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GUSTAVO BERRIZBEITIA

The Political Economy of Arbitration Law

ABSTRACT. This Note responds to the dominant critique of today's arbitration doctrine—the access-to-justice critique—and articulates a novel intervention from the perspective of political economy. By developing a new periodization of the Supreme Court's arbitration jurisprudence, the Note categorizes and recounts the normative positions on arbitration law that predominate in the literature. This Note identifies a gap in existing critiques and borrows from critical analyses of antitrust to contend that arbitration law suppresses the coordination rights of the market's small players—workers, consumers, contractors, and small merchants—to the benefit of large players like corporations. This suppression facilitates the kinds of economic production and corporate organization that characterize gig-economy firms. Evaluating arbitration law through this lens provides a novel application of, and further develops, the insights of law and political economy, ultimately suggesting reform pathways that might retrench mandatory arbitration.

AUTHOR. J.D. 2024, Yale Law School; B.A. 2017, Northwestern University. I thank Professor Amy Kapczynski, who oversaw several early drafts of this project and shaped its overall direction. I also thank Professor Sanjukta Paul, Professor Alvin K. Klevorick, Professor Zephyr Teachout, Eamon Coburn, Sachin Holdheim, Zac Krislov, and my colleagues in the 2022 Law and Political Economy Directed Research seminar for their insightful comments across various drafts. I also thank Christine Webber and Stacy Cammarano, attorneys under whose supervision I was first exposed to arbitration and its legal regime in action. Lastly, I especially thank Ami Ishikawa, Lily Moore-Eissenberg, Shreya Minama Reddy, Beatrice L. Brown, Deja R. Morehead, and the staff of the *Yale Law Journal*, whose efforts immensely improved this Note. Without their thorough commentary and editorial assistance, this Note would not have accomplished its aims. All errors are my own.

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INTRODUCTION

Workers and consumers are often subject to contract provisions mandating that they bring any dispute to arbitration and renounce the use of any class or collective procedures in that arbitration. These provisions are typically nonnegotiable, part of adhesive contracts between one party with immense market and bargaining power (such as a large firm) and an individual (often a worker, consumer, or contractor working for that firm). Yet this restrictive regime is not yet a half-century old: the underlying legal framework allowing arbitration's proliferation arose from the Supreme Court's zealous expansion of the Federal Arbitration Act (FAA)[1] since the 1980s. The Court has distorted the FAA's original scope to include transactions between parties of vastly unequal bargaining power, prompting justifications and vociferous criticism alike from scholars and policymakers.

This Note builds on the dominant normative critique of arbitration—what might be termed the access-to-justice critique—from a political-economy perspective. The access-to-justice view holds that arbitration, widely imposed as part of adhesive employment and consumer contracts, erodes or even forecloses workers' and consumers' ability to bring meritorious claims against firms that harm them. This harm can look like stolen tips or wages, or hidden fees to which a consumer did not agree. The critique argues that when workers and consumers do bring these claims, they are less likely to prevail and more likely to recover smaller sums than might be available in the traditional civil-litigation system.[2]

But the access-to-justice view, while certainly useful, insufficiently addresses a key aspect of arbitration's effects, which this Note seeks to chart: arbitration influences how firms organize themselves, and, in turn, what kind of economic production they undertake. Investigating arbitration through a political-economy lens reveals these effects and further counsels that arbitration law must be understood as a field of law that *allocates coordination rights*. Borrowing a concept from contemporary critiques of antitrust law, my political-economy critique of arbitration holds that the current doctrine allocates coordination rights away from small players by disallowing horizontal coordination among workers, consumers, contractors, and small merchants. This political-economy critique, in turn, provides a theoretical framework for conceptualizing the flaws of our arbitration regime and the ways in which it might be reformed.

1. 9 U.S.C. §§ 1-16 (2018).

2. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 124 (2015); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 52-61 (2019); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5-7 (2011).

This Note proceeds as follows. Part I begins with a description of how arbitration mandates work, followed by a new categorization of FAA jurisprudence that demarcates and explains three jurisprudential phases. While most scholars pay attention solely to the so-called "national policy" favoring arbitration, Part I characterizes the development of arbitration jurisprudence in two additional ways. First, the "national policy" interpretation was a reaction to an earlier approach that was not uniformly deferential to arbitration — what I call the contextual understanding of arbitration. Second, the national-policy era was an antecedent to our current, highly restrictive arbitration jurisprudence. Part II then summarizes the literature on arbitration, dividing it into three groups of critiques. It argues that the access-to-justice critique's primary shortfalls are its narrow focus on an arbitration mandate's preclusive effect on individual claims against a firm, as well as its inattention to arbitration's broader systemic role in influencing firm behavior and structure. Part III extends those themes and builds on the contextual understanding to introduce a political-economy account of arbitration. This framework centers arbitration's systemic effects on political economy, emphasizing the ways in which arbitration disallows certain kinds of horizontal coordination and incentivizes certain forms of economic production. Lastly, Part III takes up the development of mass-arbitration tactics and suggests that, while mass arbitration may promote access to justice, it does not address the problems identified by the political-economy critique.

The evolution of arbitration law, as this account will show, has been complex and contested. But the main point of this critique is a simple one: arbitration law prevents small players in the economy from coordinating against large firms, which allows such firms to engage in behaviors that may violate substantive laws.

I. ARBITRATION AND ITS DISCONTENTS

Mandatory single-file arbitration refers to contractual provisions, mostly found in employment and consumer contracts, between a natural person and a firm acting as employer or service provider. Typically, such provisions require the person to:

> (1) waive their right to pursue legal claims against the firm in a government court and agree to bring legal claims only in arbitration (the *mandate*), and
>
> (2) waive their right to pursue any claims on an aggregated, class, or collective basis (*single-file*), often with an express waiver of a class action and any class, joined, nonaggregate, or bundled procedures within arbitration.

These provisions are almost always found together.[3] Today, arbitration — in the form of single-file arbitration mandates — occupies a dominant position in the economy, covering large numbers — tens, if not hundreds, of millions — of workers and consumers.[4]

To analyze such mandates, this Part proceeds as follows. After detailing the structure of the FAA and the extent of arbitration in the economy, I describe how the Supreme Court's arbitration doctrine shifted from a contextual understanding of arbitration's role to a very expansive view of it. This expansive view undergirds holdings that have incentivized firms to impose single-file arbitration mandates onto workers, consumers, and contractors, greatly expanding arbitration's scope throughout national economic life. This shift occurred via the jurisprudential innovation of the so-called "national policy" favoring arbitration — the feature of the Court's arbitration jurisprudence that has received the most commentary.[5]

This Note offers an additional perspective, characterizing the national-policy language as a transition between the contextual understanding of arbitration and its current restrictive character. Tracing this jurisprudential movement across these themes has three advantages. First, it reveals how the Court began to turn a blind eye to previously recognized conflicts between arbitration and the accomplishment of federal regulatory aims in fields like antitrust and employment law. Second, it shows how the Court was once aware that arbitration could exacerbate differences in bargaining power between small and large players in the economy, a feature prevalent in today's arbitration dynamic. The disappearance of these concerns from the Court's arbitration jurisprudence initiated an unannounced shift that the Court used to authorize arbitration's expansion. Third, uncovering the contextual understanding of arbitration provides a reference point from which to develop a critique of arbitration from the perspective of political economy, as will be discussed in Part III.

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3. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884 (2008) (reporting data that every consumer contract with an arbitration clause in a study sample also included a class-arbitration waiver).

4. *See infra* Section I.A.2.

5. *See* Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1128-49 (2019); 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, 112-13 (2006); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 269-319 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3061-64 (2015).

A. The FAA and Its Dominant Position

1. The Structure and Effect of the FAA

Contemporary arbitration is generally—but not exclusively[6]—regulated by the FAA,[7] which was passed in 1925. The statute's operative function is presented in Section 2, which states that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."[8] When parties move to compel arbitration, they do so with reference to this provision of the FAA. Those motions to compel arise from Section 4, which provides that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[9] In the meantime, suits that have been filed are stayed.[10]

2. The Extent of Arbitration

Arbitration covers large numbers of workers and consumers. Using data gathered from a national survey of private-sector employers, a study from the Economic Policy Institute found that 50% of respondents, representing employers covering about 60 million U.S. workers, impose mandatory arbitration in their employment contracts.[11] Mandatory arbitration provisions are common at employers of any size but are more common among larger employers. About 50% of firms with up to 499 employees, roughly 60% of firms with between 500 and 5,000 employees, and 67% of firms with 5,000 or more employees had such provisions.[12]

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6. Arbitration outside of the scope of the Federal Arbitration Act (FAA) is uncommon but does occur, such as in grievance processes in the labor context. This Note considers some Supreme Court decisions on non-FAA arbitration because they help shed light on the Court's jurisprudence.

7. 9 U.S.C. §§ 1-16 (2018).

8. *Id.* § 2.

9. *Id.* § 4.

10. *Id.* § 3.

11. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 5 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/6PFC-C6DT]. For information on how the survey was conducted, see *id.* at 13-14.

12. *Id.* at 6.

On the consumer side, a landmark study of arbitration in consumer finance discovered that arbitration clauses in credit cards make up 53% of the market and in checking accounts make up 44% of the market.[13] In telecommunications, Verizon requires all consumers — totaling 114.2 million retail connections[14] — to agree to have disputes handled via single-file arbitration or small-claims court.[15] Similarly, AT&T, which claims more than 100 million consumers,[16] requires all its customers to agree to an arbitration mandate.[17]

In short, arbitration occupies a dominant position in the U.S. economy. But this was not always the case. The FAA itself was passed nearly a hundred years ago, but it took a century for arbitration provisions to find their way into almost every consumer and worker contract in the United States.

B. The Evolution of Supreme Court Arbitration Doctrine: From the Contextual Interpretation to a Policy of Restriction

While much of the scholarship on arbitration focuses on the so-called "national policy" favoring arbitration,[18] I seek to supplement that account by looking more closely at the postwar arbitration doctrine. These decisions reveal an arbitration jurisprudence far different from today's. Based on this close reading, I offer a novel periodization of arbitration jurisprudence, contending that this earlier group of decisions made up a quasi-doctrine or jurisprudential trend that I call the *contextual understanding* of arbitration. Uncovering the contextual understanding of arbitration is critical to the political-economy critique of arbitration because it demonstrates how the Supreme Court was once aware of

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13. *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROT. BUREAU § 2.3, at 8 tbl.1 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/XW3D-6HUF].

14. *Fact Sheet*, VERIZON 2 (June 30, 2024), https://www.verizon.com/about/sites/default/files/Verizon_Fact_Sheet.pdf [https://perma.cc/U3HE-WB4W].

15. *Verizon Customer Agreement*, VERIZON § 16 (Sept. 1, 2023), https://www.verizon.com/about/terms-conditions/verizon-customer-agreement [https://perma.cc/DGH3-9MTQ] ("YOU AND VERIZON BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION . . . . THIS AGREEMENT DOESN'T ALLOW CLASS OR COLLECTIVE ARBITRATIONS EVEN IF THE AAA PROCEDURES OR RULES WOULD.").

16. *Investor Profile*, AT&T, https://investors.att.com/investor-profile [https://perma.cc/88JU-NVJG].

17. *AT&T Consumer Service Agreement*, AT&T § 1.2-.3, https://www.att.com/legal/terms.consumerServiceAgreement.html [https://perma.cc/TDR2-SKDT] ("You agree that all users of your AT&T services (including minors), are subject to . . . [this Agreement's] arbitration provision . . . . You and AT&T agree that arbitration will take place on an individual basis.").

18. *See supra* note 5 and accompanying text.

arbitration's market-wide effects but subsequently suppressed this understanding in its decisions.

I do not challenge the more-or-less settled conclusion that arbitration's contemporary dominance comes from the "national policy" favoring arbitration.[19] Rather, I argue that the decisions introducing the "national policy" idea represent a transitional phase away from the contextual understanding to today's highly restrictive, very broad arbitration doctrine. In other words, the national policy is a bridge by which the Supreme Court, beginning in the 1990s, was able to transform arbitration into a tool that firms could use to significantly restrict workers' and consumers' access to courts. In summary, I propose three main jurisprudential eras: (1) the early contextual interpretation, (2) the transitional national-policy era, and (3) the contemporary restrictive paradigm.

1. The Contextual Era: Arbitration in the Broader Statutory Context

For nearly half a century, between the 1930s and 1970s, the Supreme Court understood arbitration as existing in context with Congress's various regulatory aims expressed in the existing statutory landscape. The contextual understanding of arbitration manifests itself in a body of decisions in which the Court commonly declined to enforce arbitration agreements where arbitration might have posed an obstacle to a federal or state statutory scheme. Conversely, the Court often enforced arbitration agreements where there was no such conflict. Thus, the Court saw arbitration not as displacing a right of action given by federal or state law, but as existing alongside it. Writ large, conflicts between arbitration and a federal policy goal were resolved against arbitration. In what follows, I discuss opinions where the Court evaluated arbitration in the context of other federal laws. Then, I recapitulate the contextual understanding's most notable effect: this jurisprudence generated a pattern where the Court typically enforced arbitration agreements between two merchants or in disputes that might be thought of as mercantile in nature, while declining to enforce arbitration agreements where one party was *not* a merchant. In some decisions, the Court directly commented on the difference in bargaining power between the parties. This pattern is strikingly different from today, where the Court enforces virtually any arbitration agreement that comes before it, regardless of the bargaining power of the parties.

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19. *See supra* note 5 and accompanying text.

a. Conflicts Between Arbitration and Federal or State Law

In early arbitration cases, the Court enforced arbitration agreements if arbitration did not conflict, in their analysis, with a federal or state[20] regulatory regime applicable to the dispute. Cases that did not feature such conflicts, and were thus appropriate for arbitration, included disputes arising from any transaction falling under the ambit of Congress's control over interstate commerce, like admiralty disputes. By contrast, the Court declined to enforce arbitration agreements where it saw a conflict between arbitration and a federal policy expressed in a statute.

For example, consider admiralty disputes. Such disputes are within the scope of Congress's power to regulate interstate commerce, and since the Judiciary Act of 1789, the federal regulatory regime covering admiralty cases has been to vest their resolution in the federal judiciary.[21] The Court typically enforced arbitration agreements in admiralty cases because the Court found no conflict between arbitration and the district-court-based regulatory regime, as in *Marine Transit Corp. v. Dreyfus*[22] and *Anaconda v. American Sugar Refining Co*.[23] In these cases, the Court noted that the FAA provides for the "enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed" in a federal district court in admiralty against the other party.[24] In other words, the Court did not conceive of arbitration as conflicting with the federal district courts' purview over admiralty disputes. Outside of admiralty, the Court enforced arbitration agreements between merchants of diverse

20. Most of the cases discussed below involve federal statutes, but two, discussed *infra*, involve state statutes. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 199-200 (1956); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 119 (1973).

21. 28 U.S.C. § 1333 (2018).

22. 284 U.S. 263, 279 (1932) (rejecting the argument that arbitration interferes with judicial power under the Constitution and noting that admiralty cases have long been settled by arbitration).

23. 322 U.S. 42, 44 (1944) (enforcing an arbitration agreement between merchants in an admiralty dispute because the FAA makes arbitration agreements in such disputes "specifically enforceable"); *see also* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 122 (1924) (enforcing an arbitration agreement and noting that in admiralty, "agreements to submit controversies to arbitration are valid" and "ha[ve] long been common practice").

24. *See, e.g.*, *Marine Transit Corp.*, 284 U.S. at 275; *Anaconda*, 322 U.S. at 45 ("Here again the Act plainly contemplates that one who has agreed to arbitrate may, nevertheless, prosecute his cause of action in admiralty, and protects his opponent's right to arbitration by court order. Far from ousting or permitting the parties to the agreement to oust the court of jurisdiction of the cause of action the statute recognizes the jurisdiction and saves the right of an aggrieved party to invoke it.").

citizenship who disputed a purchasing order[25] and between merchants transacting internationally,[26] since arbitration in these cases covered a dispute arising from transactions within the Commerce Clause (and thus within federal regulatory power), and because arbitration did not conflict with the application of any other substantive law.[27]

Conversely, the Court declined to enforce arbitration agreements when arbitration could frustrate the aims of other federal statutes. In three cases from the 1930s and 1940s involving the then-nascent technology of films, the Court issued opinions invalidating arbitration agreements embedded in film-distribution contracts because they conflicted with the Sherman Act.[28] In *Paramount Famous Lasky Corp. v. United States*, the Court held that while arbitration could be "well adapted to the needs of the motion picture industry," agreements that "unreasonably suppress normal competition," including those that make use of arbitration toward an anticompetitive end, are illegal.[29] In *United States v. Paramount Pictures, Inc.*, the Court noted that arbitration would be "an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations . . . of the Sherman Act," expressly stating that "[w]hether such a system of arbitration should be inaugurated is for the discretion of the District Court."[30] It should be noted that these decisions did not cite the FAA when discussing the underlying arbitration agreements, though they did squarely consider arbitration as provided for by the parties' contracts.[31]

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25. Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 452-53 (1935) (enforcing an arbitration agreement between corporations disputing a purchasing contract by affirming the federal courts' power to stay litigation pending an arbitration).

26. Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-17, 519-20 (1974) (enforcing an arbitration agreement between two merchants because it was a "truly international agreement," where an arbitration agreement would provide certainty in which law to apply).

27. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States").

28. *See* Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930) (invalidating an arbitration agreement because it "suppress[ed] normal competition"); United States v. Paramount Pictures, Inc., 334 U.S. 131, 176 (1948) ("[T]he District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the anti-trust laws."); Fox Film Corp. v. Muller, 296 U.S. 207, 208-10 (1935) (sustaining the Supreme Court of Minnesota's invalidation of a film-distribution contract with an arbitration agreement by dismissing for lack of jurisdiction).

29. 282 U.S. at 42, 43.

30. 334 U.S. at 176.

31. None of the Supreme Court or underlying district-court opinions in *Paramount Famous Lasky Corp.* or *Paramount Pictures* mentions the FAA, though conceivably the aggrieved party could have cited to the FAA to enforce the arbitration agreement challenged in each case. The original district-court opinion in *Paramount Famous Lasky Corp.* notes that the rules for the

In fact, the Court's contextual understanding was most distinctive in how it analyzed the validity of arbitration agreements that, in its view, potentially posed a conflict with the policy aims of other federal statutes. In *Wilko v. Swan*, a dispute between a merchant (a securities-brokerage firm) and nonmerchants (securities buyers), the Court considered arbitration in context and in conflict with Section 14 of the Securities Act of 1933.[32] The Court ultimately concluded that the statute disallowed arbitration because its purpose of protecting investors overrode the contractual freedom underlying an agreement to arbitrate.[33] Although "Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment," the Court explained that "it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights."[34] The Court weighed these competing concerns and held that "[r]ecognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."[35] This passage contains the hallmarks of the contextual understanding—it recognizes the "not easily reconcilable" congressional policies of investor

arbitration were to come from the American Arbitration Association, *see* United States v. Paramount Famous Lasky Corp., 34 F.2d 984, 986 (S.D.N.Y. 1929), while the district-court opinion in *Paramount Pictures* mentions that the parties envisioned a sort of national "Arbitration Board" for the industry, *see* United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 342 (S.D.N.Y. 1946).

32. *See* 15 U.S.C. § 77n (2018) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void.").

33. Wilko v. Swan, 346 U.S. 427, 438 (1953).

34. *Id.*

35. *Id.*

protection and availability of arbitration,[36] and it acknowledges that arbitration may interfere with other congressional aims despite its advantages.[37]

Where arbitration did not conflict with the Securities Act's policy of investor protection, enforcing such agreements was appropriate. In *Coenen v. R.W. Pressprich & Co.*, the Supreme Court denied certiorari[38] of a Second Circuit determination that a claim by one securities broker against another was proper for arbitration.[39] Here, the Second Circuit distinguished the case from *Wilko* because *Wilko* "involved a dispute between an investor and a member of a national securities exchange, not a dispute 'between members,'" and thus the policy aim of investor protection in the Securities Act was not at risk.[40] While plaintiff-appellant Dale Coenen was an individual, he sued in his capacity as a director of his brokerage firm Coenen & Co.,[41] perhaps satisfying the Court's concern from *Wilko* that arbitrating the dispute would pose a risk to the federal goal of protecting investors.

Wilko would be influential in cases involving the vindication of statutory rights. In *Alexander v. Gardner-Denver Co.*, the Court ruled that a claimant's prior submission of Title VII claims to a formal labor-grievance arbitration, established pursuant to a collective bargaining agreement between his union and employer, could not preclude him from suing in court because arbitration does not displace "a statutory right against discrimination" enforceable by courts.[42] While

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36. *Id.* Earlier, the Court rejected a challenge that arbitration was unconstitutional, rooting arbitration's availability as a method of dispute resolution in Congress's general power to modify regulatory and judicial processes (in accordance with the Constitution). *See* Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278-79 (1932) (citing Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 460 (1852)). For a more recent argument about the unconstitutionality of arbitration, see Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 4-14 (1997).

37. *Wilko*, 346 U.S. at 438. Importantly, to arrive at this conclusion, the Court employs purposive readings of the statute, instead of deferring exclusively to plain-language readings of the text. *Id.* (commenting on the "intention of Congress").

38. 406 U.S. 949, 949 (1972).

39. 453 F.2d 1209, 1213-14 (2d. Cir. 1972), *cert. denied*, 406 U.S. 949 (1972).

40. *Id.* at 1213. The panel cited Article VIII, Section 1 of the New York Stock Exchange Constitution in force at the time. *Id.* at 1211.

41. *Id.* at 1210.

42. 415 U.S. 36, 51-54 (1974). Note that labor-grievance arbitrations are typically enforceable under the terms of a collective bargaining agreement, not the FAA, and historically, such labor-grievance arbitrations arose from a separate statutory and legal framework. *See* Michael Hayes, *Hey, We Were Here First!: Union Arbitration and the Federal Arbitration Act*, 70 SYRACUSE L. REV. 991, 992-94 (2020). Since 1987, the Supreme Court has instructed lower courts to use FAA precedent in analyzing labor-grievance arbitration cases, *see* United Paperworkers

the arbitration agreement at issue did not arise from the FAA, the Court nevertheless approvingly cited *Wilko* for the proposition that an employee may not prospectively waive their Title VII claims by submitting them to arbitration.[43] *Wilko* would also be used by the Second Circuit to declare affirmatively that antitrust claims were not appropriate for arbitration, since a "claim under the antitrust laws is not merely a private matter," but rather one of public concern requiring access to courts.[44] And a Pennsylvania district court would use *Wilko* to declare that predispute agreements to arbitrate Employee Retirement Income Security Act claims were unenforceable because they risked sacrificing the full vindication of statutory rights.[45] While not explicitly evaluating a conflict between a statutory right and arbitration, the Supreme Court would favorably cite *Wilko* when invalidating an arbitration agreement between a Vermont employee and his New York employer because the application of Vermont state law would have allowed the employee to withdraw from the arbitration agreement,[46] thereby contradicting the FAA.

b. Disputes Between Merchants

One of the most remarkable features of the contextual interpretation is that it generated a pattern of results where the Court commonly enforced arbitration agreements between two merchants or firms in a commercial dispute, in line with the view that it was a specialized "tool for resolving commercial disputes between businesspeople,"[47] while refraining from enforcing arbitration agreements where one party was not a merchant or a firm. In cases ranging from

Int'l Union v. Misco, Inc., 484 U.S. 29, 35 (1987), though the precise relationship between the FAA and labor arbitration under the terms of a collective bargaining agreement remain unclear.

43. *Alexander*, 415 U.S. at 51-52 (citing Wilko v. Swan, 346 U.S., 427, 434-38 (1953)).

44. Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-28 (2d Cir. 1968) (stating that "[w]e conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear" that arbitration is not appropriate for the dispute at issue). No appeal was taken of the case, so the Supreme Court did not have a chance to rule on the Second Circuit's determination.

45. Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 274-76 (E.D. Pa. 1977). No appeal was taken of this case either.

46. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200-01, 203, 205 (1956) (declining to enforce an arbitration agreement in an employer-employee dispute because the plaintiff's remedy was based on state law and arbitration would "substantially affect the enforcement right as given by the State" (quoting Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945))).

47. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1428-29 (2008).

admiralty[48] to simple breaches of contract involving citizenship diversity,[49] the Court enforced arbitration when the dispute was essentially mercantile in nature. Conversely, the Court exhibited more hesitancy to enforce arbitration agreements outside of the two-merchant relationship, as in *Wilko*,[50] which involved a buyer alleging misrepresentation in the sale of securities against a securities brokerage firm, and *Bernhardt*, which involved a former Vermont employee's suit for breach of employment contract against a New York corporation.[51] Similarly, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, the Supreme Court declined to enforce an arbitration agreement between an employee and an employer under the California Arbitration Act,[52] whose provisions are nearly identical to the FAA.[53]

In short, the contextual analysis employed by the Court involved a sensitivity to the relative positions of the market actors involved in the arbitration. The Court often employed narrow constructions of the FAA to vitiate an existing arbitration agreement. This realist view is clearly articulated in *Wilko*: "While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor" since "[i]ssuers of and dealers in securities have better opportunities to investigate and appraise the prospective

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48. Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278-79 (1932); Anaconda v. Am. Sugar Refin. Co., 322 U.S. 42, 44 (1944). To be clear, at least once, the Court let stand a lower-court decision enforcing an arbitration agreement in an admiralty dispute between a merchant and a nonmerchant on procedural grounds. *See* Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454, 456-58 (1935) (effectively enforcing an arbitration agreement by treating a lower-court order enforcing an arbitration as unappealable).

49. Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 450-54 (1935); Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-17, 519-20 (1974).

50. Wilko v. Swan, 346 U.S. 427, 434-35 (1953) (declining to enforce an arbitration agreement between a securities buyer and a brokerage firm because the arbitration provision waives the "right to select [a] judicial forum . . . that cannot be waived under § 14 of the Securities Act"). Compare the result with *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1213 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972), where the Court denied certiorari over a Second Circuit decision enforcing an arbitration agreement between two securities-dealing firms.

51. *Bernhardt*, 350 U.S. at 199, 202-03.

52. 414 U.S. 117, 139-40 (1973) (declining to enforce an arbitration agreement in an employer-employee dispute).

53. *Compare* CAL. CIV. PROC. CODE § 1281 (West 2024) ("A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."), *with* 9 U.S.C. § 2 (2018) (stipulating that a written provision to settle by arbitration a controversy "thereafter arising out of . . . an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

earnings and business plans affecting securities than buyers."[54] Despite the "commercial" nature of the case, the differences in bargaining power—the "disadvantages under which buyers labor"—justified a construction of the Exchange Act holding that arbitration would not preserve Congress's intent to build a regulatory scheme that protects investors.[55]

Similarly, in *Ware*, the Court suggested that arbitration could hurt workers by exacerbating differences in bargaining power between workers and their employers: "California has manifested a strong policy of *protecting its wage earners* from what it regards as *undesirable economic pressures affecting the employment relationship*."[56] While the *Bernhardt* Court did not comment on arbitration's effects on the bargaining power of contracting parties, it flatly rejected the view that arbitration could apply to employment cases, since employment disputes are neither maritime transactions nor do they involve commerce.[57] In general, the FAA's original drafters and backers did not think that it would apply to employment contracts.[58] Further, in both *Ware* and *Bernhardt*, the Court frankly commented on arbitration's potential drawbacks.[59] By contrast, as will be discussed in Section I.B.3, the Court more often pronounces policy justifications in favor of arbitration in contemporary cases.

In summary, these cases, which range from early admiralty cases to those involving securities and employment disputes across forty years, form a body of law that saw arbitration in context and in conflict with the broader regulatory framework enacted by "separate, yet coordinate, federal and state

54. *Wilko*, 346 U.S. at 435.

55. *Id.*

56. 414 U.S. at 139-40 (emphasis added).

57. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200-02 (1956) (analyzing portions of 9 U.S.C. §§ 1, 2 (2018)); *see also id.* at 201 ("The Court of Appeals . . . concluded that . . . § 3 covers all arbitration agreements even though they do not involve maritime transactions or transactions in commerce. We disagree with that reading of the [FAA].").

58. Imre Szalai, An Annotated Legislative Record of the Federal Arbitration Act 9-12 (2021); *see* Glover, *supra* note 5, at 3060 n.30; *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4123 and S. 4124 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of Mr. W.H.H. Piatt) (noting that "it was not the intention of the bill to have any such effect" on employment disputes); David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 Yale L.J.F. 1, 5 n.17 (2022).

59. *Compare Bernhardt*, 350 U.S. at 203 ("Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . ." (citing *Wilko*, 346 U.S. at 435-38)), *with Ware*, 414 U.S. at 136 ("It is difficult to understand why muffling a grievance in the cloakroom of arbitration would prevent lessening of confidence in the market. To the contrary, . . . market confidence may tend to be restored in the light of impartial public court adjudication.").

sovereignties."[60] In this contextual understanding, the Court had few qualms about enforcing arbitration agreements between merchants who had willingly agreed to arbitrate. But departures from this paradigm created more hesitancy for the Court for two reasons. First, arbitration was not to displace other regulatory regimes. Second, the "disadvantages" of certain market actors relative to others[61] or the "undesirable economic pressures" one might exert on another[62] may mean that arbitration could frustrate state and federal regulatory goals. In some cases, arbitration agreements might come perilously close to a prospective waiver of federal statutory rights,[63] making it appropriate for courts to void them.

2. *The National-Policy Era: An Ever-Growing Preference for Arbitration*

In subsequent years, the Court came to reject any further elaboration of the contextual interpretation in favor of the position that any limitations on arbitration's reach could only be found within the text of the FAA itself. In the 1980s, the Court announced a new doctrine holding that the FAA was evidence of a congressionally intended "national policy favoring arbitration."[64] The strength of this language, its unclear origins, and its central place in contemporary FAA doctrine[65]—practically every Supreme Court case since then begins with it—has prompted vociferous and sustained criticism from commentators.[66] The phrase's first Supreme Court appearance is a remark in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, a dispute between a building contractor and hospital operator only tangentially involving the FAA. There, the Court said that "Section 2 is a congressional declaration of a *liberal federal policy* favoring arbitration agreements, notwithstanding any state substantive or procedural policies to

60. *Ware*, 414 U.S. at 128.

61. *Wilko*, 346 U.S. at 435.

62. *Ware*, 414 U.S. at 139.

63. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1973); *Wilko*, 346 U.S. at 427.

64. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration . . . .").

65. In 2022, the Court anemically suggested a course correction, remarking that "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration." Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022). Nevertheless, the damage had been done, as the rest of this Section lays out.

66. *See, e.g.*, Sanga, *supra* note 5, at 1125 (noting that modern Court jurisprudence on arbitration is "primarily based not on the federal statute that governs arbitration (the FAA), but on a 'national policy favoring arbitration'" (quoting *Southland Corp.*, 465 U.S. at 10)); Moses, *supra* note 5, at 99-100; Leslie, *supra* note 5, at 266 (noting that courts "regularly" overstate the strength of that national policy).

the contrary. The effect of the section is to create a body of federal substantive law of arbitrability."[67]

This is the first appearance of the "liberal federal policy" or "national policy" language in a majority opinion of the Court. The Court appears to cite an earlier case from the contextual era, *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*,[68] but its pincite to that case does not contain the language of "liberal federal policy."[69] *Prima Paint* nowhere mentions either "liberal federal policy" nor "federal substantive law" in the majority opinion, and it is the dissent that offers the phrase "federal substantive law" as a criticism. [70] Given this opacity, theories advanced as to the phrase's roots include that the Court may have intended to import a standard from the industrial labor-mediation setting,[71] endorsed an underlying Second Circuit decision from which the phrase ultimately originates,[72] or even erroneously cited the dissent of an earlier case instead of its

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67. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (emphasis added).

68. 388 U.S. 395 (1967).

69. *Id.* at 402-04. The pincite instead refers to the idea that there exists a federal substantive law of arbitration applicable only once a federal court is satisfied it is evaluating a contract "evidencing transactions in [interstate] 'commerce.'" *Id.* at 403. For what it is worth, the *Prima Paint* opinion was comparatively more divided (6-3) than the others from the contextual era. *Wilko v. Swan*, 346 U.S. 427 (1953), was 7-2; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), was 8-1; and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), was 8-0. The *Prima Paint* dissent was incredulous, writing that the majority's result was "fantastic," because it allowed arbitrators—who "in all probability will be nonlawyers, wholly unqualified to decide legal issues"—to determine whether the contract with the arbitration provision was induced by fraud; in other words, that their own authority to adjudicate a dispute arose illegitimately by fraud. *Prima Paint Corp.*, 388 U.S. at 407 (Black, J., dissenting).

70. *See Prima Paint Corp.*, 338 U.S. at 407 (Black, J., dissenting). *Ware* does refer to "national policy objectives" connected to the Exchange Act. 414 U.S. at 136-37. But see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974), which mentions a "congressional policy" in favor of arbitrating *international* commercial disputes derived from its ratification of a U.N. convention on the issue. The case states, "[W]e think that this country's adoption and ratification of the Convention and the passage of [the FAA] provide strongly persuasive evidence of congressional policy consistent with the decision we reach today." *Scherk*, 417 U.S. at 520 n.15.

71. Moses, *supra* note 5, at 123-24 ("The so-called policy favoring arbitration appears to be one created by the judiciary out of whole cloth. A possible explanation for its creation, however, is that the Court may have indiscriminately superimposed on the FAA the national labor policy favoring collective bargaining agreements. . . . In [labor law], there are strong national policy justifications for favoring arbitration of collective bargaining agreements . . . .").

72. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959) ("Finally, any doubts as to the construction of the [FAA] ought to be resolved in line with its *liberal policy* of promoting arbitration . . . ." (emphasis added)). But *Moses H. Cone* only mentions the FAA as a fourth factor counseling against a district court's premature effort to dissolve a stay while the same issue was litigated in a state court. 460 U.S. at 24-27. However, at least

majority opinion.[73] I do not aim to challenge these accounts, but rather to situate the development of the national-policy language as a doctrinal transition away from the contextual interpretation and toward today's restrictive regime. This sweeping reinterpretation of the FAA would privilege it over all other laws, federal and state alike. It rejected purposive interpretations[74] in favor of a literalist textualism, a trend well understood as part of the Court's steady rightward drift since the middle of the twentieth century.[75] Archival evidence sheds light on the national-policy language's origins.

At least one Justice was aware of the national-policy theory during the deliberations over *Ware*, a contextual case involving arbitration but not the FAA, but chose not to push it. Justice Powell,[76] confirmed in the year *Ware* was decided, voted to grant certiorari against the recommendation of President Nixon's Solicitor General.[77] He joined the 8-0 majority affirming the California court's opinion preventing the arbitration. Justice Powell may have been swayed by his clerk, who argued in a bench memorandum that

> Petitioner contends that the [FAA] creates federal substantive law equally applicable in federal and state courts. Despite the explicit dictum to that

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one Justice—Justice Powell—was aware that the *Robert Lawrence* holding was not, at the time, the majority view of the Court. *See infra* pp. 283-84.

73. Sanga, *supra* note 5, at 1121-34, 1133 n.76 (citing *Prima Paint Corp.*, 388 U.S. at 399-400).

74. Curiously, the Court's current arbitration jurisprudence cannot be said to be "textualist" either, since the national-policy language is distinctly not a part of the FAA.

75. *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 Cornell L. Rev. 591, 634-40 (2021).

76. Justice Powell, of course, is considered a key figure in the history of the Court's increasingly probusiness drift. Powell wrote the infamous "Powell Memo" in 1971, just prior to accepting President Nixon's nomination to the Court. *See* Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class 117, 119 (2010). The Powell Memo called on businesses to organize themselves to exert greater political power, in promoting the political force now called neoliberalism. *Id.* at 117. For further details of Powell's arguments, see generally Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo [https://perma.cc/6GCJ-FUXJ].

77. Conference Votes, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, No. 72-312 (Mar. 19, 1973) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 13), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1186&context=casefiles [https://perma.cc/J2KU-GQDV] (showing the votes by the Justices in favor of and against granting certiorari); Supplemental Memo re Memo from SG, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, No. 72-312 (Jan. 18, 1973) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 13), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1186&context=casefiles [https://perma.cc/J2KU-GQDV] ("The Conference asked for the views of the SG. The SG recommends that cert be denied . . . .").

> effect in *Robert Lawrence*, it is not entirely clear that this is the law . . . . [T]he federal substantive policy favoring arbitration is dependent on the legality of the agreement under state law.[78]

In any event, since the statute at issue in *Ware* was the California Arbitration Act instead of the FAA, Justice Powell's clerk was likely trying to make the point that the defendant in that case (Merrill Lynch) was wrong to argue that there existed a national policy generally promoting arbitration, as represented by the FAA.

Perhaps because of his status as the Court's rookie, Justice Powell seems to have forgone the chance to push the national-policy language, according to which the FAA supersedes state law. But as his tenure continued, Justice Powell reliably voted to expand arbitration's power incrementally, joining the majorities in several important cases that did so.[79] He took no part in the consideration of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[80] the one case that articulated a potential limit to arbitration's reach, before he retired in 1987.[81] His deliberations on *Ware* shed light on the idea that the national-policy language was known to at least one Justice before *Moses H. Cone* was decided. They suggest that Powell and his conservative colleagues could use the idea to expand arbitration's reach, especially under the FAA—a nationally applicable statute, unlike the underlying California statute providing for arbitration in *Ware*.

Why should we think of that language as doctrinally transitional? On the one hand, in some of the cases invoking the national policy favoring arbitration, the Court engaged in the kind of contextual analysis of arbitration agreements that marked its early jurisprudence. On the other hand, after the phrase's formal advent in an opinion, the Court enforced nearly every arbitration agreement that

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78. John Jeffries, Law Clerk, U.S. Sup. Ct., Memorandum 1-2, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, No. 72-312 (Oct. 3, 1973) (citation omitted) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 13), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1186&context=casefiles [https://perma.cc/J2KU-GQDV]. Jeffries would go on to write that that the case "does not implicate *Wilko v. Swan*." *Id*. at 2. Note that *Robert Lawrence* was the Second Circuit case that first used the phrase "national policy." *See supra* note 72 and accompanying text.

79. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (enforcing an arbitration agreement between franchisors and a franchisee and announcing the existence of the national policy favoring arbitration); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating that the FAA is evidence of a "liberal federal policy" favoring arbitration); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) (enforcing an arbitration agreement between investors and a firm); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987) (enforcing an arbitration agreement and holding that the parties must show congressional intent that arbitration cannot apply to the dispute at issue).

80. 473 U.S. 614, 640 (1985).

81. *Justices 1789 to Present*, Sup. Ct. U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/LZU3-ATLZ].

came before it—signaling that the contextual analysis was no longer doing much jurisprudential work. Thus, the national-policy language initially coexisted with the contextual interpretation. Before long, however, the Court would use the former to suppress the latter.

In the beginning of this phase—during the initial period of coexistence—the Court engaged in some contextual analysis while still rooting its decision in the new language of the national policy. In *Southland Corp.*, the Court enforced an arbitration agreement between a class of 7-Eleven franchisees and the corporate franchisor with a fairly straightforward affirmation that the parties fell within the paradigm of merchant-to-merchant transactions of at least putatively comparable bargaining power: "[The parties'] contracting for arbitration . . . was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."[82] But at the same time, the Court said that "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[83] Curiously, the Court characterized *Moses H. Cone* as having "reaffirmed our view that the [FAA] 'creates a body of federal substantive law,'" even though *Moses H. Cone* was the decision in which the national-policy language first appeared and so was not reaffirming anything.[84]

If *Southland Corp.* implies a rebuke of the contextual view, then *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* is its high-water mark. There, in line with the contextual view, the Court extensively considered the regulatory aims of antitrust law and the bargaining positions of the parties in enforcing an arbitration agreement between a domestic and foreign merchant.[85] In strikingly clear language, the Court came close to articulating a contextual limitation on arbitration while recognizing the national policy:

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82. *Southland Corp.*, 465 U.S. at 7 (citing Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)). The Court evidently believed that the parties had negotiated their franchising contract and did not cite any record evidence from the underlying litigation that they had done so.

83. *Id.* at 10. *Compare id.* (rejecting state-level attempts to regulate arbitration), *with* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 130 (1973) (permitting a state-level regulation of arbitration), *and* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201 (1956) (same).

84. *Southland Corp.*, 465 U.S. at 12 (citing *Moses H. Cone*, 460 U.S. at 25 n.32).

85. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634-40 (1985). Much of the Court's discussion rested on the international nature of the dispute, which it saw as practically dispositive given that arbitration was traditionally appropriate in international contexts. *See id.* at 628-31, 638-40.

> Just as it is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.[86]

The Court took care to articulate that a party "agreeing to arbitrate a statutory claim . . . does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[87] In addition, the Court recognized that the market positions of the parties and their associated capacities to exercise power could provide grounds to revoke a contract should one side become too dominant.[88] But despite *Mitsubishi*, the move away from the contextual view accelerated as the 1980s concluded. *Dean Witter Reynolds* saw the Court enforce an arbitration agreement between a firm and an investor bringing claims under the Securities Exchange Act[89] without any mention of the market positions of the parties,[90] in contrast to *Wilko*. Only a concurrence discussed Congress's regulatory aims with the statute at issue.[91] Elsewhere, in *Perry v. Thomas*, another employment dispute between a securities broker and their former employer, the Court issued one of its earliest decisions explicitly proclaiming that the FAA displaced a state labor law.[92] The case did not undertake any of the analyses—on bargaining power of the parties or any conflicts

86. *Id.* at 627 (first citing Wilko v. Swan, 346 U.S. 427, 434-35 (1953); then citing *Southland Corp.*, 465 U.S. at 16 n.11; and then citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 224-25 (1985)). Compare that language with Chief Justice Burger's admonition in *Barrentine v. Arkansas-Best Freight System, Inc.* that "[l]eaving resolution of discrimination claims to persons unfamiliar with the congressional policies . . . could have undermined enforcement of fundamental rights Congress intended to protect." 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting); *see also* 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, 2838 (2015) (citing *Barrentine*, 450 U.S. at 750 (Burger, C.J., dissenting), for the proposition that "Justices read statutes protecting consumers and employees to limit the FAA's scope").

87. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

88. *Id.* at 627 ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" (quoting 9 U.S.C. § 2 (2018))).

89. 15 U.S.C. §§ 78a-78rr (2018).

90. *Dean Witter Reynolds, Inc.*, 470 U.S. at 217.

91. *Id.* at 224-25 (White, J., concurring).

92. 482 U.S. 483, 492 (1987) (holding that Section 2 of the FAA "preempts" a California labor law).

between arbitration and some other law—that were common in the contextual era.[93]

The Court's next arbitration decisions put to rest whatever limitations the Court had almost articulated in *Mitsubishi*, confirming the expansion of the FAA. These decisions immediately precede the restrictive era, and their strident outward push of arbitration's boundaries makes them difficult to locate definitively on either side of a jurisprudential dividing line. In *Shearson/American Express, Inc. v. McMahon*, the Court saw the FAA as standing above Congress's broader regulatory scheme.[94] Now, a party challenging an arbitration agreement on a statutory basis—in that case, the Racketeer Influenced and Corrupt Organizations Act[95] and the Securities Exchange Act[96]—would have to point to a "contrary congressional command" and would bear the burden of "demonstrat[ing] that Congress intended to make an exception to the Arbitration Act" discernible from the "text, history, or purposes of the statute."[97] The case threw *Wilko* onto life support, which the Court ultimately disconnected in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, holding that "the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 [of the Securities Act] is properly construed to bar any waiver of these provisions."[98] Here, the Court turned a blind eye to the conflicts between arbitration and the Securities Act that the Court had seen in *Wilko* using the contextual interpretation. Instead, the right to select the judicial forum was not "so critical that [the right of access to courts] cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers."[99] Critical to the Court's maneuver here is its reliance on earlier cases from

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93. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 139-40 (1973). *Perry v. Thomas* did not consider whether arbitration could frustrate a state policy to protect wage earners, unlike in *Ware*, another wage dispute involving securities brokers, nor did it opine on the differences in bargaining power of the participants in the disputed arbitration. Both analyses would have been part of a contextual inquiry that the Court, by this time, was discarding.

94. *See* 482 U.S. 220, 226-27 (1987).

95. 18 U.S.C. §§ 1961-1968 (2018).

96. 15 U.S.C. §§ 78a-78rr (2018).

97. 482 U.S. at 226-27. A contemporaneous law-review article even described the Court in *McMahon* as having "completed its work on the FAA." G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 Am. Bus. L.J. 397, 398 (1988). Professor G. Richard Shell's article is also an early description of the Court's interpretation of the FAA as "expansive." *Id.* at 397.

98. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989).

99. *Id.* That statement from the Court indicates at least a superficial awareness that buyers of securities might possess less bargaining power than sellers, but the Court's analysis stops there.

the national-policy era refusing to find conflicts between arbitration and the procedural mechanisms used to vindicate federal statutory rights: the Court cites *Shearson/American Express Inc. v. McMahon* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* for the propositions that neither the Securities Exchange Act of 1934[100] nor the Clayton Antitrust Act of 1914 "prohibit enforcement of predispute agreements to arbitrate."[101] But whereas these cases made cabined holdings establishing the suitability of arbitration for disputes under those statutes, *Rodriguez de Quijas* surreptitiously authorizes arbitration across a range of federal statutory claims, at least inasmuch as it formally overrules *Wilko*.[102]

If *Wilko* understood that arbitration could pose a challenge to the accomplishment of some federal regulatory objectives, the *Rodriguez de Quijas* Court, thirty years later, refused to consider any such conflict, demonstrating the depth of change in the Court's thinking. More generally, what the Court had abandoned from *Wilko* was the understanding that the substantive remedies provided by statute were only as viable as the procedure specified to acquire those remedies. The Court would go so far as to accuse themselves, thirty years earlier, of having a "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants."[103] The stage was set for the Court's expansion of arbitration to cover any claim.

3. The Restrictive Era: Arbitration Law as a Restriction on Small Players

Since the national-policy language continues to be cited by the Court, the dividing line between the two jurisprudential eras—the transitional national-policy era and today's highly restrictive doctrine—can be difficult to locate. The year 1989 provides a useful, if imperfect, marker. In that year, the Court decided *McMahon* and *Rodriguez de Quijas*, which in their most limited reading held only that investors bringing claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 could now have them arbitrated. But the Court also decided *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, where the Court refrained from enforcing an arbitration agreement between Stanford University and a contractor that had defrauded it by finding no conflict between the state law that Stanford had cited to void the arbitration

100. 15 U.S.C. § 78aa (2018).

101. *Rodriguez de Quijas*, 490 U.S. at 481-82.

102. *Id.* at 485 ("[W]e overrule the decision in *Wilko*.").

103. *Id.* at 481; *see also id.* at 482 ("There is no sound basis for construing the prohibition in § 14 on waiving 'compliance with any provision' of the Securities Act to apply to these procedural provisions." (quoting 15 U.S.C. § 77n (2018))).

agreement and the FAA.[104] *Volt* may well have been one of the last instances in which the Court refused to resolve a conflict between enforcing an arbitration agreement and a state law in favor of the former, lowering the curtain on the transitional national-policy era and moving to today's highly restrictive arbitration jurisprudence.[105]

McMahon and *Rodriguez de Quijas* demonstrate the Court's full preparation for abandoning the contextual understanding of arbitration. The stage was set for the Court to move the FAA beyond disputes that sound in a classically mercantile register—such as securities or antitrust claims between merchants—and into other areas of the law such as employment disputes, where a robust scheme of federal statutory protections (many providing for private rights of action) already existed.

Going forward, the Court would maintain two new positions. First, arbitration no longer needed to fit within Congress's other laws, but rather stood above them. The nominative start of this period may be the Court's strident announcement in 1995 that the FAA is coextensive with Congress's Commerce Clause power.[106] Second, the market positions of the parties no longer held any relevance to an analysis of the propriety of an arbitration agreement. These positions supported a restrictive turn, which would become the dominant theme of the current jurisprudential era. That is, decisions from this time period emphatically rejected reading the FAA in context with other statutes, leading some commentators to describe it as a "super-statute."[107] This explicit rejection distinguishes the restrictive era from the transitional national-policy era, during which the Supreme Court sometimes still employed the rhetoric of contextual interpretation, even as it consistently produced pro-arbitration outcomes. As a result of this shift, profoundly neoliberal values,[108] such as a jurisprudential hostility to

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104. 489 U.S. 468, 476-79 (1989).

105. See *infra* notes 125-131 and accompanying text for cases where the Court invalidates defenses to enforcement of arbitration agreements based in state law.

106. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995) (citing 9 U.S.C. § 2 (2018)) (holding that the FAA's language of "involving commerce" is the "functional equivalent" of the phrase "affecting commerce," and thus the FAA applies to any transaction affecting commerce).

107. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1260 (2001).

108. Political theorist Wendy Brown identifies two senses of neoliberalism: juridical reasoning that "economize[s] new spheres and practices" (such as "free speech," whose meaning changes to include economic transactions) and "legal reforms that strengthen the political hand of capital and weaken associations of citizens, workers, and consumers." WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 151-52 (2015). For a general polemic on neoliberalism and law, see *id.* at 151-73. For a more exhaustive account of arbitration's neoliberal turn, see Corinne Blalock, The Privatization of Protection: The Neoliberal Fourteenth

collective litigation by workers[109] and consumers,[110] characterize today's arbitration jurisprudence.

While critiques of today's highly restrictive arbitration doctrine abound, I aim to highlight one specific mechanism by which the Court has entrenched these neoliberal values and rejected outright the contextual interpretation of the FAA: by disabling attempts by states to regulate arbitration through legislation or state high-court rulings, to the effect of binding and burdening small players with single-file arbitration mandates. While this Note is not the first to specifically consider the Supreme Court's privileging of the FAA over states' attempts to regulate arbitration,[111] I seek to specifically highlight the impact of the relevant decisions on small players, like consumers, workers, and small businesses, which will be relevant to the political-economy approach that I outline in Part III. I also seek to draw a sharp contrast with the contextual doctrine identified above in Section I.B.1. In what follows, I lay out the key tenets of today's restrictive arbitration doctrine and recount how the Court insulated it from state regulation.

The Court has repeatedly privileged the arbitration of employees' claims even when those employees can point to other statutes that provide them with specific procedural mechanisms to vindicate their rights. The best illustration of this is in the field of employment law. In *Gilmer v. Interstate/Johnson Lane Corp.*, an employment dispute brought in 1991 under the Age Discrimination in Employment Act of 1967,[112] the Court took the first step in this direction to hold that any statutory claim could be arbitrated,[113] building on its holding in

Amendment 31-95 (2019) (Ph.D. dissertation, Duke University), https://dukespace.lib.duke.edu/server/api/core/bitstreams/b81370a9-d862-4809-8600-8d3f20ef7eff/content [https://perma.cc/WC95-JEH4]. *See also* ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 98-99 (2020) (describing the Court's turn towards arbitration as reflecting neoliberalism).

109. *E.g.*, Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502 (2018) (allowing single-file arbitration of employees' claims because collective litigation does not fall within the National Labor Relations Act of 1935).

110. *E.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341-45, 348 (2011) (explaining that the FAA preempts state laws declaring class-arbitration waivers unconscionable).

111. *See* Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1185-94 (2021).

112. 29 U.S.C. §§ 621-634 (2018).

113. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (noting that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA" and collecting cases that enforced arbitration agreements in the face of statutory claims (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624-28 (1985); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225-27 (1987); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989))). *But see* Gilmer, 500

Rodriguez de Quijas, which first recognized the idea that federal statutory claims can generally be arbitrated.[114] This was one of the first instances of the Court sending an employment dispute based in federal statutory law to arbitration, a result far afield of what the FAA's backers originally intended.[115]

Ten years later, *Circuit City Stores, Inc. v. Adams* expressly adopted—in a narrow 5-4 decision that drew two dissents—the novel view[116] that the *only* employment contracts that are not arbitrable under the FAA were those of foreign or interstate transportation workers.[117] It also rejected reading the FAA in context with the Norris-LaGuardia Act of 1932 (NLGA),[118] which forbids any court in the United States from issuing any restraining order or injunction—as would occur under Section 3 of the FAA—in a case "involving or growing out of a labor dispute."[119] The implication is that a federal court would face two irreconcilable statutory commands, or at least a conflict between the policy expressed in the NLGA—which is to prevent courts from enjoining industrial action—and the FAA. It is precisely this conflict of statutory objectives and arbitration that the Court had typically sought to resolve against arbitration using the contextual jurisprudence.[120] The capstone of this line of cases authorizing the imposition of arbitration in employment disputes is *Epic Systems Corp. v. Lewis*.[121] There, the Court held that the National Labor Relations Act of 1935 (NLRA)'s guarantee

U.S. at 26 ("Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" (alteration in original) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628)).

114. *Rodriguez de Quijas*, 490 U.S. at 482.

115. See *supra* note 58 and accompanying text.

116. *See* 532 U.S. 105, 130 (2001) (Stevens, J., dissenting) (noting that courts had never limited the FAA's applicability to "only employees engaged in interstate transportation" until the Third Circuit's decision in Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Loc. 437, 207 F.2d 450, 452 (3d Cir. 1953), an approach rejected by the Fourth Circuit three years later in United Elec., Radio & Mach. Workers of Am. v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954)).

117. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001). The Court explicitly asserted textualist arguments and declined to consider references to the FAA's legislative history. *See id.* at 119-20. The dissent had argued that the legislative history of the FAA indicated that Congress had not intended for it to apply to employment contracts. *Id.* at 124-26 (Stevens, J., dissenting); *see supra* note 57. In 2024, the Supreme Court confirmed that interstate transportation workers—even those who do not work for transportation companies—fall within the FAA's exemption in Section 1. *See* Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 252-54 (2024).

118. 29 U.S.C. § 101 (2018).

119. *Id.*

120. *See supra* Section I.B.1.

121. 584 U.S. 497 (2018).

that workers may engage in "concerted activities for the purpose of . . . mutual aid or protection"[122] does not override Congress's requirement in the FAA that federal courts "enforce arbitration agreements according to their terms," even if those terms mandate single-file proceedings, and thus prevent collective litigation, that could be "concerted activities" under the NLRA.[123] *Epic Systems* explicitly rejected the contextual interpretation by expressly elevating the FAA over the NLRA and disregarding any conflict between the two.[124]

The Court has also disabled attempts by states to regulate arbitration.[125] The list of cases from the last twenty years that overturn state supreme courts[126] or void state legislation perceived by the Court as hostile to arbitration[127] is extensive. This is a clear departure from the Court's earlier position in *Ware*, where the Court credited a California state policy goal, in that case, protecting

122. 29 U.S.C. § 102 (2018).

123. *Epic Sys. Corp.*, 584 U.S. at 502, 511. The Court has also rejected the use of collective procedures within arbitration. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (holding that a party may not be compelled into class arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so"); Lamps Plus, Inc. v. Varela, 587 U.S. 176, 183-86 (2019) (holding that an arbitrator may not institute a class arbitration unless the contract explicitly permits it).

124. 584 U.S. at 497-98. The Court also ignores, on vague grounds, petitioners' argument that the Norris-LaGuardia Act of 1932 (NLGA) also poses a conflict. *See* Brief for the Respondent at 9, *Epic Sys. Corp.*, 584 U.S. 497 (No. 16-285), 2017 WL 3475520, at *9. The NLGA only prevents injunctions of labor disputes that are "in conflict with its policy of protecting workers' 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,'" and such disputes occurring in arbitration do not, apparently, conflict with the NLGA's policy of protecting workers' strikes. *Epic Sys. Corp.*, 584 U.S. at 499 (quoting 29 U.S.C. § 102 (2018)).

125. However, it must be noted that imposing arbitration in the face of a contrary state rule is not new. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984) ("We see nothing in the [FAA] indicating that [its] broad principle of enforceability is subject to any additional limitations under state law.").

126. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 448-49 (2006) (reversing the Florida Supreme Court on the grounds that the national policy favoring arbitration meant that gateway questions of arbitrability were for the arbitrator); Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17, 19-21 (2012) (per curiam) (quashing an Oklahoma Supreme Court ruling that voided noncompete clauses in employment contracts as against public policy); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 247 (2017) (invalidating a rule promulgated by the Kentucky Supreme Court because it "fails to put arbitration agreements on an equal plane with other contracts").

127. *See, e.g.*, Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 660-63 (2022) (invalidating a California law allowing the use of private-attorneys-general lawsuits to avoid single-file arbitration mandates); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 55, 58-59 (2015) (holding that the FAA preempts California law declaring class-arbitration waivers unenforceable and that the California Court of Appeals must enforce an express class-action waiver).

employees.[128] The paragon of this transition is *AT&T Mobility LLC v. Concepcion*,[129] an affirmative declaration that the FAA preempts any state law that conflicts with it. This 2011 holding nullified the application of a California state law, known as the *Discover Bank* rule,[130] permitting courts to declare class-arbitration waivers in consumer contracts as unconscionable (and thus permitting judges to impose class arbitration).[131]

To conclude, Table 1 presents the evolution of the Supreme Court's arbitration doctrine.

TABLE 1. JURISPRUDENTIAL ERAS OF ARBITRATION AND SELECTED CASES

Year	Cases	Party types	Arbitration enforced?
Contextual Era			
1932	*Marine Transit Corp. v. Dreyfus*[132]	Merchant v. merchant	Yes
1935	*Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*[133]	Merchant v. merchant	Yes
1944	*Anaconda v. American Sugar Refining Co.*[134]	Merchant v. merchant	Yes
1953	*Wilko v. Swan*[135]	Investor v. firm	No

128. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 125, 137-38, 139-40 (1973) ("California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme.").

129. 563 U.S. 333, 341-45, 348 (2011) (holding that class arbitration, "to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA").

130. Discover Bank v. Superior Ct. of Los Angeles, 113 P.3d 1100, 1103 (Cal. 2005) (holding an arbitration waiver in a contract of adhesion to be unconscionable), *abrogated by Concepcion*, 563 U.S. 333.

131. CAL. CIV. CODE § 1670.5(a) (West 2024).

132. 284 U.S. 263, 278-79 (1932) (rejecting the argument that arbitration interferes with the judicial power under the Constitution and noting that admiralty cases have long been settled by arbitration).

133. 293 U.S. 449, 450-54 (1935) (enforcing an arbitration agreement between corporations that disputed a purchasing contract by affirming the federal courts' power to stay litigation pending an arbitration).

134. 322 U.S. 42, 44 (1944) (enforcing an arbitration agreement between merchants in an admiralty dispute because the FAA makes arbitration agreements in such disputes "specifically enforceable").

135. 346 U.S. 427, 438 (1953).

Year	Cases	Party types	Arbitration enforced?
1956	*Bernhardt v. Polygraphic Co. of America*[136]	Employee v. firm	No
1973	*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*[137]	Employee v. firm	No
1974	*Scherk v. Alberto-Culver Co.*[138]	Merchant v. merchant	Yes
National-Policy Era			
1983	*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[139]	Firm v. firm	Yes
1984	*Southland Corp. v. Keating*[140]	Small merchants v. firm	Yes
1985	*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[141]	Small merchant v. firm	Yes
1985	*Dean Witter Reynolds, Inc. v. Byrd*[142]	Investor v. firm	Yes
1987	*Perry v. Thomas*[143]	Employee v. firm	Yes
1987	*Shearson/American Express, Inc. v. McMahon*[144]	Investors v. firm	Yes
1989	*Rodriguez de Quijas v. Shearson/American Express, Inc.*[145]	Investors v. firm	Yes
1989	*Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*[146]	Firm v. nonprofit	No

136. 350 U.S. 198, 199, 202-04 (1956).

137. 414 U.S. 117, 139-40 (1973). This case evaluates the California Arbitration Act. *See supra* notes 52-53 and accompanying text.

138. 417 U.S. 506, 515-17, 519-20 (1974) (enforcing an arbitration agreement between two merchants because it was a "truly international agreement," where an arbitration agreement would provide certainty in which law to apply).

139. 460 U.S. 1, 24 (1983).

140. 465 U.S. 1, 7 (1984).

141. 473 U.S. 614, 627 (1985).

142. 470 U.S. 213, 217 (1985).

143. 482 U.S. 483, 492 (1987).

144. 482 U.S. 220, 226-27 (1987).

145. 490 U.S. 477, 481 (1989).

146. 489 U.S. 468, 476-79 (1989).

Year	Cases	Party types	Arbitration enforced?
Restrictive Era			
1991	*Gilmer v. Interstate/Johnson Lane Corp.*[147]	Employee v. firm	Yes
1995	*Allied-Bruce Terminix Cos. v. Dobson*[148]	Consumers v. firm	Yes
2001	*Circuit City Stores, Inc. v. Adams*[149]	Employee v. firm	Yes
2010	*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[150]	Firm v. firm	Yes
2011	*AT&T Mobility LLC v. Concepcion*[151]	Consumers v. firm	Yes
2013	*American Express Co. v. Italian Colors Restaurant*[152]	Small merchants v. firm	Yes
2019	*Epic Systems Corp. v. Lewis*[153]	Employees v. firm	Yes
2019	*Lamps Plus, Inc. v. Varela*[154]	Employees v. firm	Yes

II. NORMATIVE DEBATES ON ARBITRATION

The foregoing has prompted both a defense of the Court's jurisprudence and a great deal of criticism. In this Part, I stake out three groups of academic interventions on arbitration. I will cover the two dominant normative positions regarding arbitration—the efficiency motive and the access-to-justice critique. The two dominant normative positions take opposing views on the more-or-less empirical question of whether arbitration facilitates access to justice. Then, I categorize a group of theories into a third strand, the catchall *republican critique*, which falls outside the dominant positions. I place two groups of critiques into this category: the first group makes a sharp critique that arbitration is nakedly a tool of class inequality, and the second attacks arbitration's interference with the vindication of substantive laws. Outlining these categories and identifying the

147. 500 U.S. 20, 26 (1991).

148. 513 U.S. 265, 273-77 (1995).

149. 532 U.S. 105, 119 (2001).

150. 559 U.S. 662, 684 (2010).

151. 563 U.S. 333, 341-45, 348 (2011).

152. 570 U.S. 228, 238-39 (2013).

153. 584 U.S. 497, 502 (2018).

154. 587 U.S. 176, 177 (2019).

strengths and weakness of the access-to-justice and republican critiques provides part of the theoretical base to which the political-economy critique in Part III responds.

A. The Efficiency Motive for Arbitration: Accessibility for the Individual

Academic proponents of arbitration have generally argued that such provisions are beneficial to all parties, including small players, because they make dispute resolution more efficient and thus more accessible.[155] This is the view espoused by the Supreme Court in its recent decisions.[156] One study concludes that while the costs of arbitration and litigation may be comparable, arbitration ultimately provides a "more accessible forum" for workers and consumers with smaller claims since it is cheaper to bring a small claim in arbitration than in litigation.[157] Another study suggests that arbitration tends to be significantly faster than litigation.[158] According to proponents, arbitration's confidentiality promotes this efficiency: confidentiality "can prevent parties from becoming 'dug in' to their positions because they have not staked them out in public" and

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155. *See, e.g.*, Hans von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, HERITAGE FOUND. (July 17, 2013), https://www.heritage.org/report/the-unfair-attack-arbitration-harming-consumers-eliminating-proven-dispute-resolution-system [https://perma.cc/BBX6-GNTY]; Peter B. Rutledge, *Arbitration—A Good Deal for Consumers* 8 (Univ. of Ga. Sch. of L. Rsch. Paper No. 11-08, 2011), https://papers.ssrn.com/abstract=1811133 [https://perma.cc/7ZAA-27BE].

156. *Stolt-Nielsen* lauds arbitration's "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," benefits that class arbitration lacks. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 615, 628 (1985)). *Concepcion* praises arbitration's "efficient, streamlined procedures tailored to the type of dispute," contending that the "informality" of arbitration "is itself desirable, reducing the cost and increasing the speed of dispute resolution." 563 U.S. at 344-45. In *Stolt-Nielsen*, the Court also acclaims arbitration's "presumption of privacy and confidentiality." 559 U.S. at 686 (quoting Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party add. at 10a, *Stolt-Nielsen*, 559 U.S. 662 (No. 08-1198)). Privacy and confidentiality are not uniformly restrictive justifications, though Professor Judith Resnik and others have noted how information privacy in adjudication harms democratic values. *See* Judith Resnik, Stephanie Garlock & J. Annie Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 679-84 (2020). In any event, the Court's reasoning in recent cases departs markedly from the Court's understanding in *Ware* that private arbitration could actually harm investor confidence. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 136 (1973).

157. Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008).

158. David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1572-73 (2005).

"spares [parties] from embarrassing revelations" such as financial details in debt arbitrations.[159] A policy arm of the U.S. Chamber of Commerce contends that employees arbitrating against employers are three times more likely to win than in litigation, recover almost twice as much money, and spend less time from filing to final disposition.[160] The implication of the efficiency narrative is that firms arbitrating against workers or consumers offer a deal or an exchange that benefits everyone: plaintiffs purportedly achieve faster and more favorable resolutions, while firms receive confidentiality and low individual payouts (as opposed to a large settlement following a class arbitration or class action). Arbitration, then, is merely one way of resolving disputes alongside litigation.[161]

B. The Access-to-Justice Critique: (In)Accessibility in the Aggregate

In response, the predominant normative critique of arbitration is the *access-to-justice critique*. This critique hinges on the issue that single-file arbitration mandates dissuade injured parties with potentially meritorious claims from bringing them in the first place because of the expense or complexity of individual arbitration. Single-file mandates accomplish most of the dissuasion: class-certification procedures in court or in arbitration serve to aggregate many small-dollar individual claims that no rational litigant and no lawyer would individually pursue. In other words, no lawyer would take the case of one consumer in arbitration alleging they had been ripped off to the tune of a few hundred dollars. Without the ability to aggregate these claims, plaintiffs—and lawyers—would simply not bring them.[162] Just as the efficiency motive has its proponents on the Court, so does the access-to-justice critique. For example, Justice Breyer's dissent in *Concepcion* questions, "What rational lawyer would have signed on to

159. Rutledge, *supra* note 155, at 17.

160. Nam D. Pham & Mary Donovan, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration*, NDP | ANALYTICS 5 (May 2019), https://live-inst-legal-reform.pantheonsite.io/wp-content/uploads/2020/10/Empirical-Assessment-Employment-Arbitration.pdf [https://perma.cc/E28D-V6A7].

161. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 433 (2010) ("[A]rbitration and litigation are substitutes for each other."); Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 964 (2014) ("An arbitration clause is an agreement to a bundle of dispute resolution services . . . . Litigation provides its own bundle of services."). This view conflating litigation and arbitration as synonymous "dispute resolution services" has been criticized by scholars. For one example of this scholarly criticism, see generally Resnik, *supra* note 86.

162. Aaron Blumenthal, Note, *Circumventing* Concepcion*: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 708 (2015).

represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[163]

Scholars working in the access-to-justice tradition have compiled considerable data bearing out the concern that single-file arbitration mandates create a "mass" of arbitration mandates "without a mass of claims."[164] Between 2009 and 2019, only about ninety consumers a year arbitrated against AT&T,[165] which has over seventy million customers.[166] Though employment arbitration may be more common than consumer arbitration, another concern is that a potential "repeat player" effect favoring the employer in arbitration will lead to fewer worker wins and smaller recoveries when they do prevail.[167] Access-to-justice scholars justify this by pointing to data showing that employees tend to win less frequently in arbitration than they do in federal or state court—when they do win, they win significantly lower damages.[168] Additionally, arbitration's confidentiality prevents claimants from sharing information about the practices that harmed them (and may have harmed other claimants), which makes it harder for similarly wronged parties to bring actions in the future.[169] The overarching thrust of the access-to-justice argument is that the main effect of forcing arbitration onto consumers or workers is to stop them from bringing claims in court or in arbitration, regardless of the merit of those claims.[170]

One way to interpret the debate between arbitration's primary proponents and critics is that they differ on the meaning and scope of accessibility. For arbitration's defenders, accessibility concerns efficient and rapid resolution, giving a quicker payout to claimants with meritorious claims and allowing respondents to resolve their legal issue quickly—and quietly. This paradigm centers the individual claimant acting to vindicate their own rights. Evidence that few people bring claims in arbitration may not indicate that arbitration clauses are

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163. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.")). Arbitration's defenders tend to avoid discussion of the demise of the class action.

164. Resnik, *supra* note 86, at 2893-2915.

165. Resnik et al., *supra* note 156, at 628 tbl.1 (listing the average number of consumer-filed claims per year during this period as eighty-five).

166. *2Q2024 Highlights*, AT&T (2024), https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/quarterly-earnings/2024/2Q24/2Q24_ATT_Highlights.pdf [https://perma.cc/4U8P-2ESA].

167. Colvin, *supra* note 2, at 16-23.

168. *See, e.g.*, *id.* at 7-8, 10-11.

169. Resnik et al., *supra* note 156, at 631-32.

170. Horton & Chandrasekher, *supra* note 2, at 116-19.

dissuading potentially meritorious claims, but that only a small number of people have meritorious claims. On the other hand, access-to-justice critics look at arbitration's effects in the aggregate. They argue that very few individuals bring claims in arbitration because they cannot find lawyers to take such low-value claims. Thus, they focus not on whether the individual arbitration compares favorably to litigation but on the aggregate effects of arbitration on individuals and claims-making writ large.

However, both perspectives focus on the individual instance of arbitration. Both are thus locked in a game of answering empirical questions, such as whether arbitration results in higher or lower win rates for consumers or workers. Proponents and opponents tend to converge on the view that arbitration *could* facilitate access to justice with certain technocratic tweaks. Thus, in the words of some of arbitration's detractors, it *could* actually "facilitate access to justice," but it is "not currently living up to this potential."[171] One major work in the access-to-justice tradition suggests merely that Congress or the judiciary "clearly define what is meant by arbitration covered by the law, and address . . . whether there should be certain minimum procedural guarantees in arbitration, and what types of parties or claims should be covered by an arbitration law."[172] Another articulates the issue as a "lack of incentives for lawyers to take these cases, rather than a lack of access to arbitration."[173] When the problem is posed this way, solutions tend to focus on making arbitration pay out more to the nonfirm party in the form of an "arbitration multiplier"[174] for prevailing plaintiffs' attorneys' fees or by paying bounties to nonfirm parties who win arbitrations.[175] These proposals focus on the problem that few consumers or workers use arbitration and seek to solve that problem by increasing arbitration's friendliness to the lawyers who represent consumers and workers. Other critiques of arbitration are less sanguine.

C. Alternative Critiques of Arbitration: Class Inequalities and Rule of Law

The access-to-justice debate does not encompass every polemic on arbitration. These other critiques, which tend to sympathize with the access-to-justice position, include the sharper point that arbitration is a direct driver of economic inequality and that arbitration erodes the rule of law by making it impossible to

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171. Chandrasekher & Horton, *supra* note 2, at 9.

172. Imre Szalai, Outsourcing Justice: The Rise of Modern Arbitration Laws in America 201 (2013).

173. Chandrasekher & Horton, *supra* note 2, at 10 (emphasis omitted).

174. *Id.* at 61-65.

175. Blumenthal, *supra* note 162, at 720-26.

enforce the substantive protections that Congress has created. These perspectives, which could be grouped under the moniker of the *republican critique*, are instructive for a political-economy analysis.

Some scholars assert a direct link between arbitration and income and wealth inequality, which might be called the *class-inequality* critique. For example, Deepak Gupta and Lina M. Khan argue that since industries are generally highly concentrated, a relatively small number of firms exert a powerful influence on the drafting of contracts that structure transactions, creating outsized effects that benefit those firms in the economy.[176] Professor Zephyr Teachout argues that this influence allows arbitration and monopolization to reinforce each other, since a monopolist firm's ability to impose contractual terms without negotiation increases its ability to sustain its monopoly by avoiding litigation.[177] Such provisions thus "most likely transfer[] wealth upwards" by allowing corporations to violate the law with impunity.[178] Arbitration also lowers the cost of misclassifying workers, who cannot band together to challenge a firm's collective misclassification of them.[179] Professor Myriam Gilles faults arbitration, which she calls "class warfare" against the poor, for killing collective litigation, which is the main mechanism by which low-income individuals gain redress for harms — including compensatory damages.[180]

Professor Gilles's critique emphasizes that the disappearance of low-income litigants from judges' civil dockets creates losses in "information forcing and common law development" that can benefit low-income litigants.[181] This is a major concern of another group of scholars who offer the *rule-of-law* critique of arbitration, which holds that arbitration allows firms "effectively to negate substantive law" by making it infeasible to hold large firms accountable for the legal harms they cause.[182] Professor Cynthia L. Estlund argues that, by the same

176. Deepak Gupta & Lina M. Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 503 (2017).

177. TEACHOUT, *supra* note 108, at 99 ("[A]rbitration . . . relocat[es] power from the public to a private, protected court where the monopoly can't be challenged.").

178. Gupta & Khan, *supra* note 176, at 503. Specific mechanisms that transfer wealth upwards include wage theft, *id.* at 510-13, the excessive charging of small fees to consumers, *id.* at 513-15, and the practice of making it prohibitively expensive for plaintiffs to bring antitrust claims, which generally require the class-action device to be economically feasible, *id.* at 515-18.

179. Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 221-25.

180. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1537-38 (2016). To be sure, courts have also narrowed the scope of class-action lawsuits, and abolishing arbitration or even class arbitration would not completely level the playing field against corporations.

181. *Id.* at 1558-61.

182. Glover, *supra* note 5, at 3075.

mechanism, arbitration mandates constitute an "ex ante waiver of substantive rights."[183] Professor Judith Resnik laments courts' abandonment of their oversight role of arbitration and unwillingness to give meaning to the doctrine of effective vindication.[184]

These arguments demonstrate the possibility of alternative visions for critiquing the arbitration doctrine. In the next Part, I introduce a novel political-economy critique of arbitration.

III. A POLITICAL-ECONOMY CRITIQUE OF ARBITRATION: ARBITRATION LAW AS ALLOCATOR OF COORDINATION RIGHTS

I propose here a new interpretation of arbitration through the framework of law and political economy. As previously explained, and as access-to-justice critics have long recognized, arbitration creates an alternative procedural framework that allows firms to evade procedural and substantive law. But the access-to-justice debate misses arbitration's effects on how small players in the market economy (workers, consumers, contractors, and even small firms) engage their most common counterparties: large firms. As I will show, arbitration law must be thought of as affecting the allocation of economic *coordination rights*, a concept arising from Professor Sanjukta M. Paul's pioneering reanalysis of antitrust law through a political-economy lens.[185] Theorizing arbitration through a political-economy lens elaborates on the contextual doctrine outlined in Section I.B.1.

In this Part, I propose the following. First, contemporary arbitration law allocates coordination rights away from small players to large players, *suppressing* their ability to engage in collective legal contestation. It prevents workers, consumers, contractors, and small firms from engaging in horizontal coordination in market disputes. In turn, this restriction affects the kinds of economic production that firms undertake in the market and the way in which firms behave and carry out their business. These suppressive effects — away from smaller players and toward larger ones — arise from contemporary arbitration law's highly restrictive character.

Because these suppressive effects influence firm behavior, today's arbitration regime ultimately has an allocative effect on coordination rights in economic

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183. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 703 (2018); *see also* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 427-30 (2006) (arguing that arbitration mandates amount to a waiver of substantive rights).

184. Resnik, *supra* note 86, at 2810-11.

185. *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378, 429-31 (2020).

production writ large. In other words, while the restrictive arbitration regime benefits all firms, it particularly benefits large firms because they contract with multiple kinds of small players. I will illustrate these effects with firms that are gig-economy firms, which provide a sharp example of this regime at work. Gig firms use arbitration law to evade the requirements of substantive law, often antitrust and employment-law statutes. The widespread use of arbitration mandates effectively prevents small players from challenging the aspects of that business model that could violate these other substantive laws. In sum, arbitration law suppresses coordination rights in legal disputes concerning economic production, which in turn facilitates certain behaviors and forms of firm structure, meaning that arbitration affects the allocation of economic coordination rights more broadly.

A brief note on what a gig-economy firm, or gig firm, is. Gig firms are typically organized as platforms, which "are large-scale, centralized places—physical or virtual—that allow people to interact or transact."[186] A *gig-economy platform* connects contractors who provide a service, like car rides or food delivery, to customers seeking that service. Typically, the contractor "performs a service central to the economic purpose of the platform," using a "material input" like their own vehicle or electric bicycle, in addition to their time.[187] The status of these contractors as true independent contractors or misclassified employees is deeply contested.[188] In practice, a gig-economy contractor may or may not be a worker given the particular facts and circumstances of the economic relationship between them and their firm, and courts have split on the question.[189] In other words, it is not possible to categorically declare that all gig workers are either misclassified employees or are true independent contractors.

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186. Morgan Ricks, Ganesh Sitaraman, Shelley Welton & Lev Menand, Networks, Platforms & Utilities: Law & Policy 7 (2022).

187. Terry Buck, Note, *Restraining the Uber Model: Antitrust Law and the Gig Economy in New York and California*, 23 N.Y.U. J. Legis. & Pub. Pol'y 861, 868 (2021).

188. *See, e.g.*, Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. Chi. Legal F. 63, 80-81, 82 nn.115-17 (arguing that "no definitive answer has been reached" to the question of whether Uber and Lyft drivers are employers or contractors and citing proposals to resolve the issue).

189. *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015) (holding that Uber drivers are presumptively employees because they perform a service for Uber without which it "would not be a viable business entity"); Rebecca Rainey, *Luxury Uber Drivers' Classification Lawsuit Tossed by Judge (1)*, Bloomberg L. (July 30, 2024, 7:43 PM EDT), https://news.bloomberglaw.com/daily-labor-report/dispute-over-luxury-uber-drivers-misclassification-claims-tossed [https://perma.cc/WC3T-68SD] (describing an Eastern District of Pennsylvania decision dismissing a case after two juries deadlocked on an employee-classification question, allowing Uber to continue classifying drivers as contractors).

This Part proceeds as follows. First, I introduce my political-economy analysis, highlighting its concern with how the law structures economic coordination and market relationships. Next, I argue that arbitration suppresses the coordination rights of smaller actors in a market. By harnessing both antitrust and arbitration law, gig platforms provide an example of this dynamic at work. Third, I comment on the recent development of *mass-arbitration* tactics, the primary way enterprising plaintiffs' lawyers have exploited the vulnerabilities that restrictive arbitration mandates create. Although mass-arbitration tactics have given some firms a bloody nose, they only work to increase the friendliness of arbitration to plaintiffs and their lawyers without fully restoring horizontal coordination in disputes.

A. Political Economy, Coordination, and the Law

It is now almost tautological to admit that "modern market systems are not natural phenomena that spontaneously arise, but rather complex institutions that must be created and sustained by the visible hand of the government."[190] As Professor Amy Kapczynski has written, political-economy analysis understands that "[l]aw constructs markets, and the distribution of economic power (and 'private' power more broadly) deeply shapes law."[191] Accordingly, the task of a political-economy analysis is to "map the relationship between markets and political life as it is figured across a wide range of legal domains."[192] Because

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190. Steven K. Vogel, Marketcraft: How Governments Make Markets Work 2 (2018).

191. Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 Colum. L. Rev. Online 179, 181-82 (2018). This line of analysis has gained ground in political science as well. *See, e.g.*, Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, *The American Political Economy: Markets, Power, and the Meta Politics of US Economic Governance*, 25 Ann. Rev. Pol. Sci. 197, 199-201 (2022) (describing that an American political economy approach reveals how legal systems and institutions—and the inequities within them—influence political-economic life). With respect to the legal academy, political-economy analysis seeks to reorient legal scholarship away from traditional concern with efficiency and silence on questions of power, a development associated with the hegemonic law-and-economics frameworks of the twentieth century. *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1818-23 (2020) (advocating for a shift in focus from efficiency to power when analyzing markets).

192. Kapczynski, *supra* note 191, at 182. Legal scholars and political scientists have noted that their critiques respond to the dual pathologies of widening economic inequality and democratic deconsolidation in the United States. *See* Britton-Purdy et al., *supra* note 191, at 1784, 1786-89; Hacker et al., *supra* note 191, at 201-04.

arbitration is so deeply embedded in the economy,[193] arbitration is ripe for a political-economy analysis.[194]

In investigating the construction of markets, scholars have paid special attention to how the law structures the behavior of actors within that market, such as consumers, workers, and producers. Economic production occurs through the coordination of these and other actors, such as firms. Many areas of the law—from contract law to property to antitrust—structure this coordination.[195] Coordination consists of the set of rules governing how actors may interact with each other.[196] Coordination is the sine qua non of economic production: there can be no economic production without coordination of some kind. Coordination has remained a central topic in political economy at least since Ronald H. Coase inquired into the origin of firms,[197] the dominant actors in economic production since industrialization started in the eighteenth century. Coase began with the observation that if pure contracting based on the price of producing a good or providing a service (the "price mechanism" in Coase's words) were the most efficient form of economic coordination, as is widely accepted in economic theory—in contrast to, for example, central planning of economic production by the government[198]—then economic production should exist largely by natural

193. *See supra* Section I.A.2 (describing the prevalence of arbitration mandates).

194. *See also* Hacker et al., *supra* note 191, at 198 ("[American political economy] expands the study of American politics to encompass a far broader range of political dynamics and policy domains that shape fundamental social and political outcomes . . . [such as] the legal wrangling over mandatory arbitration that limits the bargaining power and labor rights of low-wage workers . . . .").

195. Paul, *supra* note 185, at 380.

196. Professor Sanjukta M. Paul has driven my concept of coordination, which I have generalized from her introduction of the term in the antitrust context: "Antitrust law's core function is to allocate coordination rights to some economic actors and deny them to others. This makes private decisions to engage in economic coordination rights subject to public approval, which antitrust law grants either explicitly or tacitly." *Id.* at 382. For a discussion of how Professor Paul applies the concept of the antitrust-firm exemption in the labor context, see Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS., no. 3, 2009, at 65, 72-78, which describes how ride-hailing firms and independent-contractor firms take advantage of gaps in antitrust law to engage in price-setting, a form of coordination, that would be impermissible between competitors, solely because they use independent contractors.

197. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390-98 (1937). For a historical overview and useful summarization, see generally Steven G. Medema, *Coase, Costs, and Coordination*, 30 J. ECON. ISSUES 571 (1996), which argues that coordination is a central concern of economic analysis and traces Ronald H. Coase's contributions to the field.

198. More precisely, economic theory holds that this is true under particular circumstances that prevail in contemporary market-based economies and societies. Under different conditions, other mechanisms are superior to price. For example, the Inka Empire did not use prices or currency as a mechanism of exchange or coordination. *See* Timothy Earle, *Wealth Finance in*

persons contracting with each other.[199] But this is not the case, as firms, not individuals or the government itself, are the dominant actors in market production. For Coase, firms arise because there are "disadvantages — or costs — of using the price mechanism," such as the costs of discovering prices or the costs associated with repeated purchases by contract for each market transaction.[200] Firms operate by vertical relationships, that is, through commanding individual members of the firm to engage in productive activities,[201] which is distinct from the horizontal nature of contracting and the price mechanism.[202] In capitalist societies, firms are the primary way in which economic coordination occurs and market production is realized.[203] At a basic level, then, firms are mechanisms of economic coordination.[204]

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the Inka Empire: Evidence from the Calchaqui Valley, Argentina, 59 AM. ANTIQUITY 443, 444-47 (1994).

199. Coase, *supra* note 197, at 387-89.

200. *Id.* at 391; *see also* Medema, *supra* note 197, at 572 (summarizing Coase's position that the firm's internally integrated nature reduces the cost of coordinating solely through prices, thereby serving "a coordinating purpose" in place of the pricing mechanism).

201. That is, typically in exchange for wages, a salary, or other compensation of some kind.

202. Coase, *supra* note 197, at 387-89. In Coase's example, "If a workman moves from department *Y* to department *X*, he does not go because of a change in relative prices, but because he is ordered to do so." *Id.* at 387. Coase was careful to note that the horizontal integration of price and command through contract involves "the supersession of the price mechanism." *Id.* at 389. By contrast, outside of the individual firm, the price mechanism determines whether a firm will make a product or offer a service. *Id.* at 388. In other words, if a price for a good or service is high, firms will endeavor to produce it.

203. Consider other market actors like consumers. Generally, since modern industrialization, market actors — like consumers of goods and workers who produce them — do not *themselves* organize economic production, at least not in any appreciable scale. Coase sought to understand why firms dominate the landscape of market production and why economic production in industrialized societies does not exist by large-scale contracting between individuals. *Id.* at 390-91.

204. Notwithstanding their critical role in economic production, scholars have noted the mostly incorporeal nature of the firm and the challenging question of what a firm *is*. Frank H. Easterbrook, the Seventh Circuit judge and law-and-economics scholar, and Professor Daniel R. Fischel once observed that the corporation (the predominant category of firm) "is not real," being "no more than a name for a complex set of contracts among managers, workers, and contributors of capital. It has no existence independent of these relations." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985). Canonically, a firm is thought of as a "nexus" of contracts between market players. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) ("The private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships . . . .*"); *see also* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) ("The corporation is a complex set of explicit and implicit contracts, and

A key site of the legal regulation of market coordination is antitrust law, which focuses squarely on how firms and other market players compete, cooperate, and coordinate within and across markets. Classically, antitrust law functions to disfavor *horizontal* coordination between firms, which includes price-fixing and cartel conduct.[205] Political-economy scholars have focused on antitrust law's regulation of coordination, and these critiques illuminate arbitration law's own role as an allocator of coordination rights, as the next Section explains.

B. Arbitration as Allocator of Coordination Rights

When viewed through a political-economy lens, arbitration law functions foremost to allocate coordination rights away from smaller actors (workers, consumers, contractors, and smaller firms) toward larger actors (large firms). In this manner, it functions analogously to antitrust law. Antitrust law allocates coordination rights in economic production, directly prohibiting or allowing certain behaviors and associated organizational forms for how goods are produced and services are rendered. On the other hand, arbitration law allocates coordination rights in *legal disputes* concerning economic production, which in turn facilitates certain behaviors and forms of firm structure. This dynamic is most visible with gig-economy firms, though it applies to many other firms.

In this Section, I first outline the key antitrust concepts necessary to understand coordination rights: horizontal restraints, vertical restraints, and the concept of allocating coordination rights by illegalizing horizontal restraints while allowing most vertical ones. The resulting legal regime can be thought to incentivize gig-platform organization in the first place, though there are other areas of law—not discussed at length in this Note[206]—that affect and regulate gig platforms. Second, I explain how arbitration law makes it very difficult, if not impossible, for small players to organize horizontally against firms in disputes. In

corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy."). Both economists and political theorists have noted that this emphasis on agreement between market players contracting with each other obfuscates the coercive power firms can wield in the real world. *See, e.g.*, Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSPS. 113, 113-14 (2017) (arguing that the nexus-of-contracts view obscures the large amount of political power corporations can amass); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 140-41 (2013) (contending that firms should be thought of not as collections of contractual agreements but as privatized offshoots of public governments).

205. *See infra* note 216 and accompanying text.

206. There is a growing trend to discuss the "law of networks, platforms, and utilities," though in the past such law regulating platforms may have been called "regulated industries" or "the law of public utilities." RICKS ET AL., *supra* note 186, at 1-2.

this way, arbitration law suppresses the coordination rights of small players. This allocation ossifies the gig-platform structure. Lastly, I illustrate these principles at work with a case study of litigation against Uber.

1. Horizontal and Vertical Restraints and Coordination Rights

Antitrust law consists of several discrete statutes, the first of which was the Sherman Antitrust Act of 1890. For the purposes of the argument below, consider the Sherman Act's first provision. It declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[207] A restraint of trade is any agreement, in the form of a contract or not, between market actors, such as firms. Antitrust law classically outlaws horizontal collusion *between* firms that are operating at the same level of the market, like cartel arrangements and price fixing.[208] An agreement between sellers of the same good is a horizontal agreement.

To understand how such an agreement operates, consider the following simplified example. Take a market for chairs, made up of buyers of chairs and sellers of chairs. Assume that the market for chairs follows a typical supply and demand curve, where the quantity of chairs sold decreases as prices increase and increases as prices decrease. In other words, the demand for chairs is inverse to the price. For the purposes of this example, only four chair sellers comprise the market. Each competes with the other by offering either better chairs or lower-priced chairs with the goal of capturing more buyers and more revenue. Ideally, the chair-selling firms will compete by innovating a better chair or offering the chairs at lower prices. But the chair-selling firms could agree with each other to set the

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207. 15 U.S.C. § 1 (2018). The Sherman Act also proscribes monopolization and attempted monopolization. *See id.* § 2. This provision is relevant to the platform context but not necessary for understanding the concept of horizontal and vertical restraint or coordination rights.

208. Andrew I. Gavil, William E. Kovacic, Jonathan B. Baker & Joshua D. Wright, Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy 7 (4th ed. 2022) ("Most systems of competition law deal severely with agreements by rival firms to suppress production, raise prices, or retard innovation."); Eleanor M. Fox & Daniel A. Crane, Global Issues in Antitrust and Competition Law 6 (2d ed. 2017) (explaining that "hard core cartels—agreements of competitors to lessen the competition among them—are generally illegal on their face or presumptively illegal under national law" in both the United States and the European Union); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act . . . ."); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) ("A horizontal cartel among competing manufacturers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful." (citing Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977))).

prices for chairs and promise not to compete with each other, capturing more revenue by setting the price higher. The firms can do this in at least two ways: they can agree to charge all buyers a certain price, or they can reduce the output of the chairs that they do sell. This will push prices up as buyers bid for the fewer available chairs by putting up more money. The agreement between the firms to set prices higher or limit output is *horizontal* because it is between entities at the same level of the market—all sellers, in this example—and it is thought of as a *restraint* because it is typically an agreement to refrain from doing something, such as setting prices freely or producing more chairs. This horizontal collusion regarding price, instantiated by horizontal restraints in the form of price fixing or coordinated output reduction, is the typical target of the antitrust laws. Since such restraints are always illegal under the Sherman Act, such conduct is "per se" unlawful.[209]

However, not all horizontal restraints or horizontal collusion directly affect the price or supply of a good. Many restraints between market players may serve a useful purpose, like the operating hours of a marketplace with independent sellers.[210] To simplify, the law does not regard these nonprice horizontal restraints as illegal per se, instead analyzing whether the restraints are necessary to promote trade in the market for a good under the more lenient so-called rule-of-reason standard.[211] To be sure, the Supreme Court has no qualms about ruling that many such nonprice horizontal restraints, such as work standards for engineers,[212] still impermissibly restrain trade, and it has also subjected activity that may look like labor activism to antitrust liability.[213]

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209. *Leegin*, 551 U.S. at 893.

210. This example comes from the canonical case enunciating the rule of reason, *Chicago Board of Trade v. United States*, which recounted reasons why operating hours restrictions benefit farmers, sellers, and consumers. 246 U.S. 231, 239-41 (2018).

211. The doctrine was announced in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278-82 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), and given life by *Chicago Board of Trade*. According to the Court in *Chicago Board of Trade*, "The true test of legality [under the Sherman Act] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 246 U.S. at 238. The *Chicago Board of Trade* holding arose from the idea that restraints of trade were only illegal if they had been held unreasonable at the common law. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (stating that a "standard of reason which had been applied at the common law and in this country . . . was intended [by Congress] to be the measure used for the purpose of determining whether" a restraint violated the Sherman Act).

212. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 693-95 (1978) (rejecting the argument that restrictions on competitive bidding for engineering services are a reasonable means of promoting higher-quality services).

213. *See* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 421-25 (1990) (holding that low-paid indigent-defense lawyers organizing for higher pay constituted an impermissible price-fixing

Entities at different levels of a market—like the suppliers of a good and that good's distributors—can also agree to restrain trade to push prices up. When such restraints occur between players at different levels of the market for a good, they are called vertical restraints. A chair manufacturer may agree by contract to distribute its products through a department store, but only on the condition that the department store not sell or discount the chairs past a certain level (so-called "minimum resale price maintenance"). This agreement is a vertical restraint on the department store. Minimum-resale-price-maintenance arrangements are evaluated under the more lenient rule-of-reason standard.[214]

In sum, antitrust law sanctions some forms of economic coordination, but not others, regardless of whether the parties desire to incorporate such forms of coordination into their contracts. Antitrust law thus *allocates* the right of certain parties to coordinate with each other in certain ways. As Professor Paul succinctly puts it, "Antitrust law decides where competition will be required"—namely, between competitors at the same market level—"and where coordination will be permitted."[215] In short, antitrust law favors "coordination accomplished through vertical contracting over horizontal interfirm coordination."[216]

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cartel for lawyer services). But in general, antitrust law contains an exemption for sellers of labor. *See* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1020-33 (2016).

214. *Leegin*, 551 U.S. at 889-99 (listing economic justifications for resale-price-maintenance arrangements, rejecting the applicability of bright-line per se rules, and concluding that the "rule of reason is designed and used to eliminate anticompetitive transactions from the market" applicable to vertical price restraints). The result in *Leegin* suggests that most price-based vertical restraints should be analyzed under the rule of reason. For most of the twentieth century, both price and nonprice vertical restraints were illegal per se. *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08 (1911) (explaining that agreements to maintain resale price of medicines "are designed to . . . prevent competition among those who trade in them," that is, the medicine dealers, and are thus "injurious to the public interest and void"), *overruled by Leegin*, 551 U.S. 877; United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967) ("Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *Arnold, Schwinn & Co.* illegalized a restrictive franchise distribution arrangement, though the logic seemed to apply to all vertical restraints. In 1977, the Supreme Court loosened these restraints. *See Cont'l T.V., Inc.*, 433 U.S. at 57-58 (explaining that vertical restrictions, "widely used in our free market economy," are not "likely to have a 'pernicious effect on competition,'" nor do "they 'lack . . . any redeeming virtue'" (alteration in original) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958))).

215. Paul, *supra* note 185, at 382.

216. *Id.* at 383.

2. *Arbitration's Allocation of Coordination Rights*

Arbitration should be conceived as allocating coordination rights, though in a different setting and with different effects than antitrust law. Parties can coordinate in dispute resolution: civil procedural rules create horizontal-coordination mechanisms like the class action,[217] and most arbitration providers offer equivalent rules.[218] Class, collective, or representative actions allow for coordination among litigants, and the statutes that create them are grantors of such rights to coordinate. Though this right is not explicitly constitutionally protected, scholars and the Supreme Court have noted that it flows from the Constitution's guarantees of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[219] These rights to coordinate and petition the government also underpin the right to sue in economic conflicts, which is why antitrust law contains an exception for nonsham litigation.[220]

The central contention of this Note is that today's restrictive arbitration law allows large firms to disable such dispute coordination by imposing contractual restrictions on their counterparties. In turn, these restrictions imposed by arbitration prevent small players from challenging the aspects of a business model that may violate other substantive laws. The law ordains restrictions imposed on

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217. *See* FED. R. CIV. P. 23.

218. *See, e.g.*, *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N 3-5 (2011), https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf [https://perma.cc/MPY5-2NHV].

219. U.S. CONST. amend. I; *see, e.g.*, NAACP v. Button, 371 U.S. 415, 429-30 (1963) (locating the right to litigate under the First Amendment's protections); Resnik, *supra* note 86, at 2822-23.

220. In other words, reasonable litigation efforts cannot be thought of as restraints of trade giving rise to liability under the Sherman Act. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) ("We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests [such as associations of trucking companies] may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors."). Beyond *California Motor Transport*, the Court upheld the right to coordinate in litigation in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 55-60 (1993), and more generally in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988), where the Court concluded that the right to petition the government outside of litigation cannot be used to find liability under the Sherman Act, within limits.

litigation brought by workers,[221] consumers,[222] smaller contracting firms[223]—and even on arbitration itself.[224] The contemporary arbitration doctrine sanctions each of these restrictions, allocating coordination rights in market disputes away from small players. While contemporary access-to-justice critics are no doubt aware of these dynamics, the emphasis of that critique is on the individual's access to a forum in which to litigate their claims. The political-economy critique offered here, on the other hand, emphasizes the role of arbitration law in shaping coordination in the market. Critiques from outside of the access-to-justice tradition discussed above in Section II.B are instructive to the political-economy analysis. In many ways, the political-economy critique builds off the work of scholars articulating rule-of-law critiques of arbitration. The coordination restriction in today's arbitration law works at least partly by restricting information sharing,[225] and the effect of allocating coordination rights away from small players, of course, may well be to transfer wealth upwards.[226] But beyond these effects, the political-economy critique of arbitration sheds light on firm behavior itself.

Coordination rights in disputes bear directly on economic production and on the behavior of firms. In other words, legal contestation modifies or reinforces the existing rules, rights, and responsibilities of market players as they engage in economic production, and the largest of these players—large firms—take those rules, rights, and responsibilities into account as they structure themselves and carry out their operations. The point is a simple one: the rules under which small players can litigate or arbitrate against larger players privilege certain forms of firm structure, organizational behavior, and economic production. In other words, firms will take advantage of today's restrictive arbitration regime to disable, by adhesive contract, the horizontal coordination of their counterparties and prevent them from litigating claims against them in court. Firms can avoid

221. *See* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502 (2018) (authorizing firms to impose collective-action waivers on employees).

222. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (authorizing firms to impose collective-action waivers on consumers).

223. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238-39 (2013) (authorizing firms to impose collective-action waivers on contracting parties like other smaller firms).

224. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671-72 (2010) (requiring a plausible contractual basis for class arbitration); Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 (2019) (requiring an explicit contractual basis for class arbitration).

225. *See* Resnik et al., *supra* note 156, at 615 ("[T]o bring claims requires 'naming,' 'blaming,' and 'claiming,' which in turn requires knowledge and resources. Aggregation supplies both, as it is information-providing and information-forcing." (footnote omitted)).

226. *See* Gupta & Khan, *supra* note 176, at 502-04, 508-18.

substantive challenges to their business model and behaviors by disabling counterparties' ability to litigate collectively.

The point is not that today's arbitration law induces firms to restructure themselves as gig firms or do anything other than adopt single-file arbitration mandates. Neither is it that gig platforms could not exist without arbitration law. Indeed, some scholars argue that platforms exist predominantly by taking advantage of problems in antitrust law.[227] The point is rather that arbitration law's distribution of coordination rights benefits large firms by allowing them to engage in behavior that may contradict other substantive laws. As I will show in Section III.B.3, one manifestation of this benefit is the way arbitration helps gig platforms sustain their business model of misclassifying workers and commanding contractors as if they were employees.

In Coasean terms, gig firms operate successfully because the cost of contracting with someone outside the firm (like an independent contractor) is lower than the cost of internally commanding a member of the firm (like an employee). This is because the contemporary employment relationship features several statutorily defined obligations that raise costs, such as minimum-wage requirements[228] and healthcare benefits.[229] Coase's theory holds that firms will organize transactions internally "as long as the costs associated with internal organization are less than the costs of organizing the same transaction through the market."[230] Structuring a firm as a gig-economy platform allows the firm to lower the costs of coordination needed to create a good or service and provide it to consumers. Put simply, it is cheaper to contract with a nonemployee to carry out a service on behalf of the firm than it is to command an employee to carry out that same service. Of course, firms achieve this effect by circumventing the legal obligations (like minimum wage or healthcare)[231] they would owe to internal members, that is, to employees.

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227. *See, e.g.*, Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 256-61 (2017) (arguing that Uber is essentially running a price-coordination ring between independent contractors while escaping antitrust liability simply because it is organized as a firm). *See generally* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (contending that, by organizing itself as a platform, Amazon is able to skirt the requirements of antitrust law).

228. *See, e.g.*, CAL. LAB. CODE § 1182.12 (West 2024) (providing California's minimum-wage requirements); N.Y. LAB. LAW § 652 (McKinney 2024) (providing New York's minimum-wage requirements).

229. *See, e.g.*, I.R.C. § 4980H (2018) (requiring employers, under the Patient Protection and Affordable Care Act, to furnish health insurance to employees or else pay a penalty).

230. Medema, *supra* note 197, at 572.

231. *See supra* notes 228-229.

An added feature of structuring a firm as a gig platform is that the firm effectively creates its own market: platform firms partly set prices for these "external" transactions. Today's arbitration regime contributes to this dynamic by allowing firms to sustain a business model built on external contracting and often misclassification, since their actions are not challengeable in court. The result of this regime, in Coasean terms, is to blur the line between the firm as a discrete market actor and the market itself. A service like the provision of a car ride for transportation purposes could be organized through a firm commanding its members to provide it in exchange for compensation, or it could be organized through the market in the form of horizontal contracting between that firm and a contractor. The latter organization is characteristic of gig-economy platforms: the firm structured as a platform is the "market" by which a consumer accesses the services conducted by the contractor. The costs for the firm in the latter model are lower partly *because* of arbitration law, since arbitration law shields the firms from courtroom challenges to their business model—and so arbitration law shapes coordination and economic production.[232]

While a case study in Section III.B.3 will provide more detail, consider how a gig-economy firm benefits from arbitration. Such a firm relying on independent contractors can impose illicit vertical restraints that contractors cannot viably challenge,[233] steal their tips with impunity,[234] or violate other laws regulating platform conduct. These legal regimes play a part in the ongoing "gig-ification of everything."[235] Gig platforms now exist for ride-hailing (like Uber and Lyft), food delivery (like DoorDash, Postmates, Seamless, and Grubhub), domestic tasks (like Taskrabbit), and car rental (like Getaround and Turo). The gig economy even plays an integral role in the business models of large firms such as Amazon that are not primarily gig platforms. Along with uniformed drivers, Amazon uses gig workers to deliver it packages, a critical aspect of Amazon's

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232. Much economic analysis assumes that coordination costs borne by firms are independent of the law, such that providing a service via a gig-economy platform is the "most efficient" way to provide that service. But the opposite is true: legal rules have a direct impact on how efficient the provision of a good or a service in a market can be. *See* Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 619-20 (2023) (arguing that most analyses of a firm's efficiency ignore the impact of legal rules on such analyses).

233. *See infra* note 268 and accompanying text.

234. *See infra* note 298 and accompanying text.

235. Brian McDowell, *Never Mind the Great Resignation. Welcome to the Great Gigification*, FIRSTUP (May 10, 2024), https://firstup.io/blog/never-mind-the-great-resignation-welcome-to-the-great-gigification [https://perma.cc/PUQ4-DB58]. The idea of, if not the actual phrase "gigification," seems to have been introduced in 2009 by Tina Brown, a former editor of *Vanity Fair* and the *New Yorker*. *See* Tina Brown, *The Gig Economy*, DAILY BEAST (July 14, 2017, 10:21 AM EDT), https://www.thedailybeast.com/the-gig-economy [https://perma.cc/SQ4Z-DJSP].

business, through its Flex delivery program.[236] As with many contractors who cannot coordinate horizontally in disputes because of single-file arbitration mandates, in 2021, Amazon settled with the FTC to return over sixty million dollars in tips that it had illegally withheld from its couriers.[237]

To the extent that counterparties can get legal relief, redress occurs through arbitration as monetary damages only. To be sure, firms not organized as gig platforms can benefit in the same way. But since gig-economy platforms make use of gaps in multiple areas of law—typically antitrust and employment law[238]—arbitration protects them against challenges to both sets of legal regimes. In other words, Uber's independent-contractor drivers may have a valid claim against Uber, either that it is imposing an illegal vertical restraint (a violation of the antitrust laws) or has misclassified them as contractors (a violation of employment law). In the realm of employment law, without arbitration law's allocation of coordination rights, contractors misclassified by a gig platform could theoretically benefit from a successful litigation campaign using collective actions to negotiate or perhaps even to impose a permanent change in their status. But since arbitration law does not allocate the ability to engage in a coordinated legal dispute against the gig platform, such misclassified workers are left with no real legal recourse to do so.[239] In short, arbitration prevents meritorious claims from proceeding in federal court, where equitable relief might be obtained and a deeper challenge to the gig platforms' operations might be heard. Arbitration, and the allocation of coordination rights it accomplishes, ultimately *ossifies* the gig-platform business model.

Epic Systems, the 2018 case in which the Supreme Court definitively authorized the widespread use of single-file arbitration mandates between employers and employees, illustrates the broader point of arbitration's suppression of

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236. *See What Is Amazon Flex?*, AMAZON, https://flex.amazon.com [https://perma.cc/UHL9-9SLT] ("It's simple: You use your own vehicle to deliver packages for Amazon as a way of earning extra money to move you closer to your goals."). Note that Amazon characterizes Flex work as "earning extra money," as opposed to being a primary source of income, perhaps to suggest that its Flex drivers are not employees and are not carrying out a key function of the firm's business. *See id.*

237. *See* Amazon.com, Inc. & Amazon Logistics, Inc., 171 F.T.C. 860, 871-77 (2021); *see also* Gupta & Khan, *supra* note 176, at 510-13 (arguing that arbitration law facilitates wage theft).

238. *See infra* note 259.

239. For a longer discussion of a gig-economy firm's ability to prevent workers from reclassifying themselves as employees, see Garden, *supra* note 179, at 221-25. For promising state-law efforts by drivers in California who allege they are misclassified as contractors under state law, see *Seifu v. Lyft, Inc.*, 306 Cal. Rptr. 3d 641, 643-44, 647-49 (Ct. App. 2023), which held that an arbitration agreement was unenforceable as to a driver's nonindividual Private Attorneys General Act claims for misclassification against Lyft; and *Gregg v. Uber Technologies, Inc.*, 306 Cal. Rptr. 3d 332, 338-41 (Ct. App. 2023), which held the same for similar claims against Uber.

coordination rights—by endorsing it. The case turned on the Court's interpretation of NLRA's Section 7, which affords workers a right to "engage in other concerted activities for the purpose of . . . mutual aid or protection."[240] Nothing in the text of this provision excludes the exercise of procedural rights like filing a class action from "concerted activities." Yet the Court asserts that "concerted activities" cannot include litigation activities because activity protected by the NLRA is only that which workers "'just do' for themselves in the course of exercising their right to free association in the workplace."[241] In the Court's view, this cannot include "the highly regulated, courtroom-bound 'activities' of class and joint litigation."[242] Under this formulation, a strike organized by workers is something they "just do" for themselves, while a class action organized by the very same workers for the very same goals is not.

The Court's decision relied on a line drawn between activity that workers "'just do' for themselves in the course of exercising their right to free association in the workplace," which is protected by the NLRA, and activity that cannot be described that way only because it involves formal courtroom procedures or the presence of lawyers. In effect, the Court denies that horizontal coordination in disputes is part of economic production and market relationships.[243] Conversely, the view that arbitration law allocates coordination rights—and can suppress them—reveals the position that a strike to accomplish one goal can be the same as a class action seeking to accomplish the same goal, and thus within the protections of NLRA's Section 7.

By contrast, the insight that arbitration allocates coordination rights in disputes suggests that scholars and advocates should examine the law more broadly for sources of coordination rights supplied by Congress. In *Mitsubishi*, a case from the national-policy era where the Court considered both the bargaining positions of the parties and the regulatory aims of the substantive law at issue, the Court observed that once parties have "made the bargain to arbitrate, [they] should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[244] For the Roberts Court, such intentions must be explicitly spelled out by statute. But

240. 29 U.S.C. § 157 (2018).

241. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 512 (2018) (quoting NLRB v. Alt. Ent., Inc., 858 F.3d 393, 414-15 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part), *abrogated by Epic Sys. Corp.*, 584 U.S. 497).

242. *Id.* (quoting *Alt. Ent., Inc.*, 858 F.3d at 414-15 (Sutton, J., concurring in part and dissenting in part)).

243. *Cf. id.* at 502-03 ("The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.").

244. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

understanding the central role that coordination plays in economic production suggests that we need not have such a narrow and demanding view of what constitutes that intention.

Consider the wealth of federal statutes that protect access to courts and envision horizontal coordination in such actions. The Fair Labor Standards Act (FLSA) creates a private right of action for individual workers that "may be maintained against any employer . . . in any Federal or State court."[245] This clear congressional command that workers have a judicial venue could give courts a reason to hesitate before enforcing an arbitration provision. That statute explicitly envisions horizontal coordination in disputes. It provides that any such actions may occur "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[246] The Securities Exchange Act expressly provides that parties "may sue . . . at law or in equity in any court of competent jurisdiction" when they are defrauded using communications occurring through interstate commerce,[247] and the Court has repeatedly held the Act to imply a private right of action in federal court.[248] The Clayton Act provides that claimants may sue for Sherman Act violations[249] "in any district court of the United States."[250]

This interpretation—that claims arising under a statute specifically naming access to courts would not be arbitrable—would more closely adhere to the text of these statutes. For example, had Congress understood that the FAA would be used to prevent workers from engaging in collective litigation, it might have written a provision into the NLRA stating that the FAA does not apply to its provisions.[251] Under the Court's restrictive arbitration jurisprudence, all claims can be arbitrated (except those brought by the parties explicitly exempted under Section 1 of the FAA),[252] which means that if Congress created new statutory protections enforced by a private right of action, it would have to write in an explicit arbitration exemption. This, of course, requires ignorance of statutory

245. 29 U.S.C. § 216(b) (2018).

246. *Id.* Note that other statutory protections rely on this provision as well: the Age Discrimination in Employment Act explicitly provides that it may be enforced according to § 216(b). *See id.* § 626(b).

247. 15 U.S.C. § 77*l*(a) (2018).

248. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy is simply beyond peradventure.").

249. *See* 15 U.S.C. § 1 (2018).

250. *Id.* § 15(a).

251. The FAA's original backers did not believe that it would generally apply to workers. *See supra* note 58.

252. *See* 9 U.S.C. § 1 (2018).

text in certain cases. For example, Congress expressly chose to endow the FLSA with a private right of action in "Federal or State court."[253] The suggestion is straightforward: take it seriously—and textually—when Congress states that a claimant may bring a case in a federal or state court.

Ultimately, the suppressive effect of today's arbitration regime on small players should be thought of as an instance of the market separating itself from democratic oversight. Karl Polanyi, a forerunner to contemporary studies of law and political economy, argued that capital, as he termed the "market" in a collective sense, had come to its dominant position in putatively democratic societies through a process of separation that he called "self-regulation":

> A self-regulating market demands nothing less than the institutional separation of society into an economic and a political sphere. Such a dichotomy is, in effect, merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market. . . . Such an institutional pattern could not have functioned unless society was somehow subordinated to its requirements. A market economy can exist only in a market society.[254]

The separation of the economic from the political sphere is a concern present in the Court's contextual jurisprudence described above.[255] It animated the Court in *Wilko*, which interpreted the Securities Act as requiring the public oversight of economic disputes in order to maintain confidence in the market,[256] and in *Ware*, in which the Court recognized the value of public oversight of economic disputes.[257]

A full prescriptive proposal is outside of the scope of this Note. In what follows, I conclude this Section with a demonstration of how arbitration ossifies the gig-firm model. The example below provides a sketch of the way in which a firm separates itself, to an extent, from public oversight using arbitration, perhaps an instance of the "self-regulating" process that Polanyi decried.

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253. 29 U.S.C. § 216(b) (2018).

254. Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 74 (Beacon Press Books 2001) (1944).

255. *See supra* Section I.B.1.

256. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953) (holding that arbitration interferes with the congressional policy, expressed in the Securities Act, of protecting investors by affording them a public "forum" to bring claims).

257. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 136 (1973) ("It is difficult to understand why muffling a grievance in the cloakroom of arbitration would prevent lessening of confidence in the market. To the contrary, . . . market confidence may tend to be restored in the light of impartial public court adjudication.").

3. An Example: Uber and the Ossification of the Gig-Platform Model

To see how arbitration shields and shapes firms, consider how Uber uses arbitration to defend against substantive challenges to its business model. Uber relies on independent contractors to provide its essential service — transportation in those contractors' vehicles. Uber has at least once used an arbitration agreement to defang an antitrust case brought against it by its drivers, and it currently seeks to do so again in an antitrust case brought against it by consumers.[258] Through arbitration law's allocation of coordination rights, Uber can protect both sides of its platform from potentially meritorious claims brought by the counterparties with which it deals. In principle, these effects materialize for many, if not most, gig-economy platforms.

Other scholarly work has more exhaustively detailed how gig-economy platforms like Uber take advantage of gaps in antitrust and employment law to structure themselves[259] — part of a broader literature on workplace "fissuring."[260] Still, the story is worth telling here because of its implications for the political-economy critique of arbitration.

Uber contends that it does not provide transportation services but rather provides a platform that connects individuals offering transportation services to customers who need them.[261] However, contractors who do not accept sufficient rides are deactivated from the platform, and, until recently, contractors could not see the final destination of the customers before accepting a trip to drive them there.[262] Uber contends that the drivers with whom it contracts to provide the actual transportation are not its employees because they are "outside the usual

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258. Davitashvili v. Grubhub, Inc., No. 20-cv-3000, 2023 WL 2537777, at *1 (S.D.N.Y. Mar. 16, 2023), *appeal docketed*, Nos. 23-521, 23-522 (2d Cir. argued Dec. 15, 2023).

259. *See, e.g.*, Paul, *supra* note 227, at 248-53; Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623, 629-37 (2023); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 45, 54; Buck, *supra* note 187, at 864-98.

260. *See* Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONLINE 27, 28-45 (2022); Paul, *supra* note 196, at 65-78. For the canonical account, see generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

261. *See* Tony West, *Update on AB5*, UBER (Sept. 11, 2019), https://www.uber.com/newsroom/ab5-update [https://perma.cc/99H9-QP5S]. Mr. Tony West is Uber's Chief Legal Officer. *Id.*

262. Ashley Capoot, *Uber Unveils New Features, Including One That Lets Drivers Choose the Trips They Want*, CNBC (July 29, 2022, 1:05 PM EDT), https://www.cnbc.com/2022/07/29/uber-will-let-drivers-choose-the-trips-they-want-to-take.html [https://perma.cc/QQP4-WV6G].

course of Uber's business, which is serving as a technology platform for several different types of digital marketplaces,"[263] including transportation, courier, and delivery services.

Uber, and gig-economy platform firms like it, are exemplars of workplace "fissuring," where firms come to exercise effective control over individuals who do work for that firm but without the responsibility to provide them wages or benefits.[264] Uber, like other ride-hailing gig-economy firms, relies on fissuring its work arrangements by taking advantage of antitrust law's particular allocation of coordination rights — specifically, its friendliness to vertical relationships — in order to avoid the application of substantive labor and employment laws. Uber relies on independent contractors, who are held not to be employees, to provide its essential service of transportation. In coordinative terms, Uber relies on the fact that its drivers, as independent contractors, cannot coordinate horizontally among themselves to provide transportation services,[265] as this would be price-fixing under contemporary antitrust law.[266] Neither can these drivers form a union that provides the services as well, though they could potentially form a joint-venture association.[267] Uber and firms like it also impose vertical restraints on drivers, such as resale-price-maintenance restrictions and data withholding.[268]

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263. West, *supra* note 261.

264. *See supra* notes 259-260.

265. *Cf.* Paul, *supra* note 213, at 972, 1030-33 (discussing the rule that, generally, independent contractors cannot engage in worker collective action without violating antitrust laws).

266. *See* Paul, *supra* note 227, at 233.

267. *See* Steven C. Salop, *Can Contract Workers Organize as Joint Venture Associations?*, LPE Blog (Apr. 11, 2022), https://lpeproject.org/blog/can-contract-workers-organize-as-joint-venture-associations [https://perma.cc/L35K-2QJX].

268. *See* Peterson & Steinbaum, *supra* note 259, at 629-32, 636-37. Resale-price-maintenance (RPM) restrictions prevent rideshare drivers from charging different rates to riders, and Uber goes so far as to make drivers agree, by contract, to "charge the Rider Payment to the Rider at the amount recommended by us," as alleged by some drivers challenging these actions in California state court. *See* Complaint at 6, Gill v. Uber Techs., Inc., No. CGC-22-600284 (Cal. Super. Ct. June 21, 2022). The *Gill* case ended in a motion compelling arbitration, so the merits of the RPM claim were never considered (and Uber's behavior never fully challenged in court, as the thesis of this Note seeks to emphasize). *See* Order Granting Defendant Uber Technologies, Inc.'s Motion to Compel Arbitration and Stay Proceedings as to Plaintiffs Taje Gille, Esterphanie St. Juste, and Benjamin Valdez at 1, *Gill*, No. CGC-22-600284 (Cal. Super. Ct. June 14, 2023). RPM is a vertical restraint (a restraint imposed by one party on another at separate market levels), but vertical restraints are not per se violations of antitrust law. *See supra* note 214 and accompanying text; *see also* Callaci & Vaheesan, *supra* note 260, at 47-48 (discussing RPM's effects on labor conditions). For a general discussion of monopolist firms' ability to impose coercive practices on workers and consumers, see Teachout, *supra* note 108, at 99-104. Nonlinear payment schemes — typically bonuses given to drivers for completing a certain number of rides within an amount of time — are not exactly vertical restraints but

More broadly, Uber sets prices, directs contractors to accept jobs by deactivating those who do not accept sufficient numbers of jobs,[269] and takes a cut of any transactions occurring on the platform—all of which seem to signal the presence of an employment relationship and which therefore raise the specter of legal liability for misclassification under state and federal labor laws or under antitrust law.[270]

Arbitration plays a key role in protecting Uber from its drivers and from consumers, the two small players with which it deals. Litigation against the firm could force it permanently to change its operating model on two axes. Lawsuits could expose it to such great damages that it remains uneconomical to operate in that manner, or could even subject Uber to equitable relief that would force it to change its contracting practices. Arbitration neuters both. Consider two lawsuits brought against Uber since the app's widespread rollout. In 2016, drivers sued Uber in federal court, with their complaint surviving a motion to dismiss on both horizontal and vertical price-fixing claims.[271] Judge Rakoff accepted that plaintiffs had plausibly alleged a classic horizontal and vertical price-fixing conspiracy, detailing a "hub-and-spoke" conspiracy where a series of vertical agreements (the spokes) between individual drivers and Uber (the hub) amount to a horizontal price-fixing agreement, which is per se illegal under antitrust doctrine.[272] But instead of litigating the claims to completion—which could have forced a change in Uber's business practices through injunctive relief or a public

"are akin to coercive labor market contracts in which the employer has some ability to worsen the worker's outside option and thereby reduce his or her threat point, which will then lower the wage that has to be paid to induce labor supply." Peterson & Steinbaum, *supra* note 259, at 634.

269. Alex Rosenblat, Uberland: How Algorithms Are Rewriting the Rules of Work 150 (2018).

270. *See* Marshall Steinbaum, *The Antitrust Case Against Gig Economy Labor Platforms*, LPE Blog (Apr. 7, 2022), https://lpeproject.org/blog/the-antitrust-case-against-gig-economy-labor-platforms [https://perma.cc/69VR-849Z]; Peterson & Steinbaum, *supra* note 259, at 654-56.

271. Meyer v. Kalanick, 174 F. Supp. 3d 817, 821-28 (S.D.N.Y. 2016).

272. *Id.* at 824-26. Plaintiffs also successfully defined a relevant market for the alleged vertical agreements, which allowed those claims to survive the motion to dismiss. *See id.* at 827-28. But since then, the Supreme Court's decision in *Ohio v. American Express Co.* has made it much more difficult for antitrust claims against platforms to define successfully a relevant market since such platforms pertain to markets that are "two-sided," so that, essentially, *both* sides of the market must be noncompetitive for such claims to proceed. *See* 585 U.S. 529, 533-37, 542-49 (2018). If the *Meyer* case had been brought today, it may not have survived a motion to dismiss. *See* Buck, *supra* note 187, at 888 & n.131, 896-97, 897 n.180. For an argument that Uber is in all probability a two-sided platform under *Ohio v. American Express Co.*, see Sanjana Parikh, Note, *Defining the Market for Two-Sided Platforms: The Scope of* Ohio v. American Express, 34 Berkeley Tech. L.J. 1305, 1329-32 (2019).

pressure campaign—Uber successfully shunted the claims into arbitration.[273] Uber's use of a single-file arbitration mandate worked: it prevented substantive adjudication, and the subsequent arbitration unsurprisingly absolved Uber of any wrongdoing—a result that plaintiffs unsuccessfully sought to vacate, again before Judge Rakoff.[274]

The ability of Uber to arbitrate questions of employment classification is critical. In *Bissonnette v. LePage Bakeries Park St., LLC*,[275] the Supreme Court confirmed that a worker need not be employed in the transportation industry to be "engaged in . . . interstate commerce" and thus exempt from Section 1 of the FAA.[276] Since Uber contends that it is not a transportation company, but rather a "technology platform for several different types of digital marketplaces,"[277] *Bissonnette* opens the door to a potential holding that Uber's drivers, were they adjudged to be employees, may not have their contracts arbitrated. That being said, the circuits have generally concluded that Uber drivers who only perform a minority of trips across state lines are not engaged in interstate commerce.[278]

Now, consider Uber's ability to vitiate the legal liability it may face with respect to consumers, the other major category of small players with which it deals.[279] In *Davitashvili v. Grubhub*, a more recent antitrust class action, plaintiff-consumers alleged that gig-economy platforms—including GrubHub, Uber, and Postmates (owned by Uber)—conspired to fix prices by entering into agreements with restaurants that do not allow those restaurants to charge lower prices

273. *See* Meyer v. Uber Techs., Inc., 868 F.3d 66, 76-81 (2d Cir. 2017).

274. *See* Meyer v. Kalanick, 477 F. Supp. 3d 52, 55-57 (S.D.N.Y. 2020).

275. 601 U.S. 246 (2024).

276. *Id.* at 248-52; 9 U.S.C. § 1 (2018).

277. West, *supra* note 261.

278. *See, e.g.*, Capriole v. Uber Techs., Inc., 7 F.4th 854, 863-65 (9th Cir. 2021) (explaining that Uber drivers crossing state lines are "merely convey[ing] interstate . . . passengers between their homes and [their destinations] in the normal course of their independent local service" (quoting United States v. Yellow Cab Co., 332 U.S. 218, 233 (1947), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984))); Cunningham v. Lyft, Inc., 17 F.4th 244, 252-53 (1st Cir. 2021) (reading Section 1 of the FAA to embrace only "workers primarily devoted to the movement of goods and people beyond state boundaries," which "cannot even arguably be said of Lyft drivers"); Singh v. Uber Techs., Inc., 67 F.4th 550, 560 (3d Cir. 2023) (explaining that traveling across state lines is not, "on the whole, an essential part of" driving Uber, and Uber drivers' transport of passengers traveling interstate is not a "'constituent part' of the interstate movement of goods or people" (citing Immediato v. Postmates, Inc., 54 F.4th 67, 77 (1st Cir. 2022))).

279. For an overview of how Uber abuses consumer-protection law, see Peterson & Steinbaum, *supra* note 259, at 642-57.

off the platform.[280] The plaintiffs' main argument was that the platforms' use of no-price-competition clauses—vertical agreements with the restaurants that do not allow them to charge lower prices to consumers off the platforms—harms consumers who do not use platforms and is a kind of price-fixing or a restraint of trade.[281] The defendants moved to compel arbitration pursuant to the agreements they impose on customers who use the platforms, even though at least one of the plaintiffs had never used any of the platforms.[282] Had the motion succeeded, Uber would have stopped, for the time being, challenges against it from the two kinds of small players it sought to bind, effectively preventing any regulation outside of actions brought by governmental parties.

In fact, Uber's aims in moving to compel arbitration were broader than the instant litigation. The defendants offer an interpretation of arbitration's scope that is so broad it commits almost *any* dispute to arbitration regardless of whether an actual contract exists between Uber and a small player, which would do a great deal to entrench Uber's position. The arbitration agreements in Uber's and Grubhub's terms-of-use contracts are so expansive that they cover any claim arising out of "your relationship with Uber"[283] or "your relationship with Grubhub."[284] One scholar calls such terms "[i]nfinite arbitration clauses," where claims arising outside the subject matter of—and even the parties to—the contract nevertheless must be arbitrated.[285] The infinite arbitration clause perturbed Judge Kaplan of the Southern District of New York, who rejected the defendants'

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280. Davitashvili v. Grubhub Inc., No. 20-cv-3000, 2023 WL 2537777, at *1 (S.D.N.Y. Mar. 16, 2023), *appeal docketed*, Nos. 23-521, 23-522 (2d Cir. argued Dec. 15, 2023).

281. *See id.*; Peterson & Steinbaum, *supra* note 259, at 629-32 (detailing similar retail-price-maintenance practices).

282. *Davitashvili*, 2023 WL 2537777, at *1.

283. Brief for Defendant-Appellants Uber Technologies, Inc. and Postmates, LLC at 5, Davitashvili v. Grubhub Inc., Nos. 23-521, 23-522 (2d Cir. May 26, 2023) (quoting an arbitration clause that provides that, with exceptions, "you and Uber agree that any dispute, claim, or controversy in any way arising out of or relating to . . . your relationship with Uber, will be settled by binding individual arbitration between you and Uber, and not in a court of law").

284. Brief for Defendant-Appellant Grubhub Inc. at 10-11, *Davitashvili*, Nos. 23-521, 23-522 (2d Cir. May 26, 2023) (requiring arbitration of "all claims, disputes, or disagreements that may arise out of . . . your relationship with GrubHub, or any other dispute with GrubHub").

285. David Horton, *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633, 639-40 (2020). Consider the following real-world example of an infinite arbitration clause. A woman died after suffering an allergic reaction at a Disney theme park, and Disney at first sought to arbitrate her widower's wrongful-death lawsuit against Disney because he signed up for a one-month free trial of Disney+ four years before her death. *See* Philip Marcelo, *Disney Drops Bid to Have Allergy-Death Lawsuit Tossed Because Plaintiff Signed Up for Disney+*, AP News (Aug. 20, 2024, 4:56 PM EDT), https://apnews.com/article/disney-allergy-death-lawsuit-b66cd07c6be2497bf5f6bce2d1f2e8d1 [https://perma.cc/L8BL-2J3B]. After intense public outcry, Disney relented, withdrawing its motion to compel arbitration. *Id.*

motion to compel arbitration on the grounds that the purchases at supercompetitive prices occurred off the platform and thus outside the contract.[286] Under New York law, arbitration clauses cannot be applied to claims "without a nexus to the underlying agreement as a matter of contract formation and unconscionability."[287] Strictly speaking, with respect to the purchases that harmed the consumers, no contract existed between the consumers and the platforms. The platforms have appealed to the Second Circuit, but curiously, they have pursued different lines of argument. Grubhub, opting for a maximalist take on arbitration like today's Supreme Court, contends that infinite arbitration clauses are valid and enforceable.[288] Uber offers a somewhat more restrained argument that the arbitration clause at issue is "not an 'infinite' arbitration clause" because it offers several carve-outs, none of which, conveniently, apply to the plaintiffs' claims.[289]

The foregoing shows the utility of arbitration in ossifying the gig-platform structure by defending potentially illegal abuses of antitrust, employment, and consumer law. By contrast, government enforcement actions, which cannot be arbitrated, offer the promise of permanent change that the gig firms seek to avoid. While not a gig-economy case, *United States v. American Express Co.* saw the government bring Sherman Act Section 1 claims against the three major credit-card platforms—American Express, MasterCard, and Visa—over antisteering provisions, contractual terms which discourage the merchants who possess credit-card terminals at their registers from inducing customers to use a different card, usually one that charges the merchant lower rates.[290] Such provisions can harm merchants—that is, small players networked into the credit-card companies' platforms, who must pay a fee to gain access to that network. Merchants often pass higher fees, especially those imposed by American Express, onto consumers.[291] Visa and MasterCard entered into consent decrees with the

286. *Davitashvili*, 2023 WL 2537777, at *10 (arguing that "[t]he fact that the [plaintiffs] at some time used some of the defendants' platforms is purely coincidental" and cannot justify the imposition of arbitration absent an explicit agreement).

287. *Id.* at *10 (citing McFarlane v. Altice USA, Inc., 524 F. Supp. 3d 264, 279 (S.D.N.Y. 2021)).

288. Brief for Defendant-Appellant Grubhub Inc., *supra* note 284, at 61-67 ("Rather, the arbitration provision requires Appellees to arbitrate 'any other dispute with Grubhub.'" (quoting Joint Appendix at 143, Davitashvili v. Grubhub, Nos. 23-521, 23-522 (2d Cir. argued Dec. 15, 2023))).

289. Brief of Defendant-Appellants Uber Technologies, Inc. and Postmates, LLC, *supra* note 283, at 30-31.

290. 88 F. Supp. 3d 143, 150 (E.D.N.Y. 2015) (describing the antisteering provisions), *rev'd and remanded*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 585 U.S. 529 (2018).

291. *Id.*

government where they voluntarily curbed the restraints they had imposed,[292] but American Express lost a bench trial,[293] allowing Judge Garaufis to order permanent injunctions against the firm along lines proposed by the government.[294] While the verdict was overturned by the Supreme Court,[295] it illustrates the possibility of litigation in federal or state court to police firms that take advantage of the position they occupy in a market. Arbitration forecloses the ability of small players to resist firm coercion, necessitating government enforcement actions to remedy bad behavior.

But how much money do firms save by structuring themselves as gig-economy platforms and policing themselves with arbitration provisions? While estimates vary on the amount of money saved by gig-economy firms' reliance on independent contractors, one report that surveyed existing data estimated that billions have been saved in payroll costs.[296] Further empirical work is needed to determine the dollar savings associated with arbitration law's allocation of coordination rights away from small players to large firms—in other words, the dollar savings associated with firms' widespread use of single-file arbitration mandates.[297] Such a study should compare the costs associated with a class action launched by a certain number of workers or consumers with the costs arising from an equivalent number of individual arbitrations. It seems intuitive that the former figure would be much larger than the latter, but empirical work would

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292. *Id.* at 149.

293. *Id.* at 150.

294. United States v. Am. Express Co., No-10-CV-4496, 2015 WL 1966362, at *1 (E.D.N.Y. Apr. 30, 2015), *rev'd and remanded*, 838 F.3d 179 (2d Cir. 2016).

295. *Am. Express Co.*, 585 U.S. at 547-52 (reasoning that the credit-card market is "two-sided," including both merchants and cardholders, and that the government had not shown anticompetitive effects because it focused on merchants alone).

296. According to the report, such firms save up to thirty percent of their payroll and other related costs, amounting to billions of dollars. *See Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT 1 (Oct. 2020), https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [https://perma.cc/RMY3-5ADZ]. Drivers asserted in a complaint against Uber in California state court that misclassification may save Uber $500 million a year. *See* First Amended Class Action Complaint for Violation of the California Unfair Competition Law and the California Unfair Practices Act at 3, Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074 (N.D. Cal. 2019) (No. 18-cv-05546).

297. Professor Christopher R. Drahozal's article entitled *Arbitration Costs and Forum Accessibility: Empirical Evidence*, *supra* note 157, remains the closest study on this point. Drahozal concludes that upfront arbitration and litigation costs are comparable "for small consumer claims and many employee claims." *Id.* at 840-41. But his study is limited only to claims that actually make it to arbitration—that is, not claims that are too low value for attorneys to bring in the first place. *See id.* (discussing some limitations of the study).

clarify the stakes of arbitration law's allocative effects. In any event, single-file arbitration mandates are primarily meant to dissuade claims outright, which would certainly lower costs associated with defending a suit or being held civilly liable in a federal or state court. In short, without the violations of substantive legal protections and requirements ordained by antitrust and employment law, and without arbitration law suppressing the coordination rights in market disputes of small players, firms may have less incentive to organize as gig-economy platforms.

In sum, the restrictive arbitration doctrine works to constrain the horizontal coordination of small players like the contractors of gig-economy platforms. Antitrust and employment law create the initial structure, and arbitration law defends it by restricting challenges against it. Together, they allow gig-economy platforms to take advantage of a business model where the individuals who carry out their core services (drivers and couriers, for example) cannot coordinate horizontally—neither in offering services themselves nor in litigation—relative to those firms. Gig-economy firms then ossify that structure by using single-file arbitration mandates to prevent their contractors from litigating collectively against them. The effect is to insulate themselves from any collective pressures exerted by their contracted workforce. With no countervailing power, firms can be tempted by impunity. One gig-platform firm, DoorDash, was sued by the D.C. Attorney General for allegedly stealing its couriers' tips, eventually settling the matter for over $2.5 million.[298] This is the core political economy of today's arbitration doctrine.

C. The False Promise of Mass Arbitration

The most important recent development in arbitration law has been the advent of mass arbitration,[299] that is, the simultaneous filing of thousands or tens of thousands of arbitration demands against firms that employ single-file arbitration mandates. By using technology to identify thousands or tens of

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298. Consent Order and Judgment, District of Columbia v. DoorDash, Inc., 2019 CA 007626 B (D.C. Super. Ct. Nov. 24, 2020), https://oag.dc.gov/sites/default/files/2020-11/DoorDash-Consent-Order.pdf [https://perma.cc/27B6-RVQ3]. For background, see Justin Wm. Moyer, *DoorDash Settles D.C. Lawsuit for $2.5 Million After Being Accused of Pocketing Workers' Tips*, WASH. POST (Nov. 4, 2020, 4:19 PM EST), https://www.washingtonpost.com/local/public-safety/doordash-settles-dc-lawsuit-for-25-million-after-allegedly-pocketing-workers-tips/2020/11/24/b36e3f00-2e92-11eb-9c71-ccf2c0b8d571_story.html [https://perma.cc/9XGV-MXLU].

299. For an account of mass arbitration's origins and procedure, see J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1319-55 (2022); and Cheryl Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence Has Created a Brand New Private Enforcement Regime in the Gig Economy Era*, 69 UCLA L. REV. 372, 386-404 (2022).

thousands of clients, generate arbitration demands, and file them at a single time, lawyers have forced firms into situations where they have contractually agreed to foot a potentially vast bill for arbitration that they never expected to cover. Because most arbitration mandates provide that the respondent firm will pay for initial filing fees and much, if not all, of the arbitration, filing thousands of claims at once places significant pressure on firms to settle early.[300] Characterized as a (perhaps temporary) victory for workers and consumers, the litigation strategy of mass arbitration, like the single-file mandatory arbitration it is designed to counter, presents the greatest opportunity for advocates of workers and consumers in vindicating meritorious but low-dollar claims.

The foregoing political-economy analysis implies that since the ability to enforce single-file arbitration is more about controlling other market actors and less about limiting costs and liability, firms are unlikely to drop their arbitration mandates when confronted with mass arbitrations, even when dropping them could save money. Instead, firms will be more likely to alter their contracting policies to blunt mass arbitration, such as by imposing further procedural requirements that work to disaggregate claims. This is in fact what most firms have done. Most firms have adopted "batching" provisions, which offset the initially high upfront cost of a mass arbitration by providing some form of mandatory consolidation.[301] These provisions limit the number of arbitrations that can take place against them at any one time, using a bellwether-trial system[302] not unlike contemporary multidistrict litigation that subsequently builds a mandatory settlement for the larger inventory of claims after some trials conclude. For example, Verizon's batching provision triggers when fifty or more customers represented by the same or "coordinated" counsel (as in, all mass arbitrations) file claims.[303] Both Verizon's and claimants' counsel select twenty-five cases to proceed, after which the parties must engage in mediation of all remaining cases. If no settlement prevails after this phase, the process repeats, with more arbitrations. Gibson Dunn, a law firm with experience defending companies hit with

300. *See* Wilson, *supra* note 299, at 386-404 (describing mass arbitration's procedural elements).

301. *See* Glover, *supra* note 299, at 1367-70 (describing the mechanics of these "batching" provisions).

302. In multidistrict litigation, a bellwether trial, or a batching system, parties hold one or a set number of trials and then build a settlement for the remaining cases based on the results. *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS 41 (6th ed. 2022). It should be noted that courts have not looked favorably on bellwether arbitration processes, with federal trial courts in California rejecting attempts by LiveNation and Verizon, respectively. *See* Alison Frankel, *'Bellwether' Arbitration Takes Another Hit Ahead of Key Appeal*, REUTERS (Aug. 14, 2023, 6:18 PM EDT), https://www.reuters.com/legal/litigation/columnbellwether-arbitration-takes-another-hit-ahead-key-appeal-2023-08-14 [https://perma.cc/GA72-XEFZ].

303. *Verizon Customer Agreement*, *supra* note 15, § 16.6.

mass arbitration, specifically recommends employing such batching provisions,[304] as does the U.S. Chamber of Commerce.[305]

The change in the contracting regime reveals mass arbitration's weakness. It does not reallocate coordination rights back to claimants and only increases the costs associated with imposing arbitration mandates in the first place. No mass arbitration has successfully resulted in anything other than a settlement so far—that is, none have induced gig-economy firms to reclassify their contractors as employees,[306] though it is not clear if any mass arbitration has attempted this or if this would even be possible through arbitration. Since mass arbitration does not restore access to courts but may make it more likely for claimants to get financial redress, it is also not clear that access-to-justice proponents would champion it. At best, mass arbitration somewhat augments the economics of taking negative-value claims for attorneys. Most commentary on mass arbitration so far sees defendants as engaged in accounting, weighing the cost of defending a mass arbitration against the cost of allowing federal and state court filings.[307] This is important since private civil-suit liability is one of the primary ways in which individuals enforce rights granted to them by the law.[308] In this way, mass arbitration can play a role in preventing firms from shirking obligations under substantive law, or at the very least force them to pay up when they try to avoid them. But since claimants cannot, for example, use these strategies to challenge misclassification or vertical restraints, mass arbitration cannot reallocate horizontal-coordination rights.

In short, while mass arbitration's best success has been to give firms a bloody nose by using the strictures of their own arbitration exemption against them,

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304. Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Developed Strategies for Deterring and Defending Against Them*, Gibson Dunn (May 24, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/05/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them.pdf [https://perma.cc/4SR9-USDG].

305. Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett & Carmen Longoria-Green, *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, U.S. Chamber of Com. Inst. for Legal Reform 48-56 (Feb. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf [https://perma.cc/9442-NP5N] (recommending the use of a bellwether-trial system).

306. It remains theoretically possible that the terms of such a settlement could result in policy change, such as converting some gig-economy contractors to workers, but since arbitration results are almost always confidential, this is very difficult to know.

307. *See, e.g.*, Wilson, *supra* note 299, at 411-18, 431-36; Dave Rochelson, *Is This the End of Mandatory Arbitration?*, 36 Antitrust, no. 1, 2021, at 63, 66-67.

308. Wilson, *supra* note 299, at 438 (arguing that mass arbitration is "the best means to realizing substantive rights for meritorious claims that is currently available for individuals bound by mandatory arbitration"); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1145-47 (2012).

further responses to arbitration from a political-economy perspective will require an alternative program. At least the advent of mass arbitration opens imaginative horizons.

CONCLUSION

This Note has offered a rejoinder to the dominant and well-articulated access-to-justice critique, which, despite its many benefits, is incomplete. In focusing on how the existing arbitration regime could be made more friendly to claimants, the access-to-justice critique fails to account for arbitration's allocation of coordination rights.[309] The access-to-justice critique speaks in too similar a register to the Court's restrictive arbitration jurisprudence, articulating goals within its horizons. Drawing instead from an alternative account of the history of arbitration jurisprudence, this Note has contended that arbitration suppresses the coordination rights of small players in market disputes. In turn, this distribution of coordination rights in disputes shapes economic production, an effect revealed most prominently by firms organized as gig platforms. Across both arbitration and antitrust, it is a market's smallest players — workers, consumers, contractors, and small firms — who are left unable to access the law's benefits and unable to marshal their bargaining power when they face legally cognizable injury. The political-economy critique emphasizes that a form of economic production cannot be separated from the rules structuring the resolution of disputes over that production. And in highlighting arbitration's suppressive effects on coordination, the political-economy critique strives toward the goal of creating a fairer market system for all small players and a more just national economic life.

309. *See supra* Section I.B.3; *see also* Chandrasekher & Horton, *supra* note 2, at 9 ("[A]rbitration has the capacity to facilitate access to justice . . . [but it] is not currently living up to this potential.").