aug. 22, 2017) https://www.nytimes.com/2017/08/22/opinion/let-consumers-sue-companies.html?emc=edit_th_20170822&nl=todaysheadlines&nid=39190842.

167. CFPB, ARBITRATION STUDY, *supra* note 143, § 8 at 28 (For class actions in federal court from 2008 to 2012, “we estimate a total of \$1.1 billion in 251 settlements reporting data on the dollar amount of payments.”).

168. Horton & Chandrasekher, *Revolution*, *supra* note 8, at 63 (“After *Concepcion*, some plaintiffs’ lawyers, whom we call ‘arbitration entrepreneurs,’ have tried to overcome their inability to aggregate disputes by bringing scores of discrete proceedings against the same company. Nevertheless, they have been unable to prosecute enough matters to replicate the deterrent or compensatory functions of the traditional class action.”).

2. *Until Very Conservative Current Law is Changed, Data Always Shows Arbitration under that Law*

To reiterate, while the most relevant empirical study does not show consumers faring worse in arbitration than litigation, suppose new and more relevant empirical data show that enforceable adhesive arbitration agreements tend to produce worse outcomes for consumers with actual or potential class or individual claims against businesses? Such new data would not significantly support the Progressive Position of prohibiting adhesive arbitration agreements because such data would necessarily be data about what occurs under existing (Very Conservative) law, as distinguished from what would occur if the law adopted the Centrist Position.¹⁶⁹

In other words, empirical studies of consumer arbitration yield data about arbitration's outcomes (including potential claims left unpursued) under existing law—which includes widespread enforcement of arbitral class waivers, as well as the separability doctrine, and deferential judicial review of arbitrators' rulings on mandatory law.¹⁷⁰ All three of these Very Conservative aspects of current law would be changed by the Centrist Position,¹⁷¹ which would likely make arbitration agreements' outcomes more favorable to consumers. So even if empirical data showed that enforceable adhesive arbitration agreements tend to produce worse outcomes for consumers with (actual or potential, class or individual) claims against businesses, that would not be a reason to prefer progressives' prohibition of adhesive arbitration agreements over the Centrist Position's enforcement of them. Such data would instead be a reason to try the Centrist Position—(1) treat arbitral class waivers like non-arbitral class waivers, (2) repeal the separability doctrine, and (3) vacate arbitrators' legally-erroneous decisions on mandatory-law claims—and see if these three reforms bring arbitration's outcomes in line with litigation's.

Overturning the Supreme Court's broad enforcement of arbitral class waivers may be the Centrist Position's most impactful reform because, as explained above, class claims may be the main factor driving businesses to use adhesive arbitration agreements.¹⁷² That

169. Similarly, Professors Horton and Chandrasekher point out that the CFPB's study "is limited" because "it precedes *Italian Colors* (decided in 2013) and cannot capture the full impact of *Rent-A-Center* (decided in 2010) and *Concepcion* (decided in April 2011)." Horton & Chandrasekher, *Revolution*, *supra* note 8, at 87. In short, studies inevitably study data generated under whatever law was in effect at the time.

170. See *supra* notes 87–94.

171. See *supra* Section II.C.1.

172. See *supra* note 157.

is, businesses may gain little by shifting individual claims (by or against consumers) from litigation to arbitration, and businesses' primary reason for seeking enforceable adhesive arbitration agreements may be to prevent class actions. If this is true, then treating arbitral class waivers like non-arbitral class waivers would likely make arbitration's outcomes more favorable to consumers than they are now, and might bring arbitration's outcomes in line with litigation's.

In addition, the Centrist Position would repeal the separability doctrine.¹⁷³ This repeal would allow parties to litigate (rather than arbitrate) contract defenses. Presumably consumers more often than businesses raise such defenses because the business nearly always drafts the contract and seeks to enforce its arbitration clause, while the consumer opposes enforcement. If the consumer sued the business, repeal of the separability doctrine would make the business's motion to compel arbitration (of the merits of the consumer's claim) harder to win because the business would have to overcome the consumer's contract defense. This additional obstacle to enforcement of a consumer arbitration agreement would give the consumer more power in negotiating post-dispute about modifications to the pre-dispute arbitration agreement. For example, the consumer might (through her lawyer) say to the business "We'll withdraw our opposition to your motion to compel arbitration if you agree that the arbitration will be before Arbitrator X on Date Y with Procedural and Evidentiary Rules Z"—with X, Y, and Z all favorable to the consumer. The business might agree to some or all of X, Y, and Z—even if unfavorable to the business—to avoid incurring the costs and uncertainty of litigating consumer's contract defense. To the extent this occurs, the Centrist Position's repeal of the separability doctrine would tend to make arbitration's outcomes better for consumers.

Finally, the Centrist Position would vacate arbitrators' legally-erroneous decisions on mandatory-law claims.¹⁷⁴ This would go a long way toward calming worries that arbitrators tend to favor businesses over individuals.¹⁷⁵ If a consumer's claim under one of consumer law's many mandatory provisions¹⁷⁶ is denied by the arbitrator, the Centrist Position would entitle the consumer to a

173. See *supra* notes 45–50.

174. Ware, *Against Conservative*, *supra* note 8, at 1248–59.

175. See *supra* notes 116 & 130.

176. Ware, *Against Conservative*, *supra* note 8, at 1256 ("Many statutes and regulations in consumer, employment, and other areas of law prohibit enforcement of various contract terms.").

court's de novo determination of whether the arbitrator correctly applied that law. If the court concluded the arbitrator incorrectly applied that mandatory law, the court would vacate the arbitration award, which would help the consumer.

3. Conclusion

In sum, the best empirical data does not show consumers faring worse in arbitration than litigation. But if it did, that showing would not significantly support prohibiting enforcement of consumers' adhesive arbitration agreements (the Progressive Position) over the Centrist Position of treating consumers' adhesive arbitration agreements like consumers' other adhesive agreements. That is because hypothetical data showing consumers faring worse in arbitration than litigation would be data about arbitration under the Very Conservative Position embodied in current law, not data about arbitration under the Centrist Position, which likely would make arbitration outcomes more favorable for consumers.

IV. PRICE AND RELATED EFFECTS OF ENFORCING ADHESIVE ARBITRATION AGREEMENTS

A. *Standard Economic Analysis and the CFPB's Endorsement of It*

While Section III casts doubt on the belief that consumers with disputes against businesses tend to experience worse outcomes in arbitration than they do in litigation, this section questions the other assertion offered as support for prohibiting consumers' adhesive arbitration agreements. That is the assertion that enforcement of such agreements has no effect on the prices consumers pay.¹⁷⁷

177. See, e.g., Levitin, *supra* note 40 (“[F]inancial services companies do not appear to be passing the cost savings of arbitration on to consumers in general.”); *id.* (“When Bank of America, JPMorgan Chase, Capital One and HSBC dropped arbitration clauses as the result of a litigation settlement their prices did not go up. Nor did mortgage rates go up when Fannie Mae and Freddie Mac stopped buying mortgages with arbitration clauses or when Congress later banned arbitration clauses in mortgages.”); J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 254 (2017) (“There is no empirical support for this cost-savings claim”); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis As A Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 851 (2004) [hereinafter Stempel, *Unconscionability*] (“[T]here is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts. Similarly, there is no solid support for the theoretical idea that by using arbitration clauses, vendors are able to refrain from price increases that would otherwise occur.”); Katherine Van Wezel Stone, *Rustic Justice: Community and coercion under the Federal Arbitration Act*, 77 N.C.L. REV. 931, 969 (1999) (“[T]he prevalence of arbitration clauses

Contrary to this assertion, standard economic analysis suggests that enforcement of adhesive consumer arbitration agreements tends over time to lower the prices of the goods and services consumers buy. As economist and law professor Omri Ben-Shahar writes, many commentators presume “that arbitration is cheaper for business than litigation,”¹⁷⁸ at least for the businesses that choose to use arbitration. On this assumption, Ben-Shahar writes, in the absence of enforceable arbitration clauses,

some of the cost of [consumers’] access to litigation would be rolled into the price of the service. In highly competitive industries, most if not all this cost would be reflected in higher prices to consumers; whereas in concentrated industries, only part of this cost would be borne by consumers, and the rest by the vendors, depending on the elasticity of demand.¹⁷⁹

While this is the standard economic analysis, the one study attempting to assess it empirically found no statistically significant evidence to support it.¹⁸⁰ That study was conducted by the CFPB in 2015. However, despite this study, in 2016 and again in 2017 the CFPB endorsed the standard economic analysis’s conclusion that enforcement of arbitration agreements tends to lower prices. Referring to a proposed regulation that would reduce such enforcement, the CFPB in 2016 said it “believes that most providers [businesses] would pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers.”¹⁸¹ The CFPB’s 2017 final rule then again endorsed the standard economic analysis’s conclusion: “the Bureau acknowledges that most providers will pass through at least portions of some of the costs described above to consumers. This

in consumer transactions represents windfalls to the sellers, not cost-saving devices for the buyers”); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 *LAW & CONTEMP. PROB.* 75, 95 (2004) (“[N]o published studies show that the imposition of mandatory arbitration leads to lower prices.”).

178. Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis*, in *REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION* 461 (Horst Eidenmüller ed., 2013).

179. *Id.* Elasticity is explained *infra* note 221.

180. CFPB, *ARBITRATION STUDY*, *supra* note 143, § 10 at 7 (“We do not find any such statistically significant evidence of increases in prices to consumers that we can associate with eliminating pre-dispute arbitration clauses.”).

181. CFPB, *Proposed Rule*, *supra* note 114, at 295.

pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers.”¹⁸²

To reiterate, the CFPB repeatedly and ultimately endorsed the standard economic analysis’ conclusion that enforcement of arbitration agreements tends to lower prices.

B. *Cost Savings to Business and the CFPB’s Treatment of Them*

The CFPB’s 2015 study says “[f]or arbitration provisions to lower the prices consumers pay for financial services, they must first lower costs for the companies that use them. Second, these companies would then have to pass along at least some of the resulting cost savings to consumers.”¹⁸³ These two steps correspond to the two steps of the standard economic analysis summarized above by Ben-Shahar.

Almost no one challenges the first step—that enforcement of adhesive arbitration agreements tends to lower the costs of the businesses that use such agreements.¹⁸⁴ Strangely, though, the CFPB Study minimizes the unanimity of consensus on this point. After noting that “companies that use pre-dispute arbitration provisions may benefit from a range of possible costs savings,”¹⁸⁵ the CFPB Study says:

Some scholarship takes the view, therefore, that pre-dispute arbitration clauses accordingly reduce a company’s overall dispute resolution costs. Not all commenters agree on this point. One commenter has asserted that carrying out arbitrations involves costs that are not associated with comparable dispute resolution proceedings in federal or state court.¹⁸⁶

182. CFPB, ARBITRATION AGREEMENTS RULE, *supra* note 12, at 681.

183. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 2.

184. Research revealed no doubt about this premise among consumer arbitration’s many critics or its few defenders. There is one scholar who doubts that employers benefit from adhesive arbitration agreements with their employees. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 420 (2000) (“[M]andatory arbitration may be bad for employers, absent some empirical evidence to the contrary.”). *Id.* at 400 (“As a matter of general practice, the use of mandatory arbitration as a dispute resolution mechanism for employment discrimination claims has failed to give employers an overall advantage. Instead, this article will show that the use of mandatory arbitration to resolve statutory employment discrimination disputes presents a significant number of disadvantages for employers.”); *id.* at 402 (“[W]ith evidence of resounding results on behalf of employers in the litigation process and absent evidence that arbitration will provide similar results, employers have no real advantage and little incentive to use mandatory arbitration.”).

185. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 1 or 2.

186. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 2–3.

This passage by the CFPB does not accurately represent the sources it cites, as it fails to cite even a single commenter who does not agree that arbitration clauses “reduce a company’s overall dispute resolution costs.” The passage cites three commenters as agreeing that arbitration clauses reduce businesses’ dispute-resolution costs and no commenter who disagrees.¹⁸⁷ While the CFPB’s passage emphasizes a commenter’s point that businesses carrying out arbitrations incur costs they would not incur in litigation, this commenter went on to say “Companies are willing to incur those costs because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court.”¹⁸⁸

This mischaracterization of a source by the CFPB is quite startling. In an effort to create the apparently-false impression that even one commenter dissents from the consensus that arbitration clauses “reduce a company’s overall dispute resolution costs,” the CFPB stretches so far as to cite a commenter who expressly supports that consensus by saying “the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation.” The CFPB’s stretching to manufacture dissent continues in a footnote in which the CFPB says “Another commenter explained that some of its member organizations find arbitration agreements to be of limited overall value.”¹⁸⁹ This does not even purport to rebut the consensus that arbitration agreements tend to reduce a company’s

187. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 3 (citing Ware, *Judicial Regulation*, *supra* note 150, at 90; Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. ARK. LITTLE ROCK L. REV. 779, 779–80 (2012) (“[C]ompanies often include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices.”); Ware, *Class Actions and Arbitration Fees*, *supra* note 115, at 254–57 (“The consensus view is that businesses using adhesive arbitration agreements do so because those businesses generally find that those agreements lower their dispute-resolution costs.”); Steven E. Abraham & Paula B. Voos, *The Ramifications of the Gilmer Decision for Firm Profitability*, 4 EMP. RIGHTS AND EMP. POL. J. 2 (2000) (finding increase of shareholder returns of 1–4% for securities firms after the *Gilmer v. Interstate/Johnson Lane Corp.* decision, which the authors describe as an indication that such firms benefited from being able to require that employees arbitrate, rather than litigate, employment-related disputes.).

188. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 3 (quoting Letter from David Hirschmann and Lisa A. Rickard, U.S. CHAMBER OF COMMERCE AND U.S. CHAMBER INSTITUTE FOR LEGAL REFORM TO CONSUMER FINANCIAL PROTECTION BUREAU, to Monica Jackson, Consumer Financial Protection Bureau (Dec. 11, 2013), at 41, http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_arbitration_cover_letter.pdf).

189. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 3.

overall dispute resolution costs, but rather suggests only that the value of this reduction is “limited.”¹⁹⁰

While the CFPB loosely refers to “scholarship tak[ing] the view” “that pre-dispute arbitration clauses” “reduce a company’s overall dispute resolution costs,”¹⁹¹ the sources cited by the CFPB actually make the subtler point that “businesses using adhesive arbitration agreements do so because those businesses generally find that those agreements lower their dispute resolution costs.”¹⁹² In other words, the sources the CFPB cites do not claim that use of adhesive arbitration agreements would necessarily reduce every business’s costs, but rather suggest that businesses actually using adhesive arbitration agreements presumably continue to do so because they find such agreements have in fact tended to lower their costs. In contrast, a business that tried using adhesive arbitration agreements and found that using them raised its costs would presumably stop using them.

Of course, some businesses using adhesive arbitration agreements may harm themselves by using them, as people sometimes make mistakes and businesses are run by people. Similarly, some businesses not using adhesive arbitration agreements might benefit from using them. Given the variety of businesses and their situations, use of adhesive arbitration agreements might well benefit some businesses, but not others. The standard economic analysis concluding that enforcement of adhesive arbitration agreements tends to lower consumer prices does not rest on the premise that all businesses would benefit from using adhesive arbitration agreements, or even that all businesses using adhesive arbitration agreements benefit from them, but only that businesses using adhesive arbitration agreements *tend to* benefit from them. This seems, despite the CFPB’s stretching to sow doubt, an uncontroversial premise inspiring widespread consensus.

190. And, more fully, what that commenter said was “the credit union industry does not make significant use of arbitration agreements. NAFCU’s member credit unions generally find arbitration agreements to be of limited value. However, some credit unions use pre-dispute arbitration agreements for some products and services and it is important that this tool not be eliminated from the market. As the CFPB certainly understands, arbitration agreements are a matter of contract and should generally be enforced just like any other contract provision.” Letter from Dillon Shea, NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS, to Monica Jackson, Consumer Financial Protection Bureau (June 22, 2012), <https://www.cuinsight.com/press-release/nafcus-comments-to-cfpb-on-arbitration-agreements>.

191. CFPB, ARBITRATION STUDY, *supra* note 143, § 10 at 2–3.

192. Ware, *Class Actions and Arbitration Fees*, *supra* note 115, at 254–57.

*C. Passing-on Cost Savings to Consumers**1. Economics: Lower Costs to Businesses Tend to Lower Prices to Consumers*

While nearly everyone presumes that enforcement of adhesive arbitration agreements tends to lower the costs of the businesses that use them, debate centers on whether this cost-reduction for businesses tends to lower prices for consumers. More broadly, this debate about whether businesses pass on their cost savings to consumers goes beyond adhesive arbitration agreements to adhesive contract terms generally.

The standard economic analysis, as the above quote from Ben-Shahar puts it, is that businesses' costs are "rolled into the price" consumers pay, so higher costs to businesses (sellers) tend to raise prices to consumers (buyers), while lower costs to sellers tend to lower prices to buyers. Although Ben-Shahar directs the University of Chicago's Institute for Law and Economics, the belief that sellers' costs affect the prices they charge their customers is not unique to "Chicago School" or other conservative economists, but rather is the standard analysis across the field of economics. For example, famously liberal Nobel-prize-winning economist Paul Krugman¹⁹³ and his co-authors explain that "a fall in the price of an input makes the production of the final good less costly for seller. They are more willing to supply the good at any given price, and the supply curve shifts to the right."¹⁹⁴ This "increase in supply leads to a fall in the equilibrium price and a rise in the equilibrium quantity."¹⁹⁵

193. Paul Krugman's blog is entitled "The Conscience of a Liberal" <https://krugman.blogs.nytimes.com>. In 2008, he won The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2008, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2008/krugman-facts.html.

194. PAUL KRUGMAN, ET AL., *ESSENTIALS OF ECONOMICS* 66 (2007).

195. *Id.* at 73. See also JAMES D. GWARTNEY, RICHARD L. STROUP, RUSSELL S. SOBEL & DAVID A. MACPHERSON, *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 448–49 (15th ed. 2015) ("In the long run, existing firms will have the opportunity to expand (or contract) the sizes of their plants, and firms will also be able to enter and exit the industry. As these long-run adjustments are made, output in the whole industry may either expand or contract. If economic profit is present, new firms will enter the industry to capture some of those profits. Current producers will have an incentive to expand the scale of their operations to capture some of the additional profits, too. This increase in supply will put downward pressure on prices."); HENRY BUTLER, CHRISTOPHER DRAHOZAL & JOANNA SHEPHERD, *ECONOMIC ANALYSIS FOR LAWYERS* 498 (3d ed. 2015) ("In the short-run, firms are capable of earning economic profits because it takes time for new firms to construct plants and enter the market, and existing firms cannot immediately expand production beyond the capacity of current plants. In the long-run, economic profits attract new firms to the market and encourage existing firms to expand their plant and output. As firms move into industries earning positive

This standard economic analysis—lower costs to businesses (sellers) yield lower prices to their customers (buyers)—is supported by voluminous evidence from a wide variety of sources. To give just a few examples of lower costs to sellers leading to lower prices for buyers, much evidence indicates that:

- Computer manufacturers' costs of obtaining semiconductors fell in the 1980s to the early 2000s and that lowered the price of computers and other products.¹⁹⁶
- Textile manufacturers' labor costs fell when they moved from New England to the South¹⁹⁷ and off-shore¹⁹⁸ and that lowered the price of clothes.
- Decreasing the cost of transporting large vehicles and their materials by moving production and assembly closer to customers lowered vehicle prices.¹⁹⁹
- In the 1980s, television manufacturers from Japan and Korea relocated their production to factories in Mexico resulting in lower labor costs and regulatory costs. The lower cost of production allowed the manufacturers to significantly reduce the price of the televisions they sold in the United States and to undercut competitors with production facilities based in nations with higher labor costs.²⁰⁰

economic profits, industry supply expands. The result of this increase in supply is to force the market price down. As the market price drops, so do economic profits. In the long-run, the entry of firms into industries earning positive economic profits eliminates those profits.”).

196. See CLAIR BROWN AND GREG LINDEN, *CHIPS AND CHANGE: HOW CRISIS RESHAPES THE SEMICONDUCTOR INDUSTRY* 77–94 (2009) (In addition to computers, the reduced costs of semiconductors resulted in reduced prices on cell phones, game consoles, and mobile devices.); see also James Curry and Martin Kenney, *The Organizational and Geographic Configuration of the Personal Computer Value Chain*, in *LOCATING GLOBAL ADVANTAGE: INDUSTRY DYNAMICS IN THE INTERNATIONAL ECONOMY* 114–15 (Martin Kenney and Richard Florida eds., 2004) (observing prices decrease as off-shoring and vertical integration lower costs); Gordon E. Moore, *Intel: Memories and the Microprocessor*, 125 *DAEDALUS* 55, 55–57 (1996).

197. See TIMOTHY W. VANDERBURG, *CANNON MILLS AND KANNAPOLIS: PERSISTENT PATERNALISM IN A TEXTILE TOWN* 3 & n. 1–2, 10. See also Broadus Mitchell, *The Rise of Cotton Mills In the South* 168–169 (February 6, 1918) (unpublished Ph.D. dissertation, Johns Hopkins University) (The Project Gutenberg EBook 2011), <http://www.gutenberg.org/files/37784/37784-h/37784-h.htm>.

198. See Frederick H. Abernathy, John T. Dunlop, Janice H. Hammond, and David Weil, *Globalization in the Apparel and Textile Industries: What Is New and What Is Not?*, in *LOCATING GLOBAL ADVANTAGE*, *supra* note 196, at 25–27.

199. See Timothy Sturgeon and Richard Florida, *Globalization, Deverticalization and Employment in the Motor Vehicle Industry*, in *LOCATING GLOBAL ADVANTAGE*, *supra* note 196, at 77.

200. See Martin Kenney, *The Shifting Value Chain: The Television Industry In North America*, in *LOCATING GLOBAL ADVANTAGE*, *supra* note 196, at 94–100.

- In the 1990s, Japanese makers of flat screen displays engineered lower-cost methods of manufacturing which helped them reduce their prices.²⁰¹
- Fracking lowers the costs of businesses extracting natural gas which is lowering prices of natural gas.²⁰²
- Some air carriers lower their costs by maximizing use of the aircraft and the space on the aircraft which lowers airfare prices.²⁰³
- Reducing manufacturing costs has dramatically lowered the price of solar energy panels.²⁰⁴
- In the Taiwanese economy generally, when growth industries experience cost decreases, those industries reduce their product prices accordingly.²⁰⁵

In sum, the standard economic analysis that lower costs to sellers yield lower prices for buyers is supported by a vast amount of data from diverse sources showing a strong pattern over a long time.

The previous pages' economic reasoning generally applies regardless of the source of sellers' lower costs. Much as reductions in sellers' costs for labor or semiconductors tended over time to lower prices to buyers, any contract term that tends to lower sellers' costs tends over time to give buyers lower prices.²⁰⁶

201. See Thomas P. Murtha, Stefanie Ann Lenway, and Jeffrey A. Hart, *Industry Creation and the New Geography of Innovation: The Case of Flat Panel Displays*, in LOCATING GLOBAL ADVANTAGE, *supra* note 196, at 178.

202. See ALEX PRUD'HOMME, HYDROFRACKING: WHAT EVERYONE NEEDS TO KNOW 29–30, 54, 55–56 (2014); see also Gregory Meyer, *Frantic Fracking Sends US Natural Gas Prices into Freefall*, FINANCIAL TIMES (Aug. 6, 2013), <http://www.ft.com/cms/s/0/45d75ad0-fe7f-11e2-97dc-00144feabdc0.html#axzz356JNzkzK>; Thiemo Fetzter, *Fracking Growth* 18 (March 28, 2014) (unpublished manuscript) (Kondard-Adenauer Foundation), (available at <http://www.trfetzter.com>).

203. See Stephen Holloway, *STRAIGHT AND LEVEL: PRACTICAL AIRLINE ECONOMICS* 358–59 (2008).

204. See Nicoletta Marigo & Chiara Candelise, *What Is Behind the Recent Dramatic Reductions in Photovoltaic Prices? The Role of China*, 3 *ECONOMICA E POLITICA INDUSTRIALE* 5, 28–29 (2013).

205. See Tay-Cheng Ma, *Do Prices Respond Asymmetrically to Cost Changes?*, 42 *APPLIED ECONOMICS* 1183, 1184, 1190, 1193–94 (2007) (for examples, see table on page 1190).

206. See, e.g., Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *STAN. L. REV.* 361, 367 (1991) [hereinafter Craswell, *Passing*]; Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 *J.L. & ECON.* 461, 485–87 (1974) (“[H]arsh terms will . . . in equilibrium, yield lower prices.”).

2. *Price is Just Another Contract Term and Lower Costs Can Affect Non-Price Contract Terms*

Adhesive contract terms that reduce sellers' costs may benefit buyers through lower prices or some other beneficial change in the transaction, including better non-price contract terms. Conversely, law prohibiting such cost-lowering terms may harm buyers through higher prices or some other negative change in the transaction, including worse non-price contract terms. As the CFPB wrote about its 2017 final rule "the Bureau acknowledges that most providers will pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers."²⁰⁷ An example of such "reduced quality" would be a negative change to a non-price contract term, such as reducing the frequent-flier miles a consumer receives for using a credit card.

More broadly, from an economic perspective, a non-price contract term "is merely a product feature—no different from price or a [car's] sunroof . . . regulated by market forces."²⁰⁸ As Marcus Cole writes, "non-price terms of contracts are no different than price terms in the ways in which they react to underlying market conditions. In other words, what happens to prices happens to other terms as well."²⁰⁹ So a reduction in sellers' costs tends to be passed on to consumers in the form of better contract terms, whether the better term is price, a non-price term, or some combination of the two. For example, the cost savings a business receives from enforceable arbitration agreements might be passed through to consumers, not in the form of lower prices, but rather in the form of adjustments to some other contract term,²¹⁰ such as more reward miles. For brevity, however, some of

207. CFPB, ARBITRATION AGREEMENTS RULE, *supra* note 12, at 681.

208. James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 168 (2013). *See also* Radin, *supra* note 58, at 1229–30 ("[T]he collapse of any distinction between the product, traditionally thought of as the object of exchange, on the one hand, and the contract, traditionally thought of as the agreement fixing the terms of the exchange, on the other . . . is a trope that has become very prominent in contract theory, [and] has become the dominant position of economic analysis."). In contrast, some non-economic perspectives object to this view. *Id.* ("The contract-as-product view denies the traditional liberal normative underpinning of contract as instantiation of freedom of the will, or at least renders it problematic.")

209. G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J.L. ECON. & POL'Y 413, 438 (2015).

210. I raised this possibility in a previous article. *See* Ware, *Case for Enforcing*, *supra* note 115, at 257 n.10.

what follows will simply say lowering businesses' costs tends to lower consumer prices, rather than (more elaborately) say lowering businesses' costs tends to lower consumer prices or improve some other consumer contract term.

D. *Even in Non-Competitive Markets, Lower Costs to Businesses Tend to Lower Consumer Prices*

The analysis of consumers' benefit from adhesive contract terms that reduce sellers' costs becomes more complicated if the source of the business's cost-savings (here enforceable arbitration agreements) affects consumers' willingness to pay for the product in question, and the analysis becomes still more complicated if different consumers are affected to different degrees.²¹¹ However, these complications are not significantly present in the context of consumers' adhesive arbitration agreements—under the widely-held view that very few consumers notice arbitration clauses at the time of contracting.²¹² If consumers do not notice the arbitration clause, then the clause cannot affect their willingness to pay or implicate their varying preferences. Leaving aside these inapplicable complexities, we can return to the general point of the standard economic analysis—if a contract term lowers businesses' costs then it will also tend to lower consumer prices or “lower” (improve) non-price terms of consumers' contracts.

Do contract terms lowering businesses' costs tend to have these pro-consumer effects only in competitive markets? Some commentators and courts can be read to imply this,²¹³ and a few say it more

211. See, e.g., Craswell, *Passing*, *supra* note 206, at 368–83.

212. See, e.g., Sternlight, *Panacea*, *supra* note 98, at 691 (1996) (“Arbitration clauses are often buried in seemingly insignificant places, camouflaged as insignificant junk mail, written in very small print, and written in technical terms not likely to be meaningful to most.”).

213. BUTLER, DRAHOZAL & SHEPHERD, *supra* note 195, at 183 (Adhesion contracts “reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices (here, a slightly lower rate of interest on the loan).”). See, e.g., *Carbajal v. H & R Block Tax Servs. Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (“People are free to opt for bargain-basement adjudication-or, for that matter, bargain-basement tax preparation services; air carriers that pack passengers like sardines but charge less; and black-and-white television. In competition, prices adjust and both sides gain. ‘Nothing but the best’ may be the motto of a particular consumer but is not something the legal system foists on all consumers.”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (“Terms of use are no less a part of ‘the product’ than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy. . . . ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements.”).

clearly. For instance, Joshua Fairfield says “Drafters [of adhesion contracts] pass cost savings along only in competitive markets. Unless there is a reason not to do so, companies will quite rationally pocket the savings.”²¹⁴ Similarly, Andrew Schwartz writes:

savings generated by contracts of adhesion need not be shared with the consumer. Rather, they can be—and, given the fiduciary duties that corporate managers owe to shareholders, generally will be—retained by the business. Of course, in competitive markets, some or all of the cost savings will likely be returned to the consumer. In reality, however, many companies, ranging from Facebook to Con Edison, have monopolistic market power.²¹⁵

In the adhesive arbitration context, Jean Sternlight asserts:

The same economics that oppose regulation in the presence of perfect competition instead justify regulation where, as here, the conditions for perfect competition do not exist. . . . Some have argued that regulation of consumer arbitration will likely harm consumers by causing prices and interest rates to increase. However, absent perfect competition, such regulation may well cause prices to drop or stay the same rather than rise.²¹⁶

The distinction between a perfectly competitive market and a monopoly (along with intermediate conditions, such as “monopolistic competition”) is part of the standard economic analysis (summarized above by Omri Ben-Shahar²¹⁷) of the extent to which changes in businesses’ costs are passed through to consumers. While the entire cost-change is passed through to consumers only under conditions of perfect competition,²¹⁸ some of the cost-change is passed through to consumers under non-competitive conditions, even monopoly. A good explanation of this point is by economists Jerry Hausman and Gregory Leonard:

214. Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1409 (2009). See also *id.* at 1436 (It is “likely that corporations will therefore simply pocket drafting cost savings.”).

215. Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 354 (2011).

216. Jean R. Sternlight, *Hurrah for the Consumer Financial Protection Bureau: Consumer Arbitration as a Poster Child for Regulation*, 48 ST. MARY’S L. J. 343, 365 (2016) [hereinafter, Sternlight, *Hurrah*].

217. See *supra* notes 178–79 and accompanying text.

218. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 7 (6th ed. 2003) (“The forces of competition tend to make opportunity cost the maximum as well as minimum price.”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 9 (9th ed. 2014) (“[P]rice tends toward alignment with opportunity cost . . . under competition.”).

To begin with the extreme case of a monopolist, price will decrease when marginal cost decreases. This claim is unexceptional to any student of intermediate microeconomics. However, we have been continually surprised over the years that many lawyers at the antitrust agencies refuse to accept this proposition and instead claim that a monopolist will “pocket the cost savings” and not pass any of them on to consumers. This claim is based on the incorrect assertion that only competition forces a firm to pass along cost savings. In fact, however, profit maximization by the firm causes it to pass along at least some of the cost savings in terms of a lower price, even if the firm is a monopolist.

Why does profit maximizing behavior cause a monopolist to pass along to consumers some of the cost savings? A monopolist sets its price so that marginal revenue equals marginal cost. If the monopolist lowers its price (by a small amount), three effects result. First, the monopolist achieves lower revenue on its existing unit sales; second, it sells more units because of the lower price; and third, its total costs increase because of the extra production. At the profit maximizing optimum, the net effect of these three terms is zero—they cancel each other out. However, if the last term, which is the cost of the extra production, becomes smaller due to efficiencies, the total net effect becomes positive because the added revenue from the price decrease exceeds the added production cost. Thus, the monopolist can increase its profits by reducing its price, causing marginal revenue and marginal cost to be equal once again.²¹⁹

Richard Posner, Russell Korobkin, and Richard Craswell are among the many scholars concurring in this point that even monopolists pass along a portion of their cost savings to consumers.²²⁰

219. Jerry A. Hausman & Gregory K. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 GEO. MASON L. REV. 707, 708–09 (1999) (citations omitted).

220. Korobkin, *Bounded Rationality*, *supra* note 37, at 1211–12. See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 335 (9th ed. 2014) (“[I]f the monopolist’s . . . costs fall (unless these are fixed costs), the optimum monopoly price will fall and output will rise”); *id.* at 378 (“[I]n the very long run virtually all [costs] are variable.”); Craswell, *Passing*, *supra* note 206, at 369 (“[T]he presence or absence of a monopoly seller would have little effect on most of the conclusions reached in this section.”); ROBERT E. HALL & MARC LIEBERMAN, *ECONOMICS: PRINCIPLES AND APPLICATIONS* 277 (2011) (“In general a monopoly will pass to consumers only part of a cost-saving technological advance. After the change in technology, the firm’s profit margin will be higher. This standard in sharp contrast with the impact of technological change in perfectly competitive markets, where—as stated earlier—all of the cost saving is passed along to consumers.”); Timothy J. Muris & Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, 9 ANTITRUST SOURCE 1, 9 (2010) (referring to “the mistaken view that firms only pass-on cost savings because of competitive pressures”); *id.* (“The economic literature establishes, with little or no disagreement,

In short, businesses' cost savings tend, to some extent, to be passed through to consumers even in non-competitive markets. More precisely, the extent to which changes in businesses' costs are passed through to consumers is determined by the elasticity²²¹ of supply and demand in the relevant markets.²²² Therefore, considering non-competitive markets indicates that the *size* of the price reduction caused by a cost-savings to business (such as enforcement of its adhesive arbitration agreements) will vary, while strengthening the underlying generalization that business cost-savings tend, to some extent, to lower consumer prices (or improve consumers' non-price terms) regardless of whether the business operates under perfect competition, monopoly, or anything in between.

That even a monopolist tends to pass through some of its cost savings to consumers does not imply that monopoly is as good as competition for consumers. Just as standard economic analysis teaches that prices tend to be lower in competition, the same reasoning applies similarly to suggest that non-price contract terms tend to be better for buyers in competition. Marcus Cole explains:

as the level of competition in a market for a good or service decreases, we should not be surprised to see a proportionate increase in pricing power by suppliers. And, in a similar vein, as the level of competition in a market for a good or service decreases, we should not be surprised if we see a qualitative and quantitative increase in the "one-sided" terms contained in the form contracts associated with the purchase of such a good or service.²²³

In sum, consumers tend to get better prices and better non-price contract terms in competition than monopoly. But consumers benefitting from more competitive, rather than less competitive, markets is separate from the point that businesses in less competitive markets—

that merger-specific marginal cost savings will, at least in part, be passed on to consumers whenever the merged entity will face a downward sloping demand curve, as do almost all real-world firms.”).

221. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 331–33 (9th ed. 2014) (“The effect of price on quantity and hence on revenue (price times quantity) is summarized in the useful concept of elasticity—the proportional change in one variable caused by a proportional change in another. Here we are interested in the elasticity of demand with respect to price—in other words, the proportional effect on the quantity demanded of proportional change in price. To illustrate, if a 1 percent price increase would cause the quantity demanded to fall by 2 percent, the elasticity of demand with respect to price (or, for brevity, simply the elasticity of demand) is -2.”).

222. See, e.g., Craswell, *Passing*, *supra* note 206, at 367.

223. Cole, *supra* note 209, at 438–39.

even monopolies—pass through some of their cost-savings to consumers.²²⁴ However (un)competitive a market, if enforceable adhesive arbitration agreements reduce costs to businesses (an uncontroversial premise),²²⁵ then standard economic analysis suggests they also tend to reduce prices to consumers.²²⁶

E. *CFPB Believes Enforcement of Adhesive Arbitration Agreements Lowers Prices*

The previous subsections explained the standard economic analysis's conclusion that, however (un)competitive a market, if enforceable adhesive arbitration agreements reduce costs to businesses (an uncontroversial premise)²²⁷ then they also tend to reduce prices to

224. Of the consumer financial services sector, Jean Sternlight writes:

Given the apparent absence of perfect competition in these industries, it is not too surprising to hear that in fact some companies collaborated with one another to impose arbitration on consumers. . . . This hardly has the ring of perfect competition in action.

The same economics that oppose regulation in the presence of perfect competition instead justify regulation where, as here, the conditions for perfect competition do not exist. Some regulations, such as antitrust law, are used to directly prohibit monopolies or other forms of imperfect competition. Other regulations, like those governing appropriate safety of consumer products, or marketing of medicines, or airplane safety, are designed to provide protection that an unregulated imperfect market would not provide. In the consumer financial context, it appears that regulation is needed to prevent companies from taking advantage of consumers through class action prohibitions.

Some have argued that regulation of consumer arbitration will likely harm consumers by causing prices and interest rates to increase. However, absent perfect competition, such regulation may well cause prices to drop or stay the same rather than rise.

Sternlight, *Hurrah*, *supra* note 216, at 364–65 (2016). The last sentence of this passage finds no support in the earlier sentences of this passage. The case against price-fixing (or adhesion-contract-term-fixing) rests on the consumer welfare enhancement that comes from more, rather than, less competitive markets. This is separate from, and does not even slightly undercut, the standard economic analysis that businesses' cost savings from (from adhesive arbitration agreements or anything else) tend, to some extent, to be passed through to consumers in even non-competitive markets. Increasing the amount of that pass through is an argument for competition over monopoly, but the absence of competition is not an argument against the belief that some pass through nevertheless occurs. Sternlight's stronger argument—analagizing regulation of adhesive arbitration agreements to regulations governing appropriate safety of consumer products is discussed below. *See infra* Section V and especially text accompanying n.272 (quoting Sternlight & Jensen).

225. *See id.*

226. What Professor Douglas Baird says of warranties is as true of arbitration agreements: "Even a monopolist looks for efficient warranty terms. Using inefficient terms compromises the monopolist's ability to extract rents. She is much better off providing quality goods and efficient terms and charging as much as she can from them." Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 941 (2006).

227. *See supra* Section IV.B.

consumers. Even the CFPB—author of the one study finding no statistically significant evidence to support this conclusion in the arbitration context—nevertheless endorses this conclusion in that context. After anticipating that business’ costs were likely to rise due to the CFPB’s proposed restriction on adhesive arbitration agreements, the CFPB said it “believes that most providers would pass through at least portions of some of the costs described above to consumers.”²²⁸ In other words, the CFPB believes the standard economic analysis’s conclusion survives the CFPB’s inability to find statistically significant evidence to support it.

While the standard economic analysis is that, by lowering costs to businesses, enforcing adhesive arbitration agreements tends over time to lower prices to consumers, or to improve non-price terms of consumers’ contracts, the CFPB’s 2015 Report found no statistically significant evidence that enforceable arbitration agreements lower consumer prices.²²⁹ The CFPB studied two groups of credit card

228. CFPB, *Proposed Rulemaking*, *supra* note 114, at 295 (“The Bureau believes that most providers would pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers. The rate at which firms pass through changes in their marginal costs onto prices (or interest rates) charged to consumers is called the pass-through rate.”). *See also* CFPB, *Arbitration Agreements Rule*, *supra* note 12, at 681 (“[T]he Bureau acknowledges that most providers will pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers. The rate at which firms pass through changes in their marginal costs onto prices or interest rates charged to consumers is called the pass-through rate.”).

229. CFPB, *ARBITRATION STUDY*, *supra* note 143, § 10 at 5 n. 9; *See also* Levitin, *supra* note 40 (“[F]inancial services companies do not appear to be passing the cost savings of arbitration on to consumers in general.”); *id.* (“When Bank of America, JPMorgan Chase, Capital One and HSBC dropped arbitration clauses as the result of a litigation settlement their prices did not go up. Nor did mortgage rates go up when Fannie Mae and Freddie Mac stopped buying mortgages with arbitration clauses or when Congress later banned arbitration clauses in mortgages.”); Glover, *supra* note 177, at 254 (“There is no empirical support for this cost-savings claim.”); Stempel, *Unconscionability*, *supra* note 177, at 851 (“[T]here is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts. Similarly, there is no solid support for the theoretical idea that by using arbitration clauses, vendors are able to refrain from price increases that would otherwise occur.”); Van Wezel Stone, *supra* note 177, at 969 (“[T]he prevalence of arbitration clauses in consumer transactions represents windfalls to the sellers, not cost-saving devices for the buyers.”); Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 106 (2006) (noting lack of “empirical proof” that “merchants pass cost of one-sided form contracts on to consumers”); Sternlight & Jensen, *supra* note 177, at 95 (“[N]o published studies show that the imposition of mandatory arbitration leads to lower prices.”).

issuers: (1) those legally-barred—by settlement of an antitrust case²³⁰—from using arbitration clauses for at least three and a half years (the “treatment group”), and (2) those not so barred (the “control group”).²³¹ The CFPB used a difference-in-differences analysis²³² “to measure how much, if at all, the treatment group (i.e., issuers that stopped using pre-dispute arbitration provisions) changed their pricing of new accounts over time relative to how much the control group changed their pricing of new accounts over the same time period.”²³³ The CFPB found no statistically significant difference in the

230. See Nancy A. Welch & Stephen J. Ware, Ross et al. v. American Express et al.: *The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements*, DISP. RESOL. MAG., Fall 2014, at 18, http://www.americanbar.org/publications/dispute_resolution_magazine/2014/fall/ross-et-al-v-american-express-et-al-the-story-behind-the-spre.html; Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 18–19 (2013) (showing percentage of credit card issuers using arbitration clauses and percentage of credit card debt subject to them).

In mid-to-late 2009, two events occurred that had a significant effect on the use of arbitration clauses in credit card agreements. First, in July 2009, the National Arbitration Forum (NAF) settled a consumer fraud lawsuit with the Minnesota Attorney General by agreeing to stop administering new consumer arbitration cases. Prior to the settlement, the NAF had the largest caseload of consumer arbitrations (almost all debt collection arbitrations) in the United States.

Second, in December 2009, four of the largest credit card issuers settled a pending antitrust suit (*Ross v. Bank of America*) by agreeing to remove arbitration clauses from their consumer and small business credit card agreements for three-and-one-half years.

Id.

231. CFPB, ARBITRATION STUDY, *supra* note 143, §10 at 8 (“To detect price impacts associated with changes relating to pre-dispute arbitration clauses, we begin with data for our ‘treatment’ group, which is composed of all the Ross settlers (issuers that ceased using arbitration provisions during our study period) whose data are in the CCDB. We then compare the treatment group with a ‘control group,’ meaning issuers that did not alter their use of arbitration provisions during the study period. The issuers in our control group could have been Ross defendants that continued in the litigation or they could have been issuers that were not involved in the litigation at all. The issuers in the control group may or may not have used pre-dispute arbitration provisions — what is important is that they did not change their usage of arbitration agreements during the analysis period. Both our treatment group and our control group contain a large sample of accounts from which to draw observations.”).

232. *Id.* at 10.

A difference-in-differences analysis requires a comparison between two time periods: the period before an event and the period after an event. In our regressions, the event separating the before and after periods was the date of the Ross settlements. Settlements in Ross were formalized in Nov. and Dec. 2009. Accordingly, our ‘before’ period is the period from Nov. 2008 through Oct. 2009. Our ‘after’ period is the period from Jan. 2010 through Nov. 2011.

233. *Id.* at 11.

change in the “total cost of credit”²³⁴ across the two groups after one group stopped using arbitration clauses.²³⁵

Despite this study, and commentators citing it to dispute the standard economic analysis’s conclusion that enforcing adhesive arbitration agreements tends to lower prices,²³⁶ the CFPB nevertheless endorsed that conclusion in its 2016’s notice proposing a rule to prohibit arbitration agreements’ “class waivers,”²³⁷ and again in its 2017 final rule prohibiting them.²³⁸

In the 2016 Notice of Proposed Rulemaking (NPRM), the CFPB lists some business costs likely to increase due to the proposed regulation,²³⁹ including “Costs Due to Additional Class Litigation.”²⁴⁰ The

234. *Id.* at 9, “Total cost of credit” is defined by the CFPB. “[T]o measure consumers’ all-in costs, we calculate, on an annualized basis, a figure that includes everything that consumers pay to keep and use their credit cards—all fees and interest charges—as a percentage of the average cycle-ending balance for those accounts.”

235. *Id.* at 5–6 (“Using data from before and after that event, the Bureau has looked to see whether it can find statistically significant evidence, at standard confidence level (95%), that companies that eliminated arbitration raised their prices (measured by total cost of credit) in a manner that was different from that of comparable companies that had not changed their policies regarding arbitration provisions. We are unable to identify any such evidence from the data.”).

236. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 115 (2015) (“[T]he CFPB found that . . . arbitration clauses likely do not lead to lower prices for consumers.”); Sternlight, *Hurrah*, *supra* note 216, at 365 (“[T]he CFPB study showed that when companies in one consumer financial market were precluded from imposing binding arbitration on their customers, in fact those companies’ prices did not rise.”). See also Brenna A. Sheffield, *Pre-dispute Mandatory Arbitration Clauses in Consumer Financial Products: The CFPB’s Proposed Regulation and Its Consistency with the Arbitration Study*, 20 N.C. BANKING INST. 219, 234 (2016) (“The CFPB also reasoned that pre-dispute arbitration clauses that ban class action waivers do not lower consumer prices. However, the Arbitration Study [the CFPB’s Arbitration Study: Report to Congress (2015)] established that proving a correlation between arbitration clauses and pricing is near impossible. . . . The CFPB recognized the difficulty in proving the “pass-through” effect because so many factors affect pricing.”).

237. See CFPB, PROPOSED RULEMAKING, *supra* note 114, at 1 (“[T]he proposed rule would prohibit covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action with respect to the covered consumer financial product or service.”).

238. See CFPB, ARBITRATION AGREEMENTS RULE, *supra* note 12, at 1 (“[T]he final rule prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service. Second, the final rule requires covered providers that are involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau and also to submit specified court records.”).

239. CFPB, PROPOSED RULEMAKING, *supra* note 114, at 271 (“Providers’ costs correspond directly to the three aforementioned effects of the proposed rule: (1) Providers

NPRM then endorsed the standard economic analysis's conclusion: "The Bureau believes that most providers would pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers."²⁴¹ The CFPB's NPRM further endorsed the standard economic analysis's more specific conclusion that the extent to which changes in businesses' costs are passed on to consumers is determined by the elasticity of supply and demand in the relevant markets.²⁴²

would experience costs to the extent they act on additional incentives for ensuring more compliance with the law; (2) providers would spend more to the extent that the exposure to additional class litigation materializes into additional litigation; and (3) providers would incur a one-time administrative change cost or ongoing amendment or notices costs.").

240. *Id.* at 277 ("The major expenses to providers in class litigation are payments to class members and related expenses following a class settlement, plaintiff's legal fees to the extent that the provider is responsible for paying them following a class settlement, the provider's legal fees and other litigation costs (in all cases regardless of how it is resolved), and the provider's management and staff time devoted to the litigation.").

241. *Id.* at 295.

242. *Id.* at 295–97.

The rate at which firms pass through changes in their marginal costs onto prices (or interest rates) charged to consumers is called the pass-through rate. . . .

Determining the extent of pass-through involves evaluating a trade-off between volume of business and margin (the difference between price and marginal cost) on each customer served. Any amount of pass-through increases price, and thus lowers volume. A pass-through rate below 100 percent means that a firm's margin per customer is lower than it was before the provider had to incur the new cost. Economic theory suggests that, without accounting for strategic effects of competition, the pass-through rate ends up somewhere in between the two extremes of: (1) No pass-through (and thus completely preserving the volume at the expense of lowering margin) and (2) full pass-through (completely preserving the margin at the expense of lowering volume). For a case of a monopolist with a linear demand function (a price increase of a dollar results in the same change in quantity demanded regardless of the original price level) and constant marginal cost (each additional unit of output costs the same to produce as the previous unit), the theory predicts a pass-through rate of 50 percent. The rate would be higher or lower depending on how demand elasticity and economies of scale change with higher prices and lower outputs. . . . The Bureau believes that providers might treat a large fraction of the costs of additional class litigation as marginal: Payments to class members, attorney's fees (both defendant's and plaintiff's), and the cost of putative class cases that do not settle on a class basis. The extent to which these marginal costs are likely to be passed through to consumers cannot be reliably predicted, especially given the multiple markets affected.

Id.

The CFPB's 2017 final rule again lists some business costs likely to increase due to the proposed regulation,²⁴³ including "Costs Due to Additional Class Litigation."²⁴⁴ The CFPB then again endorsed the standard economic analysis's conclusion: "the Bureau acknowledges that most providers will pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers."²⁴⁵ The CFPB's final rule further endorsed the standard economic analysis's more specific conclusion that the extent to which changes in businesses' costs are passed on to consumers is determined by the elasticity of supply and demand in the relevant markets.²⁴⁶

In short, the CFPB's 2016 NPRM and its 2017 final rule join the standard economic analysis in concluding that enforcement of adhesive arbitration agreements tends to lower prices, so the CFPB's rule ending that enforcement with respect to class waivers would likely raise prices. As the CFPB's 2015 study found no evidence that enforcement of adhesive arbitration agreements had a statistically significant effect on price,²⁴⁷ why would the CFPB nevertheless conclude in each of the following two years that reducing such enforcement would likely raise businesses' costs with some of that cost-increase passed through to consumers?

The CFPB's 2015 findings are consistent with its later conclusions. First, while the 2015 CFPB study only looks at price,²⁴⁸ the

243. CFPB, ARBITRATION AGREEMENTS RULE, *supra* note 12, at 647, 653, 665, 675 ("Covered Persons' Costs Due to Additional Compliance . . . Providers' Costs Due to Additional Class Litigation: Methodology and Description of Assumptions Behind Numerical Estimates . . . Covered Persons' Costs Due to Additional Class Litigation . . . Covered Persons' Costs Due to the Administrative Change Expense . . .").

244. *Id.* at 653 ("Additional investments in compliance are unlikely to eliminate additional class litigation completely, at least for some providers. Thus, those providers that are sued in a class action will also incur expenses associated with additional class litigation.").

245. *Id.* at 681.

246. *Id.* at 681–82 ("Determining the extent of pass-through involves evaluating a trade-off between volume of business and margin (the difference between price and marginal cost) on each customer served. Any amount of pass-through increases price, and thus lowers volume. A pass-through rate below 100 percent means that a firm's margin per customer is lower than it was before the provider had to incur the new cost.").

247. The NPRM specifically acknowledges that the Bureau's 2015 study "[D]id not find a statistically significant effect on the prices . . ." CFPB, PROPOSED RULEMAKING, *supra* note 114, at 298.

248. CFPB, ARBITRATION AGREEMENTS RULE, *supra* note 12. The CFPB study does not examine non-price contract terms of credit card agreements, but only their price terms as measured by the "total cost of credit" which the CFPB defines as follows:

2016 NPRM and 2017 final rule join standard economic analysis in recognizing that changes in sellers' costs may be passed through to buyers on price or on non-price contract terms or other qualities of the product.²⁴⁹ Because the 2015 study did not examine non-price terms of the agreements it studied, it may have overlooked a statistically significant difference between the treatment group and the control group with respect to some non-price term or other product quality, such as frequent flier miles for using a credit card.

Furthermore, even focusing only on price, the time it takes businesses' cost changes to be reflected in their prices varies, and may never occur when the cost change is expected to be merely temporary.²⁵⁰ As Jason Scott Johnston and Todd Zywicki write in their critique the CFPB study:

[I]t is known that firms in the consumer services sector adjust prices much more slowly in response to cost changes than do firms in the manufacturing sector and that large firms adjust prices more slowly than do small firms.

In light of what economists have learned about how firms adjust prices to cost changes, it is hardly surprising that the CFPB found that the four credit card issuers that agreed to remove arbitration clauses for three and half years did not change their credit card prices in a way that significantly differed from the practices of other issuers. Even if the arbitration clause moratorium increased the costs to the subject firms, the moratorium was only temporary. There is neither theoretical nor empirical reason to have thought that such a temporary change in costs would change credit card pricing. Moreover, the CFPB looked at

“[T]o measure consumers' all-in costs, we calculate, on an annualized basis, a figure that includes everything that consumers pay to keep and use their credit cards—all fees and interest charges—as a percentage of the average cycle-ending balance for those accounts.” CFPB, *ARBITRATION STUDY*, *supra* note 143, §10 at 9 n.19. This does not suggest the CFPB studied non-price terms of the credit card agreements. If it did not, then we would not know of a statistically significant difference in changes of the non-price terms between the treatment group and the control group.

249. CFPB, *PROPOSED RULEMAKING*, *supra* note 114, at 295 (“The Bureau believes that most providers would pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers.”).

250. Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique*, 35 *BANKING & FIN. SERVICES POL'Y REP.* 5, 20 (May 2016) (“[F]inancial economists have long known that banks do not adjust their deposit and loan rates quickly or fully to temporary changes in market interest rates. Recent work indicates clearly that to explain bank pricing, one needs to take account not only of current and recent values of factors such as money market rates but also of expected future rates.”).

whether prices changed differentially during the year after the arbitration moratorium was imposed. Again, no evidence indicates that financial services prices respond so quickly even to a permanent change in costs and no sound theoretical reason exists to think that they would.²⁵¹

In sum, standard economic analysis does not suggest businesses always change their prices immediately to reflect all their cost changes, no matter how ephemeral. Rather, standard economic analysis concludes that businesses' cost-savings tend over time to lead to price reductions or improved non-price terms of consumers' contracts. As the CFPB's 2016 NPRM and 2017 final rule recognize, this conclusion—as applied to arbitration—survives the 2015 study's understandable failure to find statistically significant evidence of it.

F. *Effects of Centrist Reforms on Price*

If, as this Section argued likely occurs, enforcement of adhesive arbitration agreements tends to reduce consumer prices, this pro-consumer effect might be undone by the Centrist Position's pro-consumer reforms of the separability doctrine, class waivers, and legally-erroneous awards. For example, if adhesive arbitration agreements reduce business costs only because such agreements make class waivers more enforceable than they would be in a comparable non-arbitration agreement,²⁵² then moving from current (Very Conservative) law to the Centrist Position would end the cost-reducing effect of adhesive arbitration agreements, and thus end their price-reducing effect. Similarly, the Centrist Position would end the cost and price-reducing effects of adhesive arbitration agreements if those effects come entirely from the separability doctrine, or from deferential judicial review of legally-erroneous awards on issues of mandatory law. If the cost and price-reducing effects of adhesive arbitration agreements are entirely due to some combination of these three factors, then adoption of the Centrist Position would end those effects.

However, even after adoption of the Centrist Position, adhesive arbitration agreements might retain much of their cost and price-reducing effects because those effects may result in part from arbitration reducing, compared to litigation, process costs such as “the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal.”²⁵³ Distinct from such process costs are “adjudicator costs”—the costs of paying for the adjudicator (arbitrator, judge, jury)

251. *Id.*

252. Ware, *Judicial Regulation*, *supra* note 150, at 90, 94.

253. Ware, *Class Actions and Arbitration Fees*, *supra* note 115, at 258.

and support for the adjudicator, such as employees of the court system or arbitration organization, and the courthouse or hearing room.²⁵⁴ Adjudicator costs tend to be higher in arbitration than litigation because the government subsidizes the adjudicator costs of litigation, but not the adjudicator costs of arbitration.²⁵⁵ Nevertheless, arbitration's non-adjudicator process costs may tend to be so much lower than litigation's as to more than make up for arbitration's higher adjudicator costs. As Jeffrey Stempel wrote, "[i]f the arbitration process is significantly faster and cheaper to undertake than litigation, the comparative savings in disputing costs should far exceed the higher, unsubsidized, user fees charged by private arbitration organizations."²⁵⁶ "[C]ounsel fees and similar costs of pressing the case generally dwarf user fees."²⁵⁷

Arbitration had long been thought to be generally quicker and cheaper than litigation largely because arbitration usually had much less discovery and many fewer motions than litigation, and perhaps also because arbitration's pleadings and hearings were shorter and faster than litigation's.²⁵⁸ Supporting this general belief, some empirical evidence indicates that employment arbitration tends to have

254. Drahozal & Ware, *supra* note 3, at 447–48.

255. *See id.* at 477 (“The fees litigants pay to courts do not cover the full cost of the judge, jury, court clerk, other administrative personnel, and the courthouse itself. By contrast, parties to arbitration must pay the arbitrator’s fee, as well as the administrative costs of the arbitration organization, and any cost of the hearing room.”).

256. Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompi, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 329 (1996).

257. *Id.* *See also* Hirschmann & Rickard, *supra* note 188 (“[A] company that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations – costs that the company does not incur in connection with judicial litigation Companies are willing to incur those costs because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court.”).

258. Drahozal & Zyontz, *Empirical Study*, *supra* note 120, at 850 (“[A]rbitration is less formal than litigation, with less discovery and fewer motions, and appellate review of awards is limited.”); J.S. Christie, Jr., Article, *Preparing for and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 265, 266 (2008) (“[C]ompared to litigation . . . arbitration motion practice is rare and arbitration discovery normally is limited. Generally, arbitrations are easier to schedule, because the parties do not work around a court’s docket. The time required for an arbitration hearing is generally less than for a trial As a consequence, arbitration litigation expenses are usually lower than court litigation expenses and arbitrations are usually completed more quickly than trials.”); Schwartz, *Fairness*, *supra* note 137, at 1268 (“[L]imits on discovery (and to a lesser extent on pretrial motion practice) hold down the actual costs of arbitration relative to litigation.”).

lower process costs than employment litigation.²⁵⁹ However, nearly all of this evidence is a decade or two old, and arbitration's discovery and motions have apparently been increasing, so arbitration's process-cost advantage over litigation may be closing.²⁶⁰ On the other hand, growing arbitral discovery is reportedly leading some parties to draft their arbitration clauses with "meaningful limits on discovery,"²⁶¹ and research revealed no evidence or argument that arbitration tends to take as long as litigation,²⁶² so arbitration's general cost

259. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the AAA*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003) (indicating that AAA employment arbitration offers affordable, substantial, measurable due process to employees arbitrating pursuant to mandatory arbitration agreements and to middle- and lower-income employees); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1589 (2005) (studying employment dispute resolution program adopted by anonymous business and reporting that "since instituting its DRP system, ADR Employer 1 has cut its outside counsel fees in half"); G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 521 n.24 (1989) ("[A]verage cost of defending customer-broker disputes in court was \$20,000 per case as compared with \$8,000 per case in arbitration."); U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-97-15, ALTERNATE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 19 (1997) ("report[ing] that the overall cost of dealing with workplace disputes (including the annual cost of the ADR program itself) was less than half of what the company had been accustomed to spending on legal fees for employment-related litigation" during the first three years after Brown and Root adopted an employee ADR program).

260. Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOKLYN L. REV. 111, 119 (2015) ("With its explosion in popularity, arbitration evolved into a different process than that practiced when Congress enacted the FAA. . . . [A]s actually practiced today in the most oft-used forums . . . arbitration involves more formalities and litigation-like processes. In turn, these formalities increase costs due to more expansive discovery, prehearing conferences, and motion practice."); *id.* at 139 ("[M]any scholars question the cost savings of modern arbitration. Litigation-like arbitration procedures—including extensive document and e-discovery, motion practice, and pre and post-hearing briefs—have become far more common, driving up arbitration costs dramatically. . . . At best, the empirical evidence gathered to date is inconclusive as to whether arbitration is still less expensive than litigation."); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 9–12 ("[A]rbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice. . . . Arbitration hearings are now often preceded by extensive discovery, including depositions."); *id.* at 12 ("Because discovery has traditionally accounted for the bulk of litigation-related costs, the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy.");

261. John Wilkinson, *Arbitration Contract Clauses: A Potential Key to a Cost-Effective Process*, 16 DISP. RESOL. MAG. 9, 9 (Fall 2009).

262. See David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on The Growing Use of ADR by U.S. Corporations* 17, 26 (1998) (reporting over 65% of companies gave "saves time" as reason they use arbitration); Drahozal & Zyontz, *Empirical Study, supra* note 120, at 845 ("The average time

advantage over litigation may have shrunk, rather than disappeared, and arbitration's speed advantage seems to continue.

G. Conclusion

In sum, the standard economic analysis concludes that enforcement of arbitration agreements tends to lower consumer prices or benefit consumers with non-price changes to their transactions. This conclusion is based on reasoning standard across the ideological spectrum of economics and was repeatedly endorsed by the CFPB despite its inability to find significant empirical evidence for it. To reiterate, the CFPB's 2017 final arbitration rule: "acknowledge[d] that most providers will pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers." This reasoning and conclusion are not refuted by evidence that the relevant markets diverge from models of perfect competition as the direction, if not the degree, of the effects indicated by this reasoning and conclusion hold in non-competitive markets, even monopoly. While these effects may be reduced by changing from current (Very Conservative) arbitration to the Centrist Position, some of these effects may well survive that change because of arbitration's tendency to reduce process costs relative to litigation.

from filing to final award for the consumer arbitrations studied was 6.9 months."); Eisenberg & Hill, *supra* note 149, at 51 (finding time to final hearing was about three times faster in arbitration than in court); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not be an All or Nothing Proposition*, 87 IND. L.J. 289, 294 (2012) ("Professor Colvin's work confirmed the speed advantage of arbitration. He found that the mean time to resolve a case that proceeded to hearing and award was approximately one year; in contrast, litigation takes at least twice as long."); Sherwyn, Estreicher & Heise, *supra* note 259, at 1572-73 (noting "few dispute the assertion that arbitration is faster than litigation"). See also AMERICAN ARBITRATION ASSOCIATION, *Measuring the Costs of Delays in Dispute Resolution*, <http://go.adr.org/impactsofdelay.html> ("On average, U.S. district court cases took more than 12 months longer to get to trial than cases adjudicated by arbitration (24.2 months vs 11.6 months).").

V. THE CASE FOR THE CENTRIST POSITION OVER
THE PROGRESSIVE POSITIONS

A. *Tradeoffs in Shaping Law Governing Adhesive Arbitration
Agreements to Benefit Consumers*

Section IV explained that enforcing adhesive arbitration agreements, like enforcing other adhesive contract terms that lower businesses' costs, likely benefits consumers with some combination of lower prices or better non-price contract terms. Rather than deny that businesses' savings from enforceable adhesive contract terms tends to lower consumer prices, the stronger economic argument is that enforcing adhesive contract terms tends to lower consumer prices too much. As Russell Korobkin puts it,

standard form contracts are likely to contain inefficient terms because most buyers will compare only a subset of product attributes ("salient" attributes) among sellers when making a purchase decision, even when all contract terms are readily available Because making nonsalient attributes "low quality" will save the seller money and not cost the seller customers, sellers will have a profit incentive to skimp on quality for such attributes. If price is a salient attribute for buyers, sellers in a competitive market will actually be forced by market pressure to make nonsalient attributes low quality, whether or not this is the efficient level of quality for those attributes. This is because they will need the resulting cost savings in order to compete on price, which they must do to retain customers.²⁶³

Passing on savings from "low quality" adhesive terms is, as Korobkin says, something "sellers in a competitive market . . . must do to retain customers,"²⁶⁴ and, as discussed above, also something other sellers can be expected to do because they benefit from doing so.

263. Russell Korobkin, *Possibility and Plausibility in Law and Economics*, 32 FLA. ST. U. L. REV. 781, 784 (2005) [hereinafter Korobkin, *Possibility*]. See also Korobkin, *Bounded Rationality*, *supra* note 37, at 1206; Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 743 (2008) ("[F]irms have a strong incentive to compete over several salient transactional terms while racing to the bottom on others. This race to the bottom allows firms to offset for the costs of competing over the salient terms, most prominently the price."); Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 971 (2012) ("[I]mperfectly rational consumers place excessive weight on short-term, salient prices and insufficient weight on long-term, nonsalient prices. Faced with such biased demand, issuers offer low short-term prices and high long-term prices to minimize the perceived total price of their product. Losses on the low, below-cost, short-term prices are recouped through high, above-cost, long-term prices.").

264. Korobkin, *Possibility*, *supra* note 263, at 784.

As Section IV explained, lowering costs to businesses in non-competitive markets, even monopoly, tends to lower prices.²⁶⁵

Rather than deny that non-price contract terms (such as arbitration clauses) affect prices, sophisticated economic scholarship on adhesion contracts generally begins with that tradeoff among price and other contract terms and asks which legal rules tend to produce the best mix of price and non-price—or, more precisely, salient and non-salient—contract terms. Scholars advocating legal rules that aggressively police adhesion contract terms emphasize sellers’ “incentive to skimp on quality” of non-salient contract terms and thus to give consumers overly low prices.²⁶⁶ In contrast, scholars cautioning against legal rules that aggressively police adhesion contract terms often emphasize two checks on sellers’ incentives toward low-quality non-salient terms.²⁶⁷ These are: (1) sellers’ incentives to win the business of an informed-minority of buyers for whom the relevant contract term is salient,²⁶⁸ and (2) the reputational harm to sellers

265. See *supra* note 219 and accompanying text.

266. See *supra* note 263 and accompanying text. See also David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1043–44 (2012) (“[I]f arbitration clauses are not ‘salient’—do not actually affect adherents’ choices about products, services, and jobs—then adherents will not be able to force drafters to offer optimal dispute resolution terms. Instead, no matter what most consumers and employees actually prefer, companies will engage in a race to the bottom, slashing procedural entitlements in order to one-up each other on the higher-profile issues of price or wages.”); Gibson, *supra* note 208, at 212–13 (“[S]ellers will decrease the quality of the nonsalient features and use the resulting savings to make the salient features more attractive. Boilerplate, as a nonsalient feature, will accordingly be full of terms that reduce seller costs and shift risks to consumers, and sellers will use the money they save to lower the price of the product.”).

267. James Gibson, *supra* note 208, at 199 (“[S]cholars have offered two distinct arguments in favor of enforcing boilerplate even in the face of the mounting evidence that it goes unread. The first is an ex ante argument that the market works, due to a sufficiently large subset of consumers that actually do read the terms. The second is an ex post argument that even when the market fails, reputational concerns keep sellers from unduly aggressive enforcement of one-sided terms.”).

268. Compare, e.g., Baird, *supra* note 226, at 951 (“As long as there are enough sophisticated buyers aware of the importance of having the right microprocessor, the seller must choose well. The sophisticated buyer provides protection for those that are entirely ignorant. Indeed, at first approximation, boilerplate is something the typical consumer can safely ignore most of the time.”) and Cole, *supra* note 209, at 417–22 (emphasizing that, just as “price is, in an indirect but very real sense, determined by the choices of the marginal consumer and the marginal producer,” adhesion contract terms are determined by the marginal consumer and marginal producer of each non-price term of the contract, and providing a colorful example of a credit card’s coverage of a consumer primary car rental insurance coverage), with Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 601 (1990) (“[T]here generally will be too few informed consumers to produce a competitive market for contract terms.”).

who enforce (as opposed to merely draft) low-quality non-salient terms.²⁶⁹

However strong these factors, as Douglas Baird concludes: There is nothing particularly special about what the law is doing with respect to fine print as opposed to other hidden product attributes. Of course, there may not be enough sophisticated buyers to give a seller the right incentives. There are computers with microprocessors that are too slow and warranties that are too stingy that are sold to people like me every day. But the question is not whether the market is perfect, but how we

269. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

The existence of a one-sided contract does not imply that the transaction will be one-sided, but only that the seller will have discretion with respect to how to treat the consumer. . . .

Many one-sided contracts are found in consumer markets that have the following characteristics: The seller side of the market consists of repeat players who have a sunk cost in a reputation for dealing “fairly” with consumers, in the sense of not taking advantage of one-sided terms as long as the consumer deals fairly with them. The buyer side of the market consists of parties that—because they do not have repeat dealings with particular sellers (the market is competitive, so consumers can switch easily among sellers) and because privacy rules or other barriers to pooling of information among sellers prevent sellers from comparing notes about the behavior of individual buyers—do not have a sunk cost in reputation and hence have no incentive to deal fairly with sellers in the sense of honoring the terms of the contract.

In such a situation, the optimal set of contract terms does not depend only on the relative costs and benefits associated with particular terms. It also depends on the relative propensity of the parties to behave opportunistically, that is, to take advantage of contractual terms and, in so doing, impose a cost on the other side that will exceed the benefit to the opportunistic party.

In the asymmetric-reputation case, the seller has little or no incentive to behave opportunistically because if he does, he will suffer a loss of reputation, which is a cost.

Id. at 827, 829–30. See also Clayton P. Gillette, *Rolling Contracts As an Agency Problem*, 2004 WIS. L. REV. 679, 704–05 (2004) (“[C]lauses that initially appear to provide sellers with significant discretion do not necessarily portend proseller abuse of that discretion.”); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 879 (2006) (“Tailored forgiveness deals with the problem of hidden customer types. . . . [A] firm that has tough standard-form terms and then delegates discretion to renegotiate when its managers believe that the customer has not behaved opportunistically does not have to worry so much about identifying opportunistic types before entering the contract. If it turns out that the customer behavior was indeed opportunistic, its manager will insist upon adherence to the unforgiving standard-form terms.”); Rakoff, *supra* note 4, at 1221 (1983) (“[I]f legal liabilities are set lower than the obligations that the firm recognizes in its actual practice, the gap can provide room to maneuver in the face of inevitable adversity. The enterprise can build a reputation for allowing customers substantial recourse in matters of return, repair, or alteration without committing itself to maintain the policy in any particular case.”).

should shape legal rules to make markets work more effectively with respect to all product attributes.²⁷⁰

In other words, lawmakers' considerations in shaping legal rules to police adhesion contract terms, like warranties and arbitration, resemble lawmakers' considerations in shaping legal rules to police product attributes like the speed of a computer. The possibility that a computer's slow processor hurts some consumers more than the price increase that would result from legally-prohibiting such processors is consistent with the possibility that many other consumers would be hurt more by the price increase. Similarly, the possibility that an adhesive arbitration clause hurts some consumers more than the price increase that would result from prohibiting such clauses is consistent with the possibility that many other consumers would be hurt more by the price increase.

B. *Defer to Non-Arbitration Law in Prohibiting Only "Unsafe" Arbitration Clauses*

Almost compatible with the previous Subsection's analysis is the following passage by Jean Sternlight, perhaps the leading scholarly advocate of the Very Progressive Position, and economist Elizabeth Jensen:

low prices neither are, nor necessarily should be, policymakers' primary concern. Many government regulations clearly increase companies' costs, and these regulations may even increase prices, but policymakers have determined that these regulations make sense nonetheless. For example, we require manufacturers of tires, drugs, and cars to meet minimum standards to protect public health and safety.²⁷¹

This passage would be compatible with this article's summary of Korobkin, Baird, etc. if this passage had said of consumer product safety regulations "these regulations *likely* increase prices" rather than "these regulations *may even* increase prices." However, if we acknowledge a likely tradeoff between price and consumer product safety regulation then Sternlight's analogy of "tires, drugs, and cars" to adhesive arbitration agreements is apt. Much as early-1900's progressives created the FDA to mandate minimum standards of

270. Baird, *supra* note 226, at 936–37.

271. Sternlight & Jensen, *supra* note 177, at 95.

drug safety,²⁷² and mid-1900's progressives created strict products liability and the Consumer Product Safety Commission to mandate minimum standards of auto safety,²⁷³ early 2000's progressives created the CFPB to mandate minimum standards of consumer credit safety.²⁷⁴ In these and similar regulatory incursions on consumers' freedom of contract, the strong progressive argument is not that the relevant markets lack "perfect competition, [so] such regulation may well cause prices to drop or stay the same rather than rise,"²⁷⁵ but rather that the regulatory protection of consumers' safety is worth consumers paying the higher prices likely caused by the regulation. And that is the argument I believe should incline progressives toward the Centrist Position of continuing to enforce adhesive arbitration

272. *Background: Research Tools on FDA History*, U.S. FOOD AND DRUG ADMINISTRATION <https://www.fda.gov/AboutFDA/WhatWeDo/History/ResearchTools/Background/default.htm> (last updated Nov. 17, 2016) ("FDA's responsibilities derive from statutes that date back to the early twentieth century. Harvey Wiley fought long and hard to unify disparate interest groups behind a federal law to deal with serious problems in the food and drug supply. Through Wiley's crusading, the support of the General Federation of Women's Clubs, the work of muckraking journalists, the efforts of state and local food and drug officials, cooperation from the American Medical Association and the American Pharmaceutical Association, and the impact of Upton Sinclair's *The Jungle*, a novel depicting the filth of the meat packing industry, Congress approved one of the landmarks of Progressive era legislation in 1906, the Food and Drugs Act.").

273. See, e.g., James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 478–79 (1995) (describing "humanistic/progressive social considerations" as the "philosophical underpinning" of strict products liability); Terry Carter, *Should this toy be saved?*, ABA JOURNAL (May 1, 2013, 10:10 AM), http://www.abajournal.com/magazine/article/should_this_toy_be_saved/ ("The consumer movement largely developed by Ralph Nader in the mid-1960s reached a pinnacle with the creation of the CPSC in 1972.").

274. See, e.g., Jim Hawkins, *The Federal Government in the Fringe Economy*, 15 CHAP. L. REV. 23 (2011) (observing that articles by then Professor, now Senator, Elizabeth Warren (D-MA) "are widely considered the academic work that propelled the Bureau into existence"); David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* 50–51, 100 (2011) (The CFPB was "conceived by Harvard law professor and TARP Oversight Committee head Elizabeth Warren, first in a short 2007 article whose title—'Unsafe at Any Rate'—consciously linked her to the Ralph Nader crusades of the 1960s, and then a more detailed, co-authored article a year later. . . . With a few exceptions, the legislative blueprint for the new Consumer Bureau reads as if it came straight from these two articles, as in many respects it did.").

275. Jean R. Sternlight, *Hurrah*, *supra* note 216, at 365 ("Some have argued that regulation of consumer arbitration will likely harm consumers by causing prices and interest rates to increase. However, absent perfect competition, such regulation may well cause prices to drop or stay the same rather than rise. Consistent with this analysis, the CFPB study showed that when companies in one consumer financial market were precluded from imposing binding arbitration on their customers, in fact those companies' prices did not rise.").

clauses that are safe for consumers, while prohibiting those that are unsafe. “Unsafe” adhesive arbitration clauses are, this article has argued, arbitration clauses:

- 1) in contracts induced by duress, misrepresentation, or other contract defense;
- 2) that deprive consumers of class actions; or
- 3) that preclude correction of legally-erroneous decisions of mandatory law.

As noted above,²⁷⁶ this list derives from current non-arbitration law. In other words, centrist arbitration law does not try to reinvent the wheel by developing new bodies of law on these three complex topics, but rather defers to the conclusions established areas of law have already reached after a long period of evolution and testing through litigated cases. The following paragraphs elaborate, first addressing class actions.

As Chris Drahozal explains, first among the “unintended consequences [that] might result from restrictions on the use of pre-dispute arbitration clauses in consumer and employment contracts” is:

[C]onsumers and employees without disputes—who have no complaint with their treatment by a business—likely will be made worse off by legal restrictions on the use of arbitration. The cost savings that businesses achieve through arbitration benefit consumers by enabling the businesses to reduce prices and employers to increase wages. Removing those cost savings by restricting the use of arbitration will have the opposite effect.²⁷⁷

To this sensible point, progressives sensibly reply that even consumers who have no complaint with their treatment by a business may have been harmed by the business’s violations of law, but not realize it.²⁷⁸ So discovering and deterring such violations is an important role for the plaintiffs’ lawyers who bring class actions, and enforcing

276. See Introduction.

277. Christopher R. Drahozal, *Arbitration Innumeracy*, 4 Y.B. ON ARB. & MEDIATION 89, 101 (2012).

278. Jean R. Sternlight, *Difficult Claims*, *supra* note 154, at 93 (opposing arbitral class waivers reducing enforcement of a businesses’ violations of laws in cases in which “the consumer does not realize she has potentially been injured”); *id.* at 119–20 (“[C]lass actions can solve the problem of consumers not knowing they were harmed, or not knowing they were harmed in an illegal way. . . a class action could be filed on behalf of persons who had been harmed by discriminatory lending or charged excessive fees or exposed to harmful chemicals even if the vast number of the members of the class had no idea they had been harmed, or harmed illegally. Only the named plaintiff and the attorney for the named plaintiff would necessarily have to be aware of the fact that the class members were allegedly harmed, or harmed in violation of the law.”).

class waivers hurts consumers who do not realize they would benefit from a class action.²⁷⁹ Jean Sternlight, for example, opposes enforcement of arbitral class waivers in part on this paternalist (or “parentalist”²⁸⁰) ground.

Bolstering this paternalist argument against class waivers is an externality argument. As Michelle Boardman writes,

there may be a free-rider problem when each individual consumer signs away her right to a legal process that in the aggregate provides public benefits. If the potential for class action is to the benefit of all consumers but is paid for individually, for example, I may wish the threat of class action to cabin a vendor’s behavior even as I willingly trade my own right in exchange for a slightly cheaper contract (or perhaps I retain the time it would take to discover the clause in exchange for the risk of the clause).

. . . Here is not the place to debate the benefit of class actions to the public. The point is that if provisions that restrict class actions or the right to sue in a convenient forum, or other clauses used widely, leave vendors with an insufficient threat of suit from consumers, the polity may choose to reinstate the threat even though each individual would choose to accept the clauses.²⁸¹

279. *Id.* at 119–20; see also Sternlight, *Hurrah*, *supra* note 216, at 358 (“[C]lass proceedings . . . allow financial consumers who may not realize they have been wronged to participate in a class action where their rights can be adjudicated.”); Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 451 (2014) (concluding individual, small-claims arbitration, rather than class action, lacks “room to develop a business model that harnesses the potentially large number of people who are harmed in small ways by corporate practices, but who may not have any knowledge of the harm or lack any incentive to pursue their small claims.”).

280. I prefer “parentalist” to “paternalist,” see Ware, *Exceptional*, *supra* note 104, at 214 n.97 (“[M]andatory disclosure laws are ‘parentalist’ restrictions on autonomy”), but that gender neutrality does not seem to have caught on.

281. Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967, 1974 (2014) (reviewing MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)) (emphasis omitted) (footnotes omitted); see also Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1815 (2016) (referring to the “litigation externality produced by class actions” and arguing “the strongest case for access to courts and against mandatory arbitration might very well rest on this deterrence externality. It is possible that various types of socially harmful conduct are insufficiently deterred by public enforcement and that private class actions create better compliance, eliminate harmful conduct, and result in more accurate prices, to the benefit of all.”).

These two arguments against enforcing arbitral class waivers (paternalism and externalities) resonate because paternalism and externalities are the standard arguments for limiting freedom of contract; that is, they are the standard arguments for mandatory rules preventing enforcement of some contract terms.²⁸² And they are why the Centrist Position, like Boardman's article ("not the place to debate the benefit of class actions to the public"), does not try to resolve the long-running debate over class actions.²⁸³ Rather, centrist arbitration law allows that debate to continue outside arbitration law, which centrist arbitration law flexibly accommodates by making arbitral class waivers as enforceable as comparable non-arbitral class waivers.²⁸⁴

Similarly, the Centrist Position does not require arbitration law to make the many difficult policy judgments about when paternalism or externalities are severe enough to justify any of the many mandatory rules of consumer law, employment law, and the like. Rather, centrist arbitration law defers to such non-arbitration law on which rules are mandatory by ensuring that arbitrators' errors on such law can be vacated *de novo*, while arbitrators' errors on law consisting of default rules can be vacated only under the deferential standards of current arbitration law, such as FAA § 10.²⁸⁵ And the Centrist Position does not require arbitration law to make the many difficult policy judgments required to develop nuanced contract defenses, like duress and misrepresentation. Rather, centrist arbitration law defers to contract law on its defenses, and merely applies them to the right to litigate, by repealing the separability doctrine.²⁸⁶

In sum, the Centrist Position incorporates the accumulated wisdom of large bodies of non-arbitration law to prohibit the categories of

282. Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 *YALE L.J.* 2032, 2084 (2012) ("The standard justifications for mandatory restrictions on freedom of contract are to protect people inside (paternalism) or outside (externalities) the contract."); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 *TEX. L. REV.* 51, 63 (1992) ("Contract theorists generally agree that mandatory rules can be justified either by society wanting to protect the contracting parties themselves (paternalism) or by society wanting to protect third parties (externalities)."); Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 *YALE L.J.* 226, 267 (2006) ("A liberal state has two basic rationales for regulating how individuals or groups use private property and enter into contracts: externalities and paternalism.").

283. Boardman, *supra* note 281; Ware, *Against Conservative*, *supra* note 8, at 1267–68.

284. *See supra* notes 91–95 and accompanying text.

285. *See supra* notes 88–91 and accompanying text.

286. *See supra* notes 87–88 and accompanying text.

adhesive arbitration agreements that non-arbitration law has already determined pose a significant risk of harming consumers, while facilitating courts' nuanced judgments about remaining adhesive arbitration clauses. Some of these remaining clauses might, compared with litigation,²⁸⁷ require significantly:

- 1) higher filing fees;²⁸⁸
- 2) lesser remedies;²⁸⁹
- 3) shorter limitations periods;²⁹⁰ or
- 4) less convenient hearing locations.²⁹¹

An arbitration agreement with such possibly "claim-suppressing"²⁹²

287. See Ware, PRINCIPLES, *supra* note 1, § 2.25; Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–96 (2004); Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 770–71 (2014).

288. *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (holding fees excessive and unconscionable); *Brower v. Gateway 2000 Inc.*, 676 N.Y.S.2d 569, 574 (App.N.Y. App. Div. 1998) (same); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004) (same).

289. *Sec. Serv. Fed. Credit Union v. Sanders*, 264 S.W.3d 292, 298–301 (Tex. App. 2008) (holding arbitration agreements' attorney-fee provisions unenforceable because in conflict with Texas Deceptive Trade Practices–Consumer Protection Act, but severable from arbitration agreement, and arbitration agreement otherwise enforceable).

290. *McKee v. AT&T Corp.*, 191 P.3d 845, 859 (2008) (finding shortened statute of limitations was "harsh and one-sided when imposed on a consumer in a contract of adhesion for a basic consumer service such as long distance telephone service"); *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712, 732 (N.D. Cal. 2012) *aff'd*, 549 F. App'x 692 (9th Cir. 2013) (finding significant shortening of statutorily-mandated statute of limitations contributed to a finding of substantive unconscionability).

291. *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563 (Ct. App. 1993); *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003).

292. Schwartz, *Claim-Suppressing*, *supra* note 110, at 239. See also Leslie, *supra* note 98, at 266 ("[F]irms insert terms into their arbitration clauses to shorten statutes of limitations, to reduce damages, or to prevent injunctive relief. These contract terms are considered unconscionable — and, thus, unenforceable 3/4 in many states. However, the Supreme Court has interpreted the Federal Arbitration Act of 1925 (the FAA) to require deference to arbitration clauses; consequently, many courts allow firms to bootstrap unenforceable contract terms into an arbitration clause in order to make unconscionable contract terms enforceable.") (footnotes omitted). *Id.* at 282 (listing "(1) truncated statutes of limitations, (2) damage limitations, (3) anti-injunction clauses, (4) fee-shifting provisions, (5) forum-selection clauses, and (6) non-coordination agreements. Each of these provisions undermines consumer protection and employment law. More importantly, these provisions would be contractually unenforceable in at least some jurisdictions but for the fact that they reside in an arbitration clause.").

procedures can be held unconscionable,²⁹³ as occurred in the cases cited throughout the previous sentence's list. While many cases have applied the unconscionability doctrine to arbitration agreements, such unconscionability policing of arbitration agreements' fairness is now in some cases restricted by the Supreme Court's extension of the separability doctrine in *Rent-A-Center, W., Inc. v. Jackson*.²⁹⁴ But that restriction would be lifted by the Centrist Position's repeal of the separability doctrine and thus leave courts fully capable of policing arbitration agreements for unconscionability.

Therefore, a rigidly-categorical prohibition against all individuals' adhesive arbitration agreements cannot be justified as needed to police claim-suppressing arbitration procedures. Such prohibitions, which unite the Very Progressive and Moderately Progressive Positions, are overbroad. Unconscionability policing is better done by case law, which tends to be more sensitive to facts, and thus more flexible and nuanced, than legislation and regulation, both of which inevitably paint with a broader brush.²⁹⁵

293. This is acknowledged even by progressive opponents of adhesive arbitration, such as the National Consumer Law Center. See The Model State Consumer & Employee Justice Enforcement Act, § IV(2), <http://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf>.

294. *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) ("Under the FAA, when an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator."); Ware, *Against Conservative*, *supra* note 8, at 1237–38 (2016) ("In *Rent-A-Center*, Jackson argued that the arbitration clause was unconscionable, so he should have been free to litigate, rather than arbitrate, his claims against Rent-A-Center. The Supreme Court rejected Jackson's argument on the ground that the [agreement's] 'delegation clause' constituted his agreement to arbitrate whether other portions of his arbitration clause were unconscionable."); David S. Schwartz, *Justice Scalia's Jiggery-Pokery in Federal Arbitration Law*, 101 MINN. L. REV. HEADNOTES 75, 86 (2016) (After *Rent-A-Center*, "[c]ourts will have no choice but to compel arbitration in every case, leaving it up to the arbitrators to determine how to respond to unconscionable and overreaching arbitration agreements. All the sorts of remedy-stripping arbitration clauses that have been struck down as unconscionable by courts will no longer be judicially reviewable in the first instance, and subject only to the very limited judicial review allowable for arbitration awards.").

295. Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1273 (2011) ("[L]egislative intervention by its nature paints in broad strokes."); Sternlight & Jensen, *supra* note 177, at 100–01 (arguing that information inequality, expense, and the "logistical realities" of arbitration make it inefficient to bring unconscionability claims individually, and it is more efficient if courts or legislatures determine what would be reasonable in the general circumstances and apply it to the class).

In short, the Centrist Position is well calibrated to “shape legal rules to make markets work more effectively” by continuing to enforce adhesive arbitration clauses that are safe for consumers while prohibiting those that are unsafe. In contrast, the Progressive Positions would lose the benefits of markets by preventing enforcement of all adhesive arbitration agreements, and thus losing their likely price-lowering and resolution-quickenning effects, even to the extent those benefits arise from genuine efficiencies arbitration achieves over litigation due to arbitration’s lower process costs.

These efficiencies are unlikely to be realized under the Very Progressive Position of enforcing only post-dispute arbitration agreements because such agreements would likely remain rare for several reasons. First, after a dispute arises the parties may well be angry with each other and thus disinclined to negotiate with each other, let alone to negotiate cooperatively.²⁹⁶ Second, in any negotiation that does occur after a dispute arises, each party has an incentive to drive a hard bargain because the parties are stuck with each other in the bilateral-monopoly sense that their dispute is with each other so they cannot “shop around” to find someone else with whom they would rather negotiate an agreement about this dispute.²⁹⁷ Moreover, if particular disputing parties can cooperate well enough to form a post-dispute agreement to arbitrate, they are probably able to, and better served by, instead just forming a settlement agreement to end the dispute entirely.²⁹⁸

So post-dispute arbitration agreements’ rarity would largely prevent the very Progressive Position from capturing arbitration’s price-lowering and resolution-quickenning effects. And the Moderately Progressive Position—of enforcing individuals’ pre-dispute arbitration agreements only when not adhesive—would similarly fail to capture

296. Ware, *Principles*, *supra* note 1, at §§ 3.23–3.30 (summarizing cooperative and problem-solving approaches to negotiation).

297. This bilateral monopoly tends to make dispute negotiation more adversarial than the transactional negotiation that precedes deals like the sale of a home, car, or business. *Id.* §§ 3.4, 3.12; Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 2006 n.18 (2014). As several scholars have noted, *ex post*, disputing parties’ interests likely diverge in ways that make agreement over large matters difficult. Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 895–96 (2004); Drahozal, *Unfair*, *supra* note 53, at 746–78.

298. See Drahozal, *Unfair*, *supra* note 53, at 747 (Compared with a post-dispute arbitration agreement, “it is only marginally more costly to settle the claim altogether.”).

arbitration's price-lowering and resolution-quickenning effects because, as noted above, individuals rarely form non-adhesive, pre-dispute contracts.²⁹⁹ So, to the extent centrist reforms leave arbitration with a process-cost advantage over litigation, adopting the Progressive over Centrist Position would increase businesses' costs and consumer prices while benefitting no one except "those (like lawyers) who sell process."³⁰⁰

VI. CONCLUSION

James White quips that "for a nickel or a dime, almost all of us would . . . agree to arbitrate,"³⁰¹ and perhaps that is about the additional price each consumer would pay for every adhesive arbitration agreement that would be prohibited by the Progressive Positions.³⁰² Regardless of its amount, the key for progressives is to acknowledge that this price effect probably exists. As explained above, the standard economic analysis concludes that businesses in competitive and

299. *See id.*

300. Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO INSTITUTE POLICY ANALYSIS NO. 433, April 18, 2002, at 9, http://www.cato.org/pub_display.php?pub_id=1292.

[E]ven this is a benefit to society as a whole because to the extent that the costs of adjudication are reduced, disputes can be resolved more efficiently, i.e., fewer resources need to be devoted to adjudication. Some bright young people who would have become trial lawyers enter other fields instead. Whatever those people produce is a gain to society from the cost savings of arbitration.

Id. *See also* Ware, *Class Actions and Arbitration Fees*, *supra* note 115, at 258 ("The only harm from process-cost savings comes to those (like lawyers) who sell process. But even this is a benefit to society as a whole.")

In this respect, the business' process-cost savings from arbitration differ from the savings a business achieves, as in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), by a forum-selection clause that relegates claims against it to a forum that it finds geographically convenient. "As to the . . . savings to the cruise line, due to not having to defend suits in remote locations, there is a corollary increase in expenses to those passengers who must litigate far from home." Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 66 (1995). By contrast, as to the business' process-cost savings from arbitration, there is no reason to expect a corollary increase in expenses to consumers with disputes against the business, and in fact arbitration may reduce consumers' process costs.

301. James J. White, *Contacting Under Amended 2-207*, 2004 WISC. L. REV. 723, 742 (2004).

302. *See* CFPB, ARBITRATION AGREEMENTS RULE, *supra* note 12, at 682 ("Given the extremely high volume of accounts covered under the final rule, the monetized cost of this provision is miniscule when averaged across markets. Thus, even 100 percent pass through of the monetized costs of additional Federal class settlements in every market would result in an increase in prices of under one dollar per account per year when averaged across all markets, although particular markets or providers might see larger changes.")

non-competitive markets (including even monopolists) tend to lower their prices as their costs fall.³⁰³ So progressives do not refute the argument that enforcing adhesive arbitration agreements tends to lower consumer prices if progressives show that some or all real-world markets deviate from the model of perfect competition.³⁰⁴ Instead, progressives advance the debate toward consensus when they acknowledge that legally-protecting consumers from “low-quality” adhesive contract terms—like legally-protecting consumers from “low-quality” cars or computers—likely raises prices.

Acknowledging that tradeoff emphasizes that the tradeoffs lawmakers face in deciding whether to prohibit all adhesive arbitration clauses are not just tradeoffs about balancing consumer interests against business interests. They are also tradeoffs about balancing the interests of consumers who benefit from enforceable arbitration clauses against the interests of consumers who do not.³⁰⁵ This article has argued for the balance struck by the Centrist Position’s reforms. These reforms—of class waivers, the separability doctrine, and legally-erroneous decisions on mandatory-law claims—would prohibit the categories of adhesion contracts that non-arbitration law has already determined pose a significant risk of harming consumers, while enforcing adhesive arbitration agreements that do not fall into these categories, but leaving these remaining adhesive arbitration agreements (like other adhesive terms) subject to courts’ policing under the unconscionability and related contract doctrines. This policing should meet the concerns of progressives and plaintiffs’ lawyers that claimants in complex cases need the procedures more prevalent in litigation than arbitration.

In sum, contractual freedom tempered by unconscionability-policing is centrist moderation that allows arbitration to differ from litigation on discovery, evidence, and identity of the adjudicator, but not differ in such a harsh way as to be unconscionable. By continuing to

303. See *supra* Section IV.A–D.

304. Jean R. Sternlight, *Hurrah*, *supra* note 216, at 361–63 (asserting “apparent absence of perfect competition” in the consumer financial sector).

305. As Omri Ben-Shahar writes, better products

[C]ost more in competitive and noncompetitive markets alike. People make different price-quality tradeoffs, and some consumers would prefer the higher quality even at a higher price. But not all consumers would benefit. Other consumers, particularly those with more constrained budgets, prefer low prices over high quality. They shop at bargain basements and search for marked-down products even if they have some defects. If class actions increase the price of products, it is quite possible that the poor may come out as net losers.

Ben-Shahar, *supra* note 281, at 1814.

enforce high-quality or “safe” arbitration clauses, the Centrist Position would enable arbitration, should it have lower process costs than litigation, to reduce costs and prices, while speeding adjudication. In contrast, the Progressive Positions’ overbroad prohibitions of all adhesive arbitration would likely fail to realize these benefits.

