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2012

Judging Lite: How Arbitrators Use and Create Precedent

W. Mark C. Weidemaier, *University of North Carolina, Chapel Hill*



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JUDGING-LITE: HOW ARBITRATORS USE AND CREATE PRECEDENT

W. Mark C. Weidemaier^{*}

ABSTRACT

Common wisdom has it that arbitrators neither follow nor make precedent, with potentially dire consequences. These include the failure to enforce individual rights and the possibility that, over time, widespread use of arbitration will result in the decay or destruction of the law itself. Although difficult to test directly, this common wisdom can be explored indirectly by analyzing arbitrators' citation practices. This article conducts such an analysis using a unique dataset of published arbitration awards from four US arbitration regimes: securities, labor, employment, and class action arbitration. It explores how arbitrators use precedent and where that precedent comes from, and it attempts a tentative comparison between the citation practices of judges and arbitrators.

Outside of securities and (to some extent) labor arbitration, the arbitrators in the sample routinely wrote lengthy awards that were substantially devoted to legal analysis and that made extensive use of precedent. The vast majority of cited precedent, moreover, came from published judicial opinions. Arbitrators did cite to past arbitration awards, but primarily to fill gaps in the law created by government actors. On the whole, the evidence provides little support for the view that arbitrators and judges engage in qualitatively different kinds of decision-making or opinion-writing.

^{*}Assistant Professor of Law, University of North Carolina at Chapel Hill. For helpful comments on prior drafts, thanks to Chris Drahozal, Adam Feibelman, Mark Fenster, Don Hornstein, Melissa Jacoby, Eric Kades, Catherine Kim, Guangya Liu, Eric Muller, and Bo Rutledge. Thanks also to participants at the Quinnipiac-Yale Dispute Resolution Workshop and at conferences and workshops at the University of Florida and University of North Carolina. Finally, thanks to Doug DeBaugh, Matt Randol, and Jeff Zhao for research assistance.

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INTRODUCTION

Widespread use of arbitration results in the wholesale transfer of disputes from public courts to private dispute resolution regimes, with serious potential consequences. Perhaps the most far-reaching potential consequence follows from the belief that arbitrators neither follow nor create precedent. According to common wisdom, arbitrators' decisions are fundamentally ad hoc—untethered from the rules and standards applied to resolve past disputes. And because judicial review is limited, arbitrators are free to misapply or even disregard the law without fear of correction.

If this vision is accurate, then arbitrators, unlike common law judges, “neither follow the law nor contribute to it.”¹ As the concern is sometimes expressed, arbitrators may ignore relevant precedent, and their awards have no value as precedent in future disputes.² Worse, by removing cases from the judicial system, arbitration diminishes the supply of precedent available to the world at large.³ When combined with the fear that arbitrators often favor businesses in disputes with consumers and employees, the implication is stark: arbitrators often fail to enforce important individual rights, and arbitration will eventually result in the destruction of the law itself.⁴

These concerns are serious, but they rest on what has been called a “folklore” understanding of arbitration.⁵ The reality is that we know very little about how arbitrators behave, and much of what we do know comes from studies of international arbitration.⁶ This article begins to fill that void.

¹ See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002).

² See, e.g., David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 490 (2011) (noting that “arbitrators need not follow precedent and thus can flout controlling law”).

³ Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORD. URB. L.J. 803, 830–31 (2009); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 694–96 (1996). For critical evaluations of this argument, see Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 190, 207–14 (2006–2007); Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 243–47 (2000).

⁴ Thus, arbitration has sometimes been called a “denial of the law,” Knapp, *supra* note 1 at 766, the “end of the law,” Rex R. Perschbacher & Debra Lynn Basset, *The End of Law*, 84 B.U. L. REV. 1, 29–30 (2004), and a tool of the law’s “destruction,” Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003).

⁵ Edward Brunet, *Replacing Folklore Arbitration With a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 42 (1999–2000).

⁶ See generally Drahozal, *supra* note 3 (evaluating empirical basis for claims of arbitral “lawlessness”).

Drawing on insights developed in earlier work,⁷ and using a unique dataset of awards from four domestic arbitration regimes, I ask whether arbitrators use precedent in any meaningful sense, where that precedent comes from, and how their behavior compares to that of judges.⁸ I also ask whether and under what conditions arbitrators generate precedent of their own. To preview the primary findings: Arbitrators who write reasoned awards behave much like judges, especially when hearing statutory (as opposed to contract) disputes. They write detailed awards that make extensive use of precedent, although perhaps to a slightly lesser degree than judges. Citations to judicial opinions also dominate the arbitration awards. Arbitrators occasionally cite to other arbitrators, but they usually do so only when there is not likely to be relevant judicial authority. These findings are subject to caveats discussed at length in this article. On the whole, however, they seriously undercut the view that arbitration involves a qualitatively different kind of decision-making than judging. Call it “judging lite.”

Part I briefly introduces the debate over the role of precedent in arbitration and summarizes the limited available evidence. Part II describes the dataset, which consists of published awards drawn from the BNA labor Arbitration Reporter, awards rendered in employment disputes administered by the American Arbitration Association (AAA), awards rendered in AAA class arbitrations, and awards rendered in securities arbitrations administered by the National Association of Securities Dealers (NASD) or the New York Stock Exchange (NYSE), now known as the Financial Industry Regulatory Authority (FINRA).

Part III analyzes the awards. I do not purport to describe the considerations that *in fact* drive arbitrators’ decisions.⁹ Instead, I focus on citation practices—that is, on the extent to which arbitrators refer in their awards to past decisions by judges or other sources of legal authority, including arbitration awards.¹⁰ Part III begins by demonstrating substantial

⁷ See W. Mark C. Weidemaier, *Towards a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1905–06 (2010).

⁸ For an examination of arbitrators’ and judges’ opinions in the context of race discrimination claims, see Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185 (2011).

⁹ For example, this article does not explore whether the characteristics of arbitrators influence dispute outcomes. See Stephen J. Choi, Jill E. Fisch, & A.C. Pritchard, *Attorneys as Arbitrators*, 39 J. LEG. STUD. 109 (2010).

¹⁰ There is an extensive body of research examining citation practices of judges, often though not always with the goal of measuring judicial quality. For just a smattering of this research, see Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions?: A Statistical Examination*, 70 MD. L. REV. 234 (2010); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008); Robert C Bird & Donald J. Smythe, *The Structure of American Legal Institutions and the Diffusion of Wrongful Discharge Laws, 1978–1999*, 42 LAW &

variance in citation practices across the four arbitration regimes. This variance cautions against making broad generalizations about how arbitration does or does not work. The reality is that arbitration regimes differ along a range of dimensions that may influence the extent to which arbitrators create and purport to use precedent.¹¹

Part III then turns to particular claims regarding the role of precedent in arbitration. First, it explores whether arbitrators in these four regimes make seemingly ad hoc decisions, instead of decisions that purport to be guided and constrained by precedent. As many would expect based on prior research,¹² the “ad hoc” description best fits securities arbitration awards, most of which provide no explanation whatsoever for the result. Securities arbitrators may or may not *in fact* try to apply the securities laws or to conform their decisions to those made in prior cases. If they do, however, their awards yield no trace of such a reasoning process.

But a very different picture emerges from the other three arbitration regimes, especially employment and classwide arbitration. Arbitrators routinely write lengthy awards that are substantially devoted to legal analysis and that often make extensive use of precedent. Part III also demonstrates that precedent assumes a greater role in arbitration contexts where concerns about ad hoc decision-making are most acute, such as when consumers and employees seek to vindicate non-waivable statutory rights in so-called “mandatory” arbitration regimes.¹³

SOC’Y REV. 833 (2008); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004); William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998); David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC’Y REV. 337, 348 (1997); William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993). For similar studies in the context of arbitration, see *infra* note 35. On the use of citation analysis in evaluating arbitration awards, see Christopher S. Gibson & Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. Int’l Arb. 521, 537–38 (2006).

¹¹ Weidemaier, *supra* note 7, at 1914-49.

¹² See Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 144-45 (2005–2006). See also Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 474-86 (2007–2008); Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1484 (1996).

¹³ The employment, securities, and class action arbitrations addressed in this article are “mandatory,” as that term is typically—if somewhat confusingly—used. See Ian R. Macneil et al., *FEDERAL ARBITRATION LAW* §17.1.2.2, at 17:8–:9 (Supp. 1999). Broadly speaking, “mandatory” arbitration agreements refer to those resulting from contracts characterized by information or other asymmetries, which suggests a greater need for regulation of these contracts. See Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits*

Part III next explores the circumstances under which arbitrators assign precedential value to past arbitration awards. Here too, there is significant variance across the four types of arbitration. Labor arbitrators cite past awards more frequently, and in greater numbers, than arbitrators in the other regimes, and labor arbitrators often justify their decisions by citing *only* other arbitration awards. But the data also suggest a role for arbitral precedent in other contexts, such as on questions of procedure and, perhaps, on questions of substantive law for which there is little judicial authority. At the same time, there is little evidence outside of labor disputes that domestic arbitration awards are widely assigned value as precedent. Nor is there any support for the commonly-held view that a system of arbitral precedent will arise whenever arbitrators write and publish reasoned awards.

Finally, Part III compares how judges and arbitrators use precedent in one subset of disputes: statutory claims of employment discrimination. The comparison is complicated by a number of differences between arbitration and litigation, but it appears that precedent may play a somewhat lesser role in arbitration. Arbitrators tend to cite fewer precedents than judges, and they arguably engage in less depth with the precedent they do cite. As I will explain, however, it is not clear that these differences matter in terms of the functions served by precedent. It is an open question, for example, whether judicial opinions better inform litigants of the reasons for the decision or provide more stable rules to support private ordering.

Part IV concludes by linking these findings to debates over the role of precedent in arbitration and by exploring implications for judicial review. With the possible exception of securities arbitration, the evidence does not support the claim that arbitrators routinely disregard the law or decide cases in an ad hoc fashion. Arbitration is a service provided in a competitive market,¹⁴ which means that arbitrators will apply whatever rules the parties want (or whatever rules the party with the power to dictate the terms of the arbitration wants). Thus, the fact that citations to judicial opinions dominate the employment and class arbitration awards implies that, at least in these contexts, parties want judicial precedent to govern their disputes. That does not mean that arbitrators and judges always apply the law in the same way

All” Does Not Fit, 16 OHIO ST. J. DISP. RESOL. 759, 767-75 (2001). Note, however, that even mandatory arbitration regimes vary in ways that make it difficult to generalize. See W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 660-63 (2007).

¹⁴ See Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 161-65 (2004) (describing market for dispute resolution). Reasonably competitive, in any event. Reputation is the only real barrier to entry, although it may be a significant one. Stephen J. Choi, *The Problem With Arbitration Agreements*, 36 VAND. J. TRANS’L LAW 1233, 1238 (2003).

or that arbitration always produces equivalent outcomes.¹⁵ But it does caution against drawing simplistic lines between arbitral and judicial decision-making.

Part IV closes with a discussion of judicial review of arbitral awards, focusing on the possibility for enhanced dialogue between arbitrators and judges. As a formal matter, judges have little power to review arbitration awards. But given the similarities between arbitral and judicial decisions, it is curious that judges do not engage with arbitration awards in less formal ways—as potentially persuasive, though certainly non-binding precedent. To the extent private law-making has value, judges might improve the quality of their decisions by explicitly considering how arbitrators have resolved similar questions. And given the seeming tendency of arbitrators to follow the law as articulated by judges, this kind of informal judicial “review” might help judges to correct mistakes or outright abuses of the law-making authority that arbitrators in fact exercise.

I. ARBITRATORS AS DESTROYERS (OR CREATORS?) OF PRECEDENT

For starters, it is worth asking why arbitrators would use precedent any differently than judges. In theory, parties go to arbitration for the same reason they go to court: because they have not settled a dispute and need a third party to adjudicate it.¹⁶ Of course, one or both parties may prefer arbitration for a reason. They might want expertise, a faster result, privacy, lower process costs, or simply a more favorable result.¹⁷ But the service arbitrators provide to litigants—binding, third-party dispute resolution—is essentially the same as that provided by judges. Just like courts, moreover, arbitration regimes often involve lawyers and even former judges as party representatives and arbitrators.¹⁸ So it is reasonable to suppose that arbitrators often will hear arguments founded on legal authority, and it is not clear why they would disregard these arguments.¹⁹

Yet despite the similarity between arbitration and litigation, there remain some grounds for skepticism about the role of precedent in

¹⁵ For studies examining arbitration outcomes, *see infra* note 67.

¹⁶ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 449–57 (2010).

¹⁷ Drahozal & Ware, *supra* note 16 at 451–52; Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1187–88 (2004).

¹⁸ For an argument that bar associations promoted modern arbitration statutes to reduce competition from forms of arbitration that did not involve lawyers, see Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J. L. ECON. & ORG. 479 (1995).

¹⁹ Alan S. Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 514–15 (2005).

arbitration. One is that parties might choose arbitration because they wish to create a different *kind* of precedent, a body of rules better suited to their needs than government-created rules.²⁰ In such a system, arbitrators would displace judges, legislators, and other state actors as producers of law. If the parties to the arbitration agreement are fully informed, and the law relevant to their dispute consists of default rules that may be changed by contract, this would not necessarily be a problem.²¹ Most objections to arbitration, however, focus on arbitration agreements between businesses and consumers or employees and on disputes arising under mandatory law, such as securities, consumer protection, and anti-discrimination laws.²² If arbitrators develop their own rules in such cases, then arbitration effectively “converts what would otherwise be mandatory rules of law into default rules.”²³ Through such a process, laws designed to remedy employment discrimination, for example, could be replaced by a system of rules designed by private actors accountable largely to employers.

A more common fear is that arbitrators will not follow or create precedent at all. Arbitral decision-making is sometimes characterized as involving the application of “Solomon-like principles of equity” rather than substantive legal rules.²⁴ The implication is that arbitrators make ad-hoc decisions that seek to do rough justice rather than rigorously enforce legal entitlements.²⁵ (This is a best-case scenario that assumes an unbiased arbitrator.) As with the concern that arbitrators will create their own rules, the possibility that they will make ad hoc decisions is troubling primarily when disputes involve mandatory laws or parties of unequal bargaining power. In other cases, parties who wish to purchase this kind of ad hoc decision-making should be allowed to do so.²⁶ But few would be pleased to

²⁰ See generally Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (discussing arbitration as a mechanism for privatizing law).

²¹ Ware, *supra* note 20 at 744–747 (describing arbitration as creating a beneficial market for default rules).

²² Ware, *supra* note 20 at 710–27; Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L. J. 1279, 1284–88 (2000).

²³ Ware, *supra* note 20 at 727. The same is true if arbitrators try to follow mandatory law but apply it incorrectly, a fact that has led some to suggest *de novo* or otherwise heightened judicial review of arbitration awards in some cases. See *infra* note 214.

²⁴ Brunet, *supra* note 5 at 42 (including this as part of arbitration “folklore”).

²⁵ See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 344–45; Knapp, *supra* note 1 at 784–85.

²⁶ Contracting parties cannot fully specify their rights and obligations in the contract, so it is inevitable that their chosen adjudicator will possess a great deal of discretion. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 835–39 (2005–2006). If their contract includes vague substantive terms and an arbitration clause, it is fair to say that they have contracted for the exercise of arbitral

hear that an arbitrator resolved, say, a claim under federal anti-discrimination law by consulting a crystal ball,²⁷ or the arbitrator's inchoate notions of "fairness," rather than statutes and case law.²⁸ If such cases exist, then arbitration effectively displaces mandatory legal rules with a system of arbitrator discretion.²⁹

A final concern is that, as arbitration becomes more prevalent, the supply of precedent will gradually erode. The concern here is not (or not only) that arbitrators will disregard the law as announced by courts and other public actors. It is that arbitrators will not create law of their own—i.e., that neither arbitrators nor judges will view past arbitration awards as relevant precedent.³⁰ The court system receives public subsidies, in part, because judges produce social goods like precedent.³¹ To the extent arbitration displaces litigation as a means of resolving disputes, the task of producing these goods increasingly falls to privately-funded arbitrators.³² Because many believe that arbitration awards have limited precedential value, the implication is that the law will fail to evolve as it would in a common law system presided over by judges. As a result, the law may fail to develop to accommodate social, technological, and other changes.³³

discretion. Ware, *supra* note 20 at 745. If parties do not want to confer such unfettered discretion, they may specify their obligations more precisely, or they may delegate to arbitrators the task of fashioning an appropriate set of default rules and require compliance with those rules. *Id.* at 744–47. In such cases, both market forces and the law of vacatur will limit the arbitrator's ability to "do justice" in a manner that conflicts with the parties' express agreement. See 9 U.S.C. § 10(a)(4) (providing for vacatur in cases where the arbitrators exceed their powers).

²⁷ Or that the contract required the dispute to be resolved by a "panel of three monkeys," *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994), or by "studying the entrails of a dead fowl," *LaPine Tech. Corp. v. Kyocera*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (2003).

²⁸ E.g., Knapp, *supra* note 1 at 782–83; Carrington & Haagen, *supra* note 25 at 344–45.

²⁹ Ware, *supra* note 20; Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992).

³⁰ Knapp, *supra* note 1 at 785; Alderman, *supra* note 4 at 12. A related concern is that arbitration lacks a mechanism for coordinating potentially conflicting awards. See Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILLINOIS L. REV. 1043, 1115–16.

³¹ See McAdams, *supra* note 30 at 1113 (explaining that private markets do not supply an optimal quantity or quality of precedent); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–40 (1979) (same).

³² The classic version of the argument, of course, is that private contracts will underproduce public goods like precedent. See Landes & Posner, *supra* note 31, at 238–40.

³³ Cf. McAdams, *supra* note 30 at 1118 (noting that "[b]etter dispute resolution may mean worse dispute avoidance"). For a skeptical view, see Hylton, *supra* note 3 at 243–47. There are other variants of this concern. One is that arbitrators will fail to generate clear rules because clear rules enable parties to resolve disputes consensually without needing to

Although they are widely-held, these concerns have limited evidentiary backing. In particular, claims that arbitrators ignore relevant precedent and do not produce precedent of their own take for granted that arbitration is an intrinsically “speedy, cheap, informal, and equitable” process.³⁴ The existing evidence paints a more nuanced picture. For example, some studies of international arbitration report that arbitrators often cite other arbitration awards.³⁵ There is not much evidence about domestic arbitration, and what evidence there is indicates that arbitrators’ use of precedent varies depending on the context.³⁶ For the most part, then,

pay an arbitrator. See Landes & Posner, *supra* note 31, at 239-40. Another is that arbitrators will fail to apply legal rules predictably, injecting uncertainty into previously-settled areas of law. *Id.*

Note that, even if widespread use of arbitration erodes the supply of judicial precedent, this loss may be partially or entirely offset by the value of having competing producers of law. *E.g.*, Hylton, *supra* note 3 at 245; Cf. Erin A. O’Hara & Larry E. Ribstein, *THE LAW MARKET* 85–106 (Oxford Univ. Press 2009) (examining arbitration’s role in creating a market for law).

³⁴ Brunet, *supra* note 5 at 42–45 (describing this as part of the folklore model of arbitration).

³⁵ Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 816–32 (2011); Christopher R. Drahozal, *The Iran-US Claims Tribunal and Investment Arbitration: A Citation Analysis*, TRANSNAT’L DISP. MGMT., at 3, May 2008, <http://www.transnational-dispute-management.com>; Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT’L ARB. 129, 148-54 (2007); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT’L. 357, 368–73 (2007); Christopher S. Gibson & Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. INT’L ARB. 521, 537-44 (2006). The recognition that arbitration awards have precedential status, and concerns about potential inconsistency, has led to calls for an appellate body in some contexts. See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1606–10 (2005) (examining potential benefits of an appellate body for ICSID).

³⁶ Securities arbitrators typically provide no explanation whatsoever for their decisions. See Johnson, *supra* note 1212, at 144-45. Because unreasoned awards provide little meaningful information about the dispute or the arbitrator’s decision, they are not likely to serve as precedent in future cases. See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1244–48 (2006) (discussing transparency and publication requirements in cases affecting “important public interests”).

In the labor arbitration context, some research indicates that arbitrators often cite other arbitration awards or arbitration-related treatises and even refer to judicial opinions when a party has asserted a claim under a federal statute. See Patricia A. Greenfield, *How do Arbitrators Treat External Law?* 45 INDUS. & LAB. REL. REV. 683, 690-91 (1992); Margaret Oppenheimer & Helen LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 ARB. J. 12, 13-16 (March 1979); Philip Harris, *The Use of Precedent in Labor Arbitration*, 32 ARB. J. 26, 29-34 (March 1977). For an examination of the content of discipline and discharge decisions in labor arbitrations, see Laura J. Cooper, Mario F. Bognanno & Stephen F. Befort, *How and Why Labor Arbitrators Decide*

our understanding of the role of precedent in domestic arbitration remains stuck at the level of “folklore.”³⁷

II. INTRODUCING THE AWARDS

To develop a better understanding of how arbitrators use precedent, I randomly selected awards from four different sources of published arbitration awards: the Bureau of National Affairs (BNA) Labor Arbitration Reporter database (LRRLA) available on LexisNexis; the American Arbitration Association (AAA) employment arbitration awards database (AAEMP), also available on LexisNexis; the FINRA arbitration awards database (FINRA-ARB) available on Westlaw; and the docket of class arbitrations administered by the AAA and available on its website.³⁸ Because the awards are drawn from arbitration regimes that differ in ways that may influence arbitrators’ use of precedent, I first describe the regimes and then turn to the composition and limitations of the dataset.

A. The arbitration regimes

Labor arbitration: Labor arbitrators derive their authority from an arbitration clause in a collective bargaining agreement (CBA) between the union and the employer. Most CBAs require “cause” or “just cause” for any discharge or disciplinary action, and most labor arbitrations feature an employee challenging an employer’s disciplinary or discharge decision under that standard.³⁹ These are contract disputes. They are unique, however, in that similar disputes rarely appear in court.⁴⁰ Relatively few non-unionized workers enjoy “just cause” protection from discipline or

Discipline and Discharge Cases: An Empirical Examination, in NAT’L ACAD. OF ARBITRATORS, ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT 42 (Stephen F. Befort & Patrick Halter eds., 2008). See also Christopher J. Bruce, *The Adjudication of Labor Disputes as a Private Good*, 8 INT’L REV. L. & ECON. 3, 9–10 (1988) (exploring the role of arbitral precedent in labor arbitration).

For a study in the context of employment arbitration, see Chew, *supra* note 8.

³⁷ Brunet, *supra* note 5, at 40 (using the term “folklore arbitration” to describe the orthodox view of arbitration).

³⁸ I selected these sources in part because they were publicly-available, which is not the case for many arbitration awards. This fact, of course, has implications for the representativeness of the sample, and I discuss these below. See *infra* text accompanying notes 58–65.

³⁹ Discipline and discharge cases comprise two-thirds of the labor sample. See Table 1. The remaining claims involve a variety of disputes—for example, a union’s challenge to the employer’s decision to stop providing death benefits, see, e.g., *In re Embarq Corp.*, 124 Lab. Arb. Rep. (BNA) 1185 (Jan. 12, 2008), or an employee’s challenge to an employer’s decision that falls short of discipline or discharge, see, e.g., *In re Rochester Area Bd. of Educ.*, 124 Lab. Arb. Rep. (BNA) 114 (Aug. 8, 2007).

⁴⁰ Stephen J. Ware, ALTERNATIVE DISPUTE RESOLUTION 109 (2001).

discharge, and fewer still file lawsuits alleging breach of contract under that standard. Most grievance arbitrations, therefore, “involve[] claims that would not have been asserted in litigation had the parties not agreed to arbitrate.”⁴¹

Of the four arbitration regimes, labor arbitration features the most robust publication practices. Labor arbitrators often issue reasoned awards, and these are of great interest to unions, to employers, and to their lawyers. Legal publishers like BNA have published labor arbitration awards—albeit selectively—for many decades, and reference texts attempt to distill the rulings of labor arbitrators into a coherent set of principles to guide future disputes.⁴²

Employment arbitration: Many contracts of employment include arbitration clauses. Because these clauses often are broad in scope, employment arbitration encompasses virtually any conceivable dispute that might arise between employees and their employers. Thus, employment arbitrators routinely decide state law contract and tort claims, as well as claims under federal and state statutes (including civil rights statutes). Note that, unlike in labor arbitration, employment arbitration serves as a substitute for litigation; that is, but for the arbitration clause, the claims resolved in arbitration could have been resolved in court.⁴³ This means that concerns over ad hoc decision-making are heightened in the employment context, especially when arbitrators hear cases involving non-waivable statutory rights.

The AAA’s employment arbitration rules provide that arbitrators will provide “written reasons for the award” unless the parties agree otherwise.⁴⁴ Since 2000, the AAA has published these awards, and current rules require that awards be made available to the public at cost.⁴⁵ These awards also are available online through LexisNexis in fully searchable format. Under current practice, however, the names of parties and witnesses are redacted before publication.⁴⁶

⁴¹ Stephen J. Ware, ALTERNATIVE DISPUTE RESOLUTION 109 (2001).

⁴² THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., 2d ed. 1998).

⁴³ See Ware, *supra* note 40.

⁴⁴ AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 39(c) (Nov. 1, 2009).

⁴⁵ Thus, except for its decision to redact party and witness names, *see infra* note 46, the AAA largely conforms to the transparency norms that many believe are appropriate in cases implicating important public interests. See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1244–48 (2006) (discussing transparency and publication requirements in cases affecting “important public interests”).

⁴⁶ AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 39(c) (Nov. 1, 2009).

Class action arbitration: The disputes at issue in the class arbitration sample are the most procedurally complex and substantively diverse of the four arbitration regimes. In class arbitration, an arbitrator selected and paid by the parties presides over a class action, making all the decisions that are typically entrusted to judges in such cases.⁴⁷ The arbitrator decides whether to certify a class, determines the form and manner of notice to class members, resolves all issues of law and fact, and enters an award that may bind many hundreds or thousands of class members.⁴⁸ Class arbitration may implicate a wide range of substantive disputes, including a great many under mandatory public laws regulating employment, consumer, franchise, and securities transactions. The common theme is that the defendant has entered a large number of standardized transactions governed by contracts that include an arbitration clause.⁴⁹

Recent Supreme Court cases have created uncertainty about the future of class arbitration.⁵⁰ To date, however, AAA class arbitrations have generated a significant number of reasoned awards, which are required by AAA rule and made available to the public on a cost basis. The awards disclose the identities of the parties and can be downloaded directly from the class arbitration docket on the AAA website.

Securities arbitration: The securities arbitration sample consists of disputes administered by NASD or the NYSE, now combined into FINRA. These include claims by customers against FINRA members or associated persons, such as claims alleging unauthorized trading, conversion, churning, or other violations, as well as disputes between or among FINRA members and their associated persons, including claims by or against employees.

⁴⁷ See AMERICAN ARBITRATION ASSOCIATION SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, Rules 3-8.

⁴⁸ See AMERICAN ARBITRATION ASSOCIATION SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, Rules 4-8.

⁴⁹ On class arbitration generally, see S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1036-83 (2009).

⁵⁰ In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court held that an arbitrator may not infer the parties' assent to class arbitration "solely from the fact of the parties' agreement to arbitrate." 130 S. Ct. 1758, 1775 (2010). And in *AT&T Mobility LLC v. Concepcion*, it held that the Federal Arbitration Act preempted state-law unconscionability doctrine that, in the Court's view, conditioned enforcement of arbitration agreements on "the availability of classwide arbitration procedures." 131 S. Ct. 1740, 1744 (2011). For further analysis of the *Stolt-Nielsen* decision, see S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* *Stolt-Nielsen, AT&T, and a Return to First Principles*, HARV. NEG. L. REV. (forthcoming 2012); Alan S. Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, AM. REV. OF INT'L ARB. (forthcoming 2012).

FINRA rules do not require arbitration of employment discrimination claims, but employees and brokerage firms may separately agree to arbitrate such claims.⁵¹ Thus, many claims resolved by securities arbitrators involve non-waivable rights under securities and anti-discrimination laws.⁵²

Securities awards are published, and securities arbitrators may and sometimes do issue reasoned awards. But historically, norms in securities arbitration have disfavored reasoned awards, and the available evidence suggests that securities arbitrators do not often issue them. For example, in an examination of customer cases closed by NASD arbitrators in 2003 and 2004, Professor Jennifer Johnson found that fewer than five percent of awards provided even a brief explanation for the result, and fewer than half of these included anything “that would be deemed an opinion by any stretch of the definition.”⁵³ The result is similar in the dataset I describe here, which spans the years 1995–2009: of the 203 securities awards, only 10 (4.9%) offer any explanation for the result.

B. Composition of the dataset

The class arbitration portion of the dataset consists of every award posted to the class arbitration docket on the AAA website as of January 1, 2010. The labor, employment, and securities samples consist of at least 200 awards randomly selected from each of the relevant databases.⁵⁴ After excluding stipulated awards and duplicates, the resulting dataset includes 848 awards. Table 1 provides a brief breakdown of the awards, and the appendix provides more detail.⁵⁵

[Insert Table 1 here]

For each award, I or a research assistant coded a number of variables related to citation practices and other matters, including the type of dispute; whether the award cites to judicial precedent, arbitral precedent, or an arbitration-related treatise; and the number of arbitration awards (if any)

⁵¹ FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13201.

⁵² See Brunet & Johnson, *supra* note 12, at 489.

⁵³ Johnson, *supra* note 12, at 144.

⁵⁴ To do this, I simply generated a list of awards using the search term “arbitrat!” and limiting the search by date range where this basic search would produce too many awards. I then generated 240 random numbers between 1 and n (the total number of awards produced by the search) and, after eliminating duplicates, downloaded the award corresponding to each number. Stipulated awards were excluded for coding purposes.

⁵⁵ The securities sample includes some employment disputes involving securities industry employees. FINRA provides separate rules governing the arbitration of such claims, *see* FINRA CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES, Rule 13802, and they are not duplicative of awards elsewhere in the dataset.

cited.⁵⁶ This portion of the coding did not capture citations to statutes (other than to note when a statutory claim was at issue), administrative regulations, or other potential sources of authority, such as books and scholarly articles. However, I also randomly selected twenty-five awards from each arbitration regime for more detailed coding and for comparison to a sample of judicial opinions.⁵⁷

Note that the use of published awards introduces a potential source of bias: these awards may overstate the extent to which arbitrators cite all forms of authority—including past arbitration awards—in their decisions. There is some evidence, for example, that appellate judges cite fewer precedents when writing unpublished opinions.⁵⁸ Similarly, it is possible that arbitrators cite to more authority when writing awards for publication. When awards are published, arbitrators may seek to gain prestige (and future business) by writing carefully reasoned awards that engage with relevant precedent.⁵⁹

If there is a relationship between citation practices and award publication, it may be more pronounced in the labor portion of the dataset. By rule, FINRA awards, AAA employment awards, and AAA class arbitration awards are made publicly available.⁶⁰ By contrast, most labor arbitration awards are unpublished, and awards that are submitted to BNA for publication are published only if BNA decides the award is of sufficiently “general interest.”⁶¹ Thus, labor awards are subject to several

⁵⁶ For the labor, employment, and class arbitration awards, two research assistants each performed half of the coding. The variables reported here are straightforward, and coding them did not require difficult or subjective judgments. Still, I had each research assistant independently code 25 awards from each system and computed reliability statistics for each of the reported variables (using Cohen’s kappa). The resulting kappa statistics range from 0.70 to 0.92, within the range generally considered acceptable. On the subject of inter-rater reliability generally, including acceptable ranges of Cohen’s kappa, see Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 113–16 (2008). The securities awards were added to the dataset later and coded by the author.

⁵⁷ See *infra* text accompanying notes 98–109.

⁵⁸ Niblett, *supra* note 10 at 265–267.

⁵⁹ Published opinions may be unrepresentative for other reasons, including the fact that parties control which cases produce a published opinion. See Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 259 (1995).

⁶⁰ See NASD CODE OF ARBITRATION PROCEDURE, Rule 10330(f); FINRA CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES, Rule 12904(h); AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 39(b) (July 1, 2006); AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATION, Rule 10(b).

⁶¹ See Laura J. Cooper, Mario F. Bognanno & Stephen F. Befort, *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination*, in NAT’L

types of selection not present in the other arbitration regimes. First, the arbitrator must decide (with the parties' assent) to submit the award to BNA. Second, BNA must decide to publish the award. As a result, published BNA awards may not be representative of all labor arbitration awards.⁶² For example, arbitrators might be more likely to submit, and BNA to accept, awards that disagree with positions taken by other arbitrators or that attempt to synthesize existing awards. If that is so, one might expect published labor awards to cite arbitral precedent more frequently than awards published in other arbitration regimes (and they do). But the difference would result from selection bias rather than the different practices of labor arbitrators.

For several reasons, however, I am inclined to doubt that selection bias explains any difference between labor arbitration and the other arbitration regimes. First, just over half of the awards in the labor sample cite to no authority at all, suggesting that many awards are published for reasons having nothing to do with their relation to decisions rendered by judges or other arbitrators. Second, labor arbitrators who cited past awards or other sources of legal authority primarily did so to *support* the result; only a small minority cited precedent that conflicted with the arbitrator's decision.⁶³ Thus, BNA's publication practices do not obviously favor awards that create or purport to resolve conflict with other legal authorities. Finally, as Part III discusses, the differences between labor and the other arbitration regimes are substantial—so much so that it seems implausible to attribute them entirely to selection bias.

Lastly, readers should be aware of a source of sample bias inherent in any study of arbitration. Whether published or unpublished, large samples of arbitration awards tend to be available only from institutional providers of arbitration services.⁶⁴ As I have described elsewhere, these providers inhabit a segmented marketplace, offering different arbitration-related services to different customers.⁶⁵ Consequently, even a random

ACAD. OF ARBITRATORS, ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT 42 (Stephen F. Befort & Patrick Halter eds., 2008); Vol. 124, LABOR ARBITRATION REPORTS at vii (BNA 2008).

⁶² Some research, for example, reveals higher management win rates in published than in unpublished awards. See Jack Stieber, Richard N. Block & Leslie Corbitt, *How Representative are Published Decisions?*, ARBITRATION 1984: ABSENTEEISM, RECENT LAW, PANELS, AND PUBLISHED DECISIONS: PROCEEDINGS OF THE THIRTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Washington, D.C.: Bureau of National Affairs, Walter J. Gershenfeld, ed., 1985).

⁶³ This conclusion is based on a randomly-selected subset of twenty-five labor awards, only two of which cited any authority that conflicted with the arbitrator's decision.

⁶⁴ This explains why I have constructed the sample from published awards. No comparable set of unpublished awards was available.

⁶⁵ Weidemaier, *supra* note 13, at 660-63.

sample of arbitration awards will support only limited inferences. The behavior of arbitrators in AAA employment arbitrations, for example, may not match the behavior of arbitrators hearing non-employment disputes or the behavior of employment arbitrators operating under different institutional rules. Nor is there clear evidence about the market share of the various arbitration providers, although NASD and NYSE, and now FINRA, are thought to administer most securities arbitrations. Thus, although I will occasionally refer broadly to “employment arbitrators,” say, or to “class arbitration,” my analysis is limited to published awards in the particular arbitration systems that comprise the sample.

III. HOW ARBITRATORS USE AND CREATE PRECEDENT

I have so far noted several concerns about the role of precedent in arbitration: that arbitrators will decide cases in a purely ad hoc, discretionary fashion; that arbitrators will not produce awards that have any precedential value; and that arbitrators will create legal rules that displace government-created mandatory law. Note that these concerns need not be linked to fears that arbitrators will be biased in favor of some litigants or that arbitration agreements will be forced on unwitting parties. If arbitration depletes the available stock of precedent, for example, then widespread use of arbitration might produce a net social loss even if contracting parties always make perfectly informed decisions and choose unbiased arbitrators.⁶⁶ For that reason, I do not attempt to determine whether arbitrators are applying the law in a biased fashion—a question that would be difficult to answer in any event.⁶⁷ Instead, I focus on citation practices in arbitration.

⁶⁶ See McAdams, *supra* note 30 at 1118. Conversely, adjudicator bias may be present even in a system of binding precedent. Most disputes can be characterized in multiple ways, each of which brings the dispute within the ambit of a different legal rule and potentially leads to a different outcome. See Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1432–43 (2000). As a result, adjudicators have significant discretion to select preferred outcomes. That discretion also extends to the sequence in which issues are decided—a question that can have significant implications. See Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 24–36 (2010). A system of binding precedent may or may not limit this discretion, but it does not eliminate it.

⁶⁷ There is a growing body of research exploring arbitration outcomes. As one would expect given the range of legal and factual contexts in which arbitration takes place, the evidence is mixed. For studies or analyses of consumer debt collection arbitration, see Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 77 HASTINGS BUS. L. J. 77 (2011); Urban Justice Ctr., *DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR* (2007); Public Citizen, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* (2007); Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990); David Caplovitz, *CONSUMERS IN*

Citations to precedent do not provide direct evidence of *why* an adjudicator reached a particular result.⁶⁸ In theory, precedent might fully determine the results in future cases; it might only partially constrain future adjudicators, leaving them some but not complete freedom to decide cases in their ideologically-preferred manner; or it might provide no constraint at all, serving only to justify a decision driven purely by extra-legal factors.⁶⁹ Citation practices do, however, reveal important information.⁷⁰ Citations

TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974). In the context of employment arbitration, see, e.g., Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EMP. RTS. & EMP. POL'Y J. 405, 412–34 (2007); Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 342–52 (2006–2007); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78 (2005); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J., 44, 48–49 (Jan. 2004); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997). For a critical view of studies examining arbitration outcomes, see David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283–1314 (2009). For evidence related to judicial review of arbitration awards, see Michael H. LeRoy, *Do Courts Create Moral Hazard?: When Judges Nullify Employer Liability in Arbitrations*, 93 MINN. L. REV. 998, 1041–52 (2009) [herein, MORAL HAZARD]; Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 581–89 (2008) [herein, MISGUIDED FAIRNESS].

⁶⁸ This is a subset of the broader problem that arbitral awards (and judicial opinions) do not “tell us what went on in judges’ minds” but do reveal “what judges *think* is legitimate argument and legitimate authority, justifying their behavior.” Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STANFORD L. REV. 773, 794 (1981).

⁶⁹ See Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 492–511. Even when courts are in theory bound by precedent from higher courts, judges may retain some freedom to decide cases in an ideologically-preferred manner. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 83–87, 115–19 (1997) (summarizing evidence relevant to lower court decision-making). For this reason, it is uncertain whether arbitrators have more discretion than judges in determining case outcomes. Although lower court judges are formally bound by precedent, few believe that judicial decisions are fully determined by precedent. See generally Lee Epstein & Tonja Jacoby, *The Strategic Analysis of Judicial Decisions* 6 ANNUAL REV. OF LAW & SOC. SCI. 22.1 (2010). A more meaningful distinction between arbitration and litigation focuses on the characteristics of the actor with the ultimate discretion to shape and apply legal rules. In arbitration, this is a private actor accountable to the litigants. In litigation, the actor is an elected or appointed judge with different incentives.

⁷⁰ Citations to precedent serve a variety of functions, among them providing background information, demonstrating compliance with anti-plagiarism norms, and providing an

shed light on how arbitrators *justify* their decisions.⁷¹ In the process, citation practices provide evidence about the rules the parties expect will govern their disputes. Arbitrators are market actors whose future income depends on litigant satisfaction. If arbitrators demonstrate a pattern of citing judicial precedent, it is reasonable to infer that parties want their disputes governed by the law as articulated by courts. By contrast, a pattern of citing to no precedent would provide some evidence that parties are content for arbitrators to resolve disputes in an ad hoc, discretionary manner.

Citation practices also shed light on the claim that arbitration awards have no precedential value. It is true that arbitrators are not bound to follow past arbitration awards. But to the extent citations signal that arbitrators try to achieve consistent results, they facilitate the kind of private ordering that is commonly viewed as a benefit of precedent. Arbitrators who cite judicial opinions, for example, signal that parties may settle disputes and structure contracts on the assumption that the rules announced by judges are binding. Arbitrators who cite past arbitration awards convey similar information about rules announced by arbitrators. In this way, citation practices offer insight into whether arbitration is capable of generating the public goods associated with precedent. For example, routine citation of arbitration awards would provide indirect evidence that rules announced by arbitrators facilitate the settlement of disputes outside of arbitration. For all of these reasons, studies of citation practices can inform debates over the role of precedent in arbitration.⁷² They also provide some basis for comparing arbitral awards to judicial opinions.⁷³

The next four sections explore various aspects of arbitrators' citation practices. The first asks whether precedent plays *any* role in arbitration and, if so, whether arbitrators look exclusively to judicial precedent. The second takes a deeper look at *how* arbitrators use the precedent they cite. The third examines the use of past arbitration awards as precedent. Focusing on disputes involving claims of employment discrimination, the fourth compares a sample of arbitration awards to a sample of judicial opinions.

A. Is arbitral decision-making ad hoc? A preliminary look

In this section, I begin with two simple, binary measures of how arbitrators in the four arbitration regimes use precedent. The first is whether the arbitrator's award includes at least one citation to either a judicial

authoritarian justification for a particular result. See Richard A. Posner, *An Economic Analysis of the Use of Citations in Law*, 2 AM. L. & ECON. REV. 381, 383–87 (2000).

⁷¹ Friedman et al., *supra* note 68 at 794. Cf. Posner, *supra* note 70, at 385 (noting that citation to “previously decided cases provide[s] a reason independent of analytical power for reaching a particular outcome”).

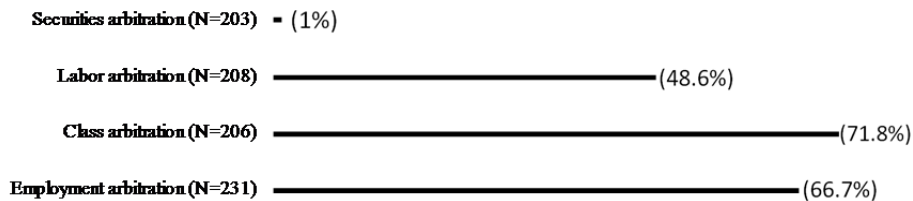
⁷² See *supra* note 10.

⁷³ As I discuss below, see *infra* text accompanying notes 179–183.

opinion or an arbitration award. The second is whether the arbitrator's award cites *only* to judicial precedent. These are rough measures, but they reveal important information that usefully frames the more nuanced discussion to follow. The first variable, for example, sheds light on whether arbitrators resolve disputes in a purely ad hoc fashion rather than by applying substantive legal rules. The second variable indirectly measures the extent to which litigants want their disputes to be governed exclusively by judicial precedent. Together, these rough measures suggest that precedent plays a very different role in different arbitration regimes, that its role depends in part on the substantive claim at issue, and that judicial precedent often plays the dominant role.

For each of the four regimes, Figure 1 depicts the proportion of awards that cite to at least one judicial opinion *or* arbitration award in the section of the award that presents the arbitrator's decision.⁷⁴ A sizeable majority of the class arbitration (71.8%) and employment (66.7%) awards cite to at least one prior opinion or award, as do nearly half (48.6%) of the awards issued by labor arbitrators labor awards. By contrast, only two of the 203 securities awards (1%) cite to even one judicial opinion or arbitration award.⁷⁵ As noted previously, most of the securities awards are unreasoned, meaning the arbitrator also provided no narrative explanation whatsoever for decision. For the vast majority of securities awards, then, parties received nothing more than a brief statement identifying the claims at issue and the winning party. This is consistent with the findings of previous research.⁷⁶

Figure 1. Awards that cite to one or more judicial or arbitral precedent



⁷⁴ Some awards described the authorities cited by the parties' in support of their respective positions. This was especially common among labor arbitrators. These were not counted as citations by the arbitrator.

⁷⁵ A chi-square test revealed a significant relationship between arbitration system and the proportion of awards that cited some form of precedent ($\chi^2(3, N=848)=19.2, p<.001$). Follow up testing (employing Bonferroni's correction for Type 1 error) revealed that, in both class and employment arbitration, the proportion of awards that cited to precedent was significantly greater than in labor and securities arbitration, and also that the proportion of labor awards that cited to some precedent was significantly greater than the proportion of securities awards ($\chi^2s \geq 9.2, ps < .001$).

⁷⁶ See *supra* note 53.

Figure 1 reveals only limited information. For example, it treats each award that cites one or more judicial or arbitral precedents equally, whether the number of citations totals one or one hundred. For now, however, I wish to make two straightforward points. First, as Figure 1 suggests, the role of precedent varies dramatically across different arbitration contexts. It therefore makes little sense to speak of “arbitration” as if all arbitrators and arbitration regimes were alike. Second, differences in citation patterns may reflect procedural differences in the arbitration or differences in the kinds of claims being adjudicated.

The securities awards illustrate how award writing and publication practices may affect the use of precedent. Recall that although securities arbitrators write awards for publication, they need not provide a reasoned award.⁷⁷ In theory, a securities arbitrator might cite to precedent without providing any narrative explanation for the result. But it is not surprising that this rarely occurs. Citations to precedent implicitly offer an explanation for the result—a form of reasoning by analogy.⁷⁸ In most securities arbitrations, however, the arbitrator has already elected not to write a reasoned award providing a narrative explanation for the result. In that case, it is not clear why the arbitrator would choose to provide an explanatory analogy to a prior decision.

Arbitrators in the labor, employment, and class arbitration regimes do write reasoned awards, and their use of precedent varies. But the variance may be due in large part to the type of dispute at issue rather than to any fundamental difference between the regimes. Recall that labor arbitrators primarily hear contract disputes and that judges rarely preside over similar cases.⁷⁹ Most labor disputes, moreover, are fact-intensive and turn primarily on whether the employer had just cause for its disciplinary decision under the applicable CBA.⁸⁰ In such cases, it is not surprising that arbitrators often explain their reasoning but do not cite any precedent. The fact that courts rarely hear similar disputes means there will be little judicial precedent to cite.⁸¹ Likewise, past arbitration awards will be of limited

⁷⁷ In part, the limited role played by reasoned awards can be explained by NASD’s historic ambivalence about whether arbitrators are required to apply securities laws. See Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 474–86 (2008).

⁷⁸ Joseph Raz, *Law and Value in Adjudication*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 180, 201–06 (1979).

⁷⁹ See *supra* text accompanying notes 39–41.

⁸⁰ See *supra* note 39.

⁸¹ Labor awards that do cite to judicial opinions often do so on matters unrelated to the arbitrator’s “just cause” determination. See, e.g., *In re Merchants Metals, Inc.*, 117 Lab. Arb. Rep. (BNA) 1 (Apr. 2, 2002) (examining but distinguishing National Labor Relations Board decisions on unfair labor practice charges).

relevance unless they interpret the same or a similar CBA or discuss the appropriate penalty for similar employee conduct.

By contrast, precedent is likely to play a greater role in disputes arising under state and federal statutes. Precedent interpreting a particular statutory provision will be relevant to all cases that implicate that provision. This may explain the difference between the labor arbitration awards and awards rendered in employment and class arbitrations, which often involve disputes arising under state and federal statutes. For example, in the AAA employment sample, the proportion of awards that cited to precedent was significantly higher when an employee asserted a claim under state or federal anti-discrimination law (76.2%) than in other kinds of disputes (51.1%).⁸² The latter category includes a large number of contract disputes. Indeed, after excluding discrimination claims from the AAA employment sample, the difference in the proportion of awards that cite precedent in labor and employment arbitration vanishes: citations appear in around half the awards in each system.⁸³ The difference is that *arbitral* precedent plays a much greater role in labor arbitration.

This leads to the second rough measure of the role of precedent in arbitration: the extent to which arbitrators cite *only* judicial precedent. Recall that one concern is that arbitrators will create an alternative body of precedent, effectively displacing judges, legislators, and other public officials as producers of law. As noted earlier, this would be relatively unproblematic if the government-supplied law consisted of default rules, but it would be problematic indeed in disputes governed by ostensibly mandatory legal rules.⁸⁴ As Figure 2 suggests, however, there is little evidence that arbitrators are engaged in any explicit effort to displace mandatory government-created law. The Figure focuses on the subset of awards in each arbitration regime that cite to at least one judicial opinion or arbitral award; thus, it excludes securities awards.⁸⁵ Within that subset of awards, Figure 2 reveals that, outside of labor arbitration, the vast majority of awards cite only to judicial precedent.

⁸² $\chi^2(1, N=231)=15.4, p<.001$.

⁸³ 48.4% of the labor and 51.1% of the employment awards (excluding discrimination claims) contain at least one citation to judicial or arbitral precedent. The difference is non-significant ($\chi^2(1, N=296)=0.17, p=.69$).

⁸⁴ See *supra* text accompanying notes 21–23.

⁸⁵ Only two of the securities awards cited any judicial or arbitral precedent. Thus, they are omitted from Figure 2.

Figure 2. Percent of "precedential" awards citing only judicial precedent

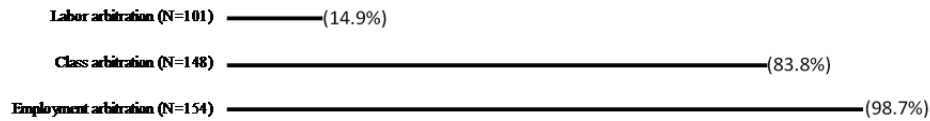


Figure 2 provides a rough but revealing look at the relative importance of judicial and arbitral precedent, showing that judicial precedent dominates both the employment and class arbitration regimes.⁸⁶ In the employment disputes, arbitrators who cited to judicial or arbitral precedent nearly always cited *only* to judicial precedent. A possible implication of this finding, to which I return below, is that employment arbitrators overlooked arbitration awards as a potential source of authority even when there was no relevant judicial precedent available.⁸⁷ For example, employment disputes often require arbitrators to discuss or interpret the employer's workplace policies or the documents it distributes to employees.⁸⁸ These policies and documents will be relevant to multiple workplace disputes. Even if relatively few disputes reach arbitration,⁸⁹ arbitrators should, over time, have multiple opportunities to interpret and

⁸⁶ There was a significant relationship between arbitration system and the proportion of awards that cited only judicial precedent ($\chi^2(2, N=405)=17.1, p<.001$). Follow-up testing (employing Bonferroni's correction for Type 1 error) revealed that a significantly higher proportion of employment awards cited only judicial authority than was the case in either class ($\chi^2(1, N=302)=21.3, p<.001$) or labor arbitration ($\chi^2(1, N=255)=14.0, p<.001$), and also that a significantly higher proportion of class arbitration awards cited only judicial precedent than was true of labor arbitration ($\chi^2(1, N=249)=8.5, p<.001$).

⁸⁷ Even among the employment awards, there are rare exceptions where arbitrators cite arbitral precedent, even as the sole authority for a decision. The employment sample includes two such cases. Overall, however, the employment awards cite overwhelmingly to judicial opinions. For further discussion, see *infra* text accompanying notes 151–160.

⁸⁸ E.g., see 2002 AAA Employment LEXIS 118, at *25-29 (Sept. 19, 2002); 2004 AAA Employment LEXIS 132, *4, *16-17 (Nov. 18, 2004); 2000 AAA Employment LEXIS 5, *6-8, *10-16, *29-31 (Sept. 27, 2000).

⁸⁹ E.g., Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, 13 ADV. IN INDUS. & LAB. REL. 71, 75–87 (2004) (finding for one manufacturing company that, of the 72 total disputes that went to mediation or arbitration between 1995 and 1997, only 3 resulted in an arbitration); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1587–88 (2005) (reporting that only 5% of the claims submitted to one employer's dispute resolution program went to arbitration); David Lewin, *Dispute Resolution in Nonunion Organizations: Key Empirical Findings*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 379, 386 (Samuel Estreicher & David Sherwyn eds. 2004) (estimating that, for nonunion employers with a dispute resolution program in place, only 4–5% of employee grievances are resolved in arbitration).

apply the same policy or document.⁹⁰ Much of the AAA employment arbitration caseload, in fact, arises out of employer-promulgated arbitration programs that apply to a wide range of employees, all governed by the same or similar workplace policies. In such a regime, it would not be surprising if parties and arbitrators looked to past arbitration awards as a source of guidance. Yet with one or two minor exceptions, this simply did not happen.⁹¹

Although less pronounced than in the employment disputes, the class arbitration awards also evinced a tendency for arbitrators to cite only judicial precedent. Of the awards that cited to at least one judicial opinion or arbitral award, the substantial majority (83.8%) cited only judicial precedent. I will return to these awards when I examine the conditions under which arbitrators assigned precedential value to past arbitration awards. For now, it is enough to say that arbitrators in class action disputes tended to cite arbitration awards only in connection with questions of contract interpretation or arbitral procedure—and not, say, in connection with questions of statutory interpretation.⁹²

Thus, neither the employment nor the class arbitration awards reveal any evidence that arbitrators explicitly rely on arbitral precedent when deciding questions of mandatory law. The labor arbitration awards reinforce this point. As noted earlier, most labor disputes involve questions of contract interpretation that are not often litigated in court.⁹³ Judicial precedent is less relevant for such disputes, so it is not surprising that only a small minority (14.9%) of the labor awards cite only to judicial opinions. In short, the only regime in which arbitral precedent plays a major role is labor arbitration, where arbitrators are engaged primarily in building a “common law of the workplace” rather than in interpreting and applying mandatory legal rules.⁹⁴

Taken together, Figures 1 and 2 suggest that arbitrators often make at least some effort to acknowledge relevant precedent and that this tendency is most pronounced when disputes turn on legal (as opposed to contractual) standards. In both the employment discrimination and class arbitration disputes, for example, a substantial majority of awards cited to precedent. Furthermore, arbitrators in the employment and class arbitration regimes typically cited judicial precedent to the exclusion of past arbitral

⁹⁰ See Weidemaier, *supra* note 7, at 1957.

⁹¹ As noted *supra* in footnote 87, two awards cited only arbitral precedent.

⁹² See *infra* text accompanying notes 134–136.

⁹³ See *supra* text accompanying notes 39–41.

⁹⁴ See generally THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., 2d ed. 2005) (distilling labor arbitration awards into a set of widely-accepted principles).

awards. This occurred even when disputes turned on the application of default rules and even when there might have been arbitral precedent on point—as with employment disputes requiring interpretation of an employee handbook or other workplace policies.⁹⁵ These patterns hardly demonstrate that judges and arbitrators decide cases the same way, but they are hard to square with descriptions of arbitrators as ad hoc decision-makers. And they provide little reason to fear that arbitrators are explicitly replacing government-created, mandatory law with private legal rules developed through arbitration.

The outlier is securities arbitration, where arbitrators almost never cited to judicial or any other form of precedent. This is consistent with past research.⁹⁶ Although that research focuses on whether securities arbitrators bother to explain their decisions, and not on citation practices, the pattern is clear. Few parties to securities arbitrations receive any indication—whether through narrative explanation or citations to analogous cases—of why they won or lost. Again, this does not mean that the law plays no role in securities arbitration. Anecdotally, I understand that it is quite common for lawyers to submit detailed briefs on behalf of parties to securities arbitrations. But if securities arbitrators attempt to apply the securities laws, their awards reveal no trace of this effort.⁹⁷

B. A more detailed inquiry: Depth of engagement with precedent

Thus far, we have seen that arbitrators in three of the four arbitration regimes often cited some form of precedent and that, except for labor arbitrators, most cited only to judicial precedent. The findings indicate that precedent often plays at least *some* role in arbitration. But how significant is that role, and do arbitrators make a serious effort to engage with the precedent they cite?

⁹⁵ See *supra* text accompanying notes 87–91.

⁹⁶ See *supra* note 12.

⁹⁷ The overall impression, therefore, is consistent with portrayals of securities arbitration as “lawless.” See Johnson, *supra* note 12, at 159 (concluding that securities arbitrators often do not “fully comprehend the complexity of federal and state” securities laws); Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1005–30 (2002) (discussing limits on the ability of securities arbitrators to apply the law); Brunet & Johnson, *supra* note 12, at 474–86 (documenting NASD’s historical ambivalence about whether arbitrators must follow the law); Brunet, *supra* note 12, at 1484 (noting that securities arbitration “remains lawless”).

1. Measures of citation quality

To develop a more complete picture, I randomly selected twenty-five awards from each of the class arbitration and labor samples for more detailed coding.⁹⁸ I also randomly selected twenty-five employment arbitration awards, although here I restricted the sample to awards that addressed a statutory discrimination claim. I imposed this limitation to facilitate comparison to judicial opinions—a subject I address below.⁹⁹ For this subset of seventy-five awards, I coded:

- The nature of each citation, including whether the precedent was a judicial opinion, arbitral award, statute, administrative regulation, treatise, law review article, book, or other source.
- The issuing court (for citations to judicial opinions).
- The length in words of the complete award, and the length in words of the portion of the award dedicated to providing the arbitrator's legal analysis.
- The age of each cited judicial opinion, measured from the date the arbitrator issued the award.

These measures provide a more robust picture, but they do not tell us why the arbitrator cited each precedent. Not all citations are the same.¹⁰⁰ Like judges, arbitrators might cite precedent they agree with or that influenced them,¹⁰¹ or they might cite precedent only to disagree with or distinguish it.¹⁰² Other citations might be less central to the arbitrator's explanation for the outcome. For example, an arbitrator might cite a

⁹⁸ I omitted the securities awards, only two of which cited either judicial or arbitral precedent.

⁹⁹ See *infra* text accompanying notes 161–193.

¹⁰⁰ See Posner, *supra* note 70, at 383–87; William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249, 251 (1976). See also Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions?: A Statistical Examination*, 70 MD. L. REV. 234, 263–65 (2010) (discussing different uses of citations); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L. J. 1383, 1391 (2009) (same); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges*, 37 J. LEGAL STUD. 87, 99 (2008) (noting that some citations are routine or pro forma).

¹⁰¹ Cross & Lindquist, *supra* note 100 at 1391.

¹⁰² Posner, *supra* note 100, at 385.

precedent simply because it uses memorable language¹⁰³ or might include the precedent as one of many entries in a long string cite.¹⁰⁴

To get a better sense of the role of precedent, I coded three additional variables. Adopting a definition used in other research, I first coded whether each cited precedent was a “strong” cite.¹⁰⁵ I coded a citation as “strong” if it (i) quoted more than a single word or phrase from the cited source, (ii) discussed the source for more than two sentences, or (iii) explicitly indicated reliance on the source.¹⁰⁶ Note that, as a proxy for “quality” citations, this variable is both under- and over-inclusive. It is under-inclusive because adjudicators may be heavily influenced by precedents that do not meet the definition (or that they do not bother to cite at all).¹⁰⁷ And it is over-inclusive because adjudicators may devote several sentences to discussing relatively unimportant precedents. Nevertheless, the variable roughly measures the extent to which an arbitrator engaged with the cited precedent.

I also wanted to know how often arbitrators tried to distinguish potentially conflicting precedents or adopted rules that conflicted with those applied in past cases. Thus, I coded whether the arbitrator explicitly adopted or rejected the *rule or standard* applied in each cited precedent. In addition, I asked whether the arbitrator explicitly described the *facts or outcome* of the cited precedent as consistent or conflicting with the outcome reached by the arbitrator.¹⁰⁸ I use these measures primarily to learn how often arbitrators cited precedent only to distinguish or reject it.¹⁰⁹

¹⁰³ David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. UNIV. L. REV. 1415, 1432 (2005).

¹⁰⁴ Cross & Lindquist, *supra* note 100 at 1391; Niblett, *supra* note 100, at 264.

¹⁰⁵ See Walsh, *supra* note 10 at 342.

¹⁰⁶ I adopt this definition from Walsh, *supra* note 10 at 342. Other research uses similar measures. See Niblett, *supra* note 10 at 263; Rorie Spill Solberg et al., *Inter-Court Dynamics and the Development of Legal Policy: Citation Patterns in the Decisions of the U.S. Courts of Appeal*, 34 POLICY STUD. J. 277, 283 (2006).

¹⁰⁷ David S. Law & Wen-Chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. U. L. REV. __ (2011).

¹⁰⁸ Some of these citations, of course, would also qualify as strong cites and also were coded that way.

¹⁰⁹ Note that I required explicit language adopting or distinguishing the cited precedent. Assume, for example, that an award stated something like: “To prevail, claimant must prove X,” followed by a citation to a judicial opinion. Although the context signals that the arbitrator agreed with the cited precedent, I would code the arbitrator as neither adopting nor rejecting the precedent. Thus, I substantially undercount citations to “favorable” precedents—i.e., those with which the arbitrator agreed. The coding captures distinguished precedents effectively, because it is difficult to distinguish a precedent without giving some explicit signal. “But see” citations are the exception; these were rare but were not coded as citations to distinguished or conflicting precedent. Note, also, that an arbitrator might simply choose not to cite precedent that conflicts with the arbitrator’s decision.

The next section discusses how arbitrators used precedent in this subset of seventy-five awards. At this point, the goal is not to compare the three regimes, which involve different substantive claims, litigants, and procedural contexts. Most of the class arbitration awards, for example, address a limited question of contract interpretation—whether the relevant contract permits a class action—whereas most of the labor and employment disputes resolve the merits of a dispute after an evidentiary hearing. Instead, the point is to assess whether any of the regimes conform to the folklore view of arbitration as an ad hoc process.

2. A second look: Arbitrators act much like judges

If the securities arbitration awards are inscrutable, most of the labor, employment, and class arbitration awards are quite the contrary. Most provide a detailed narrative explanation for the result and devote the majority of the award to legal analysis rather than to reciting the parties' arguments or reporting findings of fact. As an example, the median award length in the employment sub-sample was almost fourteen pages (at 500 words per page) and devoted two-thirds of this to legal analysis.¹¹⁰ To be sure, the awards vary. One employment award, for example, dispenses with an employee's statutory discrimination claim with less than a page of perfunctory fact-finding.¹¹¹ As another example, labor arbitrators often recited the parties' arguments in detail but spent relatively less time on analysis.¹¹² But in general, the awards describe the arbitrator's decision in some detail.

[Insert Table 2 here]

Precedent featured prominently in most of the awards, although it did so to a lesser extent in labor arbitration.¹¹³ As Figure 1 made clear, a minority of the employment and class arbitration awards, and a slight majority of the labor awards, did not cite any judicial or arbitral

¹¹⁰ I defined the legal analysis part of the award as the portion of the award that followed any discussion of the background and procedural history of the dispute, recitation of the parties' arguments, and findings of fact.

¹¹¹ 2003 AAA Employment LEXIS 187 (Dec. 2, 2003). The award leaves the impression that the claim had little factual merit, but of course I cannot confirm this.

¹¹² This is reflected in Table 2. *See also* Laura J. Cooper, Mario F. Bognanno & Stephen F. Befort, *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination*, in NAT'L ACAD. OF ARBITRATORS, ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT 42 (Stephen F. Befort & Patrick Halter eds., 2008) (noting this tendency).

¹¹³ Presumably, this is due to the fact that the labor disputes tend to involve contract claims. *See supra* text accompanying notes 79–82.

precedent.¹¹⁴ In keeping with that pattern, in this seventy-five award subsample, nearly half of the labor (eleven) and four of the employment awards cited to no precedent at all.¹¹⁵ But the majority of awards that cited precedent did so extensively. For each regime, Table 3 reports total and unique (i.e., non-duplicative) citations to precedent as well as the types of precedent cited. The average employment award, for example, contained citations to 28.4 total and 21.6 unique precedents. For class arbitration, these figures were 24.8 (total) and 17.6 (unique), and for labor arbitration they were 9.4 (total) and 8.7 (unique). The vast majority of these were judicial opinions, although the labor awards also cited to arbitration awards with some frequency.

[Insert Table 3 here]

Once again, it is less helpful to compare the different arbitration regimes than to explore the role of precedent in each. Although there is no widely-held understanding of what role precedent should play in arbitration, it is clear that it plays more than a trivial role here. Certainly the awards do not remotely resemble what one would expect from a system of ad hoc, purely discretionary adjudication. Indeed, even in the labor arbitration awards, the relatively limited use of precedent revealed by Table 3 is largely due to the fact that the labor awards were shorter.¹¹⁶ In each arbitration regime, arbitrators cited, on average, two or more unique precedents per page of legal analysis.¹¹⁷

Across the three regimes, over one-quarter (26.2%) of citations to judicial opinions or arbitral awards qualified as “strong” cites—meaning, again, that the award quoted or discussed the cited source in some detail or explicitly indicated reliance on the source.¹¹⁸ Table 4 provides more details for each regime. The strong citations measure is a proxy for citation “quality,”¹¹⁹ one that indirectly measures the extent to which arbitrators

¹¹⁴ See *supra* page ____.

¹¹⁵ Each of the twenty-five class arbitration awards cited to some form of precedent.

¹¹⁶ For purposes of this paper, only citations that were included in the arbitrator’s explanation for the award were coded. For example, in describing the parties’ arguments, arbitrators sometimes noted that a party relied on a particular judicial opinion or arbitral award. This was an especially common practice in the labor awards. But unless the arbitrator cited or explicitly referred to the relevant precedent in explaining the decision, it was not coded as a citation to precedent.

¹¹⁷ On average, the labor awards cited 2.6 total and 2.4 unique precedents per page in the legal analysis section. The class arbitration awards cited 2.8 total and 2.0 unique precedents per page, and the employment awards cited 2.9 total and 2.2 unique.

¹¹⁸ For the full definition of “strong” citations, see *supra* text accompanying note 106. See also Walsh, *supra* note 10, at 342.

¹¹⁹ Walsh, *supra* note 10, at 342.

purport to rely on precedent or engage with it in a meaningful way. And like all proxies, it is imperfect. But it reveals, at a minimum, that the arbitrators in these regimes did more than pepper their awards with string citations. And although we cannot make a direct comparison, it compares favorably to existing research into judicial practices. One study of wrongful discharge cases, for example, reported that, on average, only 20 percent of citations per judicial opinion were strong citations.¹²⁰

[Insert Table 4 here]

Nor did arbitrators only cite precedent that favored the arbitrator's preferred rule or outcome or that directly supported the outcome. As Table 4 indicates, arbitrators sometimes cited precedent only to explicitly distinguish it. Across all three regimes, seven percent of the total citations were of this sort.¹²¹ There were no cases in which arbitrators simply rejected a precedent out of hand—for example, on the theory that arbitrators are not bound by legal rules announced by courts. Instead, the awards reveal a familiar pattern of common law reasoning in which the adjudicator explains why a potential precedent is not truly analogous.¹²² In one employment arbitration, for example, the employer defended against a Title VII retaliation claim by citing a judicial opinion rejecting a similar claim, in part, because the adverse employment action had occurred nearly a year after the employee filed an EEOC complaint.¹²³ The arbitrator ruled in the employee's favor, distinguishing the precedent proffered by the employer as a case in which there was no *other* evidence linking the adverse employment action to the employee's protected activity.¹²⁴

It is hard to say how often arbitrators (or judges) *should* cite and distinguish precedent. To answer this question, we would have to identify both the functions that adjudication should serve and the level of engagement with precedent necessary to satisfy those functions. Thus, if we expect adjudicators to provide the parties and their lawyers with an

¹²⁰ *Id.* (reporting that the average number of citations per case was 16.66 and that only 3.19 were strong citations). See also Niblett, *supra* note 10, at 264 (using a different definition, finding that 42.7% of citations were “meaningful”).

¹²¹ These citations were not evenly distributed across awards; of the awards that cited to judicial or arbitral precedent, nearly half (44.1%) made no effort to distinguish any of the cited precedents.

¹²² See, e.g., 2008 AAA Employment LEXIS 122 at 12–16 (June 23, 2008) (determining whether an employee was a qualified individual with a disability for purposes of the Americans With Disabilities Act, by examining and distinguishing several judicial opinions).

¹²³ See 2007 AAA Employment LEXIS 63 at *31–32 (Jan. 18, 2007) (citing *Foster v. Solvay Pharms., Inc.*, 160 Fed. Appx. 385, 389 (5th Cir. 2005)).

¹²⁴ *Id.*

adequate explanation for the result,¹²⁵ they should cite (and distinguish) precedent to the extent necessary to serve this function. If we also expect them to inform the public and contribute to debates over social policy,¹²⁶ or to supply rules to guide future behavior,¹²⁷ they should cite and distinguish precedent to whatever extent is necessary to serve these additional functions. Whether a given judicial opinion or arbitration award fulfills these functions is practically unknowable. Moreover, the extent to which arbitrators (and judges) cite and distinguish precedent also will depend on a host of more quotidian factors, such as the size of the available pool of relevant precedent, the diligence of the parties in finding precedent to support their positions, and the extent to which the arbitrator (or judge, or judge's law clerk) has the time and inclination to perform independent research and produce a lengthy written decision.

To the extent precedent serves public functions—contributing to social debate, guiding future conduct, etc.—then we might expect judges to engage with it more often, and more seriously, than arbitrators.¹²⁸ After all, arbitrators will produce awards that discuss relevant precedent only if their customers are willing to pay for that service.¹²⁹ What is striking about the evidence discussed thus far, however, is the degree to which arbitrators in

¹²⁵ Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 54–55 (1988); Robert A. Lefflar, *Honest Judicial Opinions*, 74 NW U. L. REV. 721, 737 (1979). See also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1085 (2000) (noting this function of arbitration awards).

¹²⁶ Daniel A. Farber, *Missing the "Play of Intelligence"*, 36 WM. & MARY L. REV. 147, 157–58 (1994). Cf. Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1085 (1984) (noting that courts exist “to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”).

¹²⁷ Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1089–92, 1113–18; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 66–71 (1995). See also Reuben, *supra* note 125, at 1085 (noting possibility that arbitration awards could serve a “powerful informational function”).

¹²⁸ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979). For a comparison of judges and arbitrators, see *infra* text accompanying notes 161–177. See also Chew, *supra* note 8 (comparing arbitrators to judges in a sample of race discrimination claims).

¹²⁹ This is not necessarily a problem, at least where all parties to the contract make an informed choice of arbitration. Although some have expressed concern that widespread use of arbitration will diminish the supply of law available to the public at large, it is not obvious why litigants who are willing to pay for their own dispute resolution services should have to accept the public subsidy and litigate in court. This is, of course, a broader debate—one that has traditionally encompassed settlement as well. See generally the symposium AGAINST SETTLEMENT: TWENTY-FIVE YEARS LATER, 78 FORDHAM L. REV. 1117 (2009) (symposium contributions considering the impact of Owen Fiss's *Against Settlement*).

these regimes do engage with precedent. There are exceptions, but the substantial majority of awards in both the employment and class arbitration regimes provide a reasonably detailed narrative explanation, frequently cite to precedent, and seem to engage with that precedent in some detail. Arbitrators in these regimes may not behave exactly like judges, but any difference is of degree and not of kind. And whatever else one can say about arbitrators in these regimes, their decisions seem anything but ad hoc.

C. Arbitral precedent: On arbitrators as producers of law

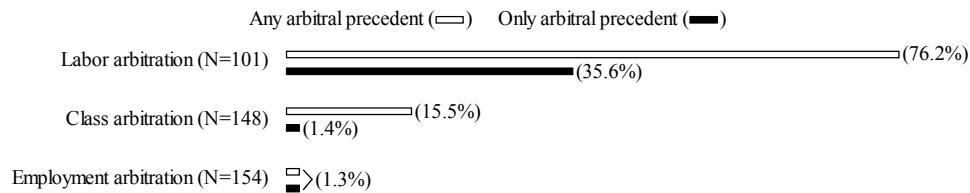
In this section, I return to the entire dataset of awards, rather than the 75-award subset, to explore the conditions under which arbitrators treated other arbitration awards as precedent. From Figure 1, recall that most AAA employment and class arbitration awards cited at least one judicial or arbitral precedent, while nearly half of the labor awards did so.¹³⁰ In this Section, I report evidence only from the subset of awards that contained such a citation. Within that subset, Figure 2 showed that judicial precedent dominated employment and class arbitration awards but not labor awards. The vast majority of employment awards (98.7%) and a sizeable majority of class arbitration awards (83.8%) cited only judicial precedent. This was quite rare in labor arbitration; only 14.9% of labor awards cited exclusively judicial precedent.

Another way to describe these findings is to say that arbitral precedent played almost no role in employment arbitration—at least not one that arbitrators were willing to acknowledge in the award. The same is true in securities arbitration, where arbitrators almost never cited any precedent and never cited arbitral precedent.¹³¹ Citations to arbitral precedent occurred primarily in the labor awards and, to a lesser extent, in the class arbitration awards. Figure 3 makes this plain by depicting, for each arbitration regime, the proportion of awards that cited at least one arbitration award and the proportion of awards that cited *only* arbitration awards.¹³²

¹³⁰ See *supra* pages __ & __. Two-thirds of the employment awards cited to at least one precedent (including 76.2% of awards addressing a statutory discrimination claim), as did 71.8% of the class arbitration awards.

¹³¹ This is hardly surprising. Unreasoned awards are the norm in securities arbitration, and these have virtually no value as precedent. See Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. DISP. RESOL. 627, 683–84 (2008) (noting that published awards have potential signaling and informational benefits and can be persuasive in future arbitrations).

¹³² The proportion of awards citing any arbitral precedent, and the proportion citing only arbitral precedent, were significantly higher in labor arbitration than in the other two regimes. The proportion of class arbitration awards citing any arbitral precedent was also significantly higher than the proportion of employment awards. ($\chi^2 \geq 11.9$, $ps < .001$).

Figure 3. Percent of "precedential" awards citing any and only arbitral precedent

As the figure makes clear, the employment awards almost never cited arbitral precedent.¹³³ The class arbitration awards, by contrast, were over ten times as likely to do so; 15.5% of these awards cited to another arbitration award, mostly in connection with questions of contract interpretation and arbitral procedure.¹³⁴ For example, arbitrators sometimes cited past awards on the question whether the parties' contract permitted arbitration to proceed as a class action.¹³⁵ Although low as an absolute percentage, the fact that 15.5% of class arbitration awards cite to other arbitration awards is noteworthy because class arbitration is in its relative infancy. Arbitrators did not begin to publish awards in earnest until 2003, and this limited the supply of potentially relevant past awards.¹³⁶ Arguably, then, the class arbitration awards suggest that a fairly robust system of arbitral precedent might evolve in a relatively short time.

The labor arbitration awards offer an idea of what such a system might look like. Although over half of the labor awards cited no precedent

¹³³ On the two occasions where this happened, the arbitrator cited *only* to arbitration awards. The first award uses conventions typical of labor arbitration, such as referring to the employee as "grievant." But the award does not mention a collective bargaining agreement, identify a union representative at the arbitration, or otherwise suggest that the workforce was unionized. *See* 1999 AAA Employment LEXIS 46 (Aug. 8, 1999). The second award is similar but makes clear there was no collective bargaining agreement. *See* 2005 AAA Employment LEXIS 6, *4 (Apr. 1, 2005). Both cases involved garden-variety contract disputes.

¹³⁴ For a related finding in the context of international arbitration, see Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357, 368–73 (2007).

¹³⁵ This question has been complicated by the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). For more discussion, see Strong, *supra* note 50.

¹³⁶ To be sure, arbitrators could have looked to other sources. In an employment class action, for example, the arbitrator conceivably might have looked to AAA employment awards for guidance on substantive questions of employment law. This did not happen in the dataset. Most of the class arbitrations, however, involve disputes (such as claims under laws regulating consumer credit transactions) that rarely result in published awards in other arbitration contexts. This means that most potentially relevant awards will come from other class arbitrations. In rare cases outside of class arbitration, arbitrators cited to awards produced in other forms of arbitration. This happened in two of the employment awards, each of which cited awards rendered by labor arbitrators. *See supra* note 133.

at all (Fig. 1), over three-quarters (76.2%) of the remaining awards cited at least one arbitration award and over one-third (35.6%) cited *only* arbitration awards as precedent (Fig. 3). The labor awards also cited a reasonably large number of arbitration awards—an average of 5.6 per award (SD=6.3), compared to only 2.6 (SD=3.1) in the class arbitration awards. Nearly 20% of the labor sample cited ten or more arbitration awards, and several cited more than thirty.¹³⁷

It is clear, then, that arbitrators sometimes but not always treat prior awards as having precedential value. But when are they likely to do so? One hypothesis is that a system of arbitral precedent will arise whenever arbitrators write and publish reasoned awards.¹³⁸ Elsewhere, I have expressed reasons to doubt this as a general rule applicable to all types of arbitration,¹³⁹ and the evidence discussed above gives further reason to be skeptical. For one thing, the dataset includes ten reasoned securities awards, none of which cite to a prior arbitration award. More telling still, since 2000 the AAA has published thousands of reasoned awards in employment disputes, yet only two of the employment awards in the sample cite to arbitral precedent.¹⁴⁰ In short, although there is an extensive body of published, thoroughly reasoned employment arbitration awards, there is no evidence that AAA arbitrators view these as an important source of precedent.

So under what conditions *will* arbitration result in a system of precedent? The labor and class arbitration awards suggest that arbitral precedent primarily fills gaps in, rather than displaces, government-created law. Recall that most labor arbitrations involve an employee's claim that an employer lacked "just cause" for its disciplinary decision under the relevant CBA and that courts rarely consider this type of breach of contract claim. The unions and employers who populate labor arbitration are not likely to

¹³⁷ Over half of the class arbitration awards, by contrast, cited to only a single past award, and only one cited to more than ten.

¹³⁸ See, e.g., Drahozal, *supra* note 3, at 214; Fabien Gélinas, *Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalisation*, in SUSTAINABLE DEV. IN WORLD TRADE LAW 577, 585 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005). On the importance of reasoned, published awards, the link between such awards, and the creation of arbitral precedent, see, for example, Brunet & Johnson, *supra* note 12, at 473; Brunet, *supra* note 12, at 1489; Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adaptation, Adoption, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1356 (2006); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1267–68 (2003); W. Michael Reisman, Law, *International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration*, in INT'L ARB. 2006: BACK TO BASICS? 849, 854–56 & n.3 (van den Berg ed., 2007).

¹³⁹ Weidemaier, *supra* note 7, at 1952.

¹⁴⁰ See *supra* note 87.

be satisfied with ad hoc decision-making, for they will expect to receive consistent answers to similar questions arising under the same CBA.¹⁴¹ And if parties want to support their arguments with relevant precedent, they will of necessity have to look to past arbitrations. The same is true for arbitrators when writing the award.

Likewise, recall that the class arbitration awards mostly cited arbitral precedent when considering questions of contract interpretation and procedure.¹⁴² Most of these citations appeared in the arbitrator's discussion of whether the parties' contract permitted arbitration to be conducted on behalf of a class.¹⁴³ At least until the Supreme Court's decision in *Stolt-Nielsen*,¹⁴⁴ courts rarely addressed this question of contract interpretation, and when they did they afforded substantial deference to the arbitrator's decision.¹⁴⁵ As with the labor disputes, then, past arbitration awards were the most relevant available precedent and could be cited without creating a potential conflict with a judge's decision in a similar case.¹⁴⁶

It is worth noting that all of the labor and class arbitration awards in the dataset were issued before *Stolt-Nielsen*. In addition to subjecting the arbitration panel's award to an unprecedented degree of scrutiny, the *Stolt-Nielsen* Court also criticized the arbitrators for relying on other arbitration awards.¹⁴⁷ The panel mistakenly proceeded, the Court said, "as if it had the authority of a common-law court to develop what it viewed as the best rule..."¹⁴⁸ *Stolt-Nielsen* is an odd case, and it is not clear that the Court's

¹⁴¹ Weidemaier, *supra* note 7, at 1930.

¹⁴² See *supra* text accompanying note 134.

¹⁴³ Not all of this arbitral precedent was especially relevant, and arbitrators often disclaimed reliance on past awards. Nevertheless, the dataset contains 100 awards in which the arbitrator addressed a question of clause construction, and in 92 the arbitrator interpreted the agreement to permit class arbitration.

¹⁴⁴ 130 S. Ct. 1758, 1775 (2010).

¹⁴⁵ See, e.g., *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 352-53 (2008). In *Stolt-Nielsen*, the Supreme Court held that an award construing a charter party to authorize class arbitration should have been vacated, notwithstanding the fact that courts typically defer to arbitrators on such questions of contract interpretation. For further discussion of the case, see Strong, *supra* note 50, and Rau, *supra* note 50. For a discussion of the implications of *Stolt-Nielsen* for the timing of judicial review, see Kristen M. Blankley, *Did the Arbitrator "Sneeze"?—Do Federal Courts Have Jurisdiction Over "Interlocutory" Awards in Class Action Arbitrations?*, 34 VT. L. REV. 493, 518-20 (2010).

¹⁴⁶ It is possible, of course, that arbitrators tend to cite arbitral precedent on questions of procedure and contract interpretation because these questions recur across a wide range of substantive disputes, while questions of statutory interpretation, say, do not. Thus, the pattern may be due to the fact that arbitral precedent exists only for questions of procedure or contract interpretation. Nonetheless, the pattern is consistent with a story in which judicial precedent, where it is available, crowds out arbitral precedent.

¹⁴⁷ 130 S. Ct. 1758 at 1768 n.4.

¹⁴⁸ *Id.* at 1769.

analysis has much relevance outside the unique context of class arbitration. Indeed, perhaps the best understanding of *Stolt-Nielsen* is that it establishes a firm presumption against class arbitration absent clear evidence that the contracting parties intended to authorize that procedure.¹⁴⁹ Nevertheless, the Court's "mystifying"¹⁵⁰ critique of arbitrators who behave like common law judges may cause future arbitrators to discount the precedential value of past arbitration awards.

If the labor and class arbitration awards suggest that arbitral precedent primarily serves a gap-filling role, the employment awards suggest that, under some conditions, it may not even do that. At first glance, it is not surprising that AAA employment arbitrators almost never cite arbitration awards as precedent. Most of these disputes involve claims that courts routinely hear, such as breach of contract and wrongful discharge claims and claims alleging violation of anti-discrimination statutes. Perhaps there is no need for arbitral authority in such cases. Courts have produced a substantial body of employment law and continue to produce more of it. These relatively thick bodies of law may leave few gaps for a system of arbitral precedent to fill. Indeed, because courts often are skeptical of arbitration in the employment context,¹⁵¹ citations to arbitration awards might provoke judicial hostility. In other work, for example, I have suggested that, because courts sometimes view arbitration as a means for employers to circumvent important legal rights, arbitrators have incentives to signal their fidelity to the law as articulated by courts.¹⁵² Citations to judicial precedent send that signal; citations to arbitral precedent do not.

But even if all this is true, it is puzzling that arbitral precedent does not play a larger role in the employment disputes. As noted earlier, many of these disputes involve recurring questions of contract interpretation.¹⁵³ For example, an employee might assert a breach of contract claim based on a handbook or manual that governs most or all of the workplace.¹⁵⁴ There is an obvious parallel here to labor arbitration. To be sure, employers that do not have to negotiate with a union may unilaterally set the terms of their workplace contracts. But in both contexts, the arbitrator must interpret and apply contract terms that necessarily affect many different employees. In both contexts, moreover, it is likely that *all* breach of contract claims will be resolved in arbitration, so courts will have few if any opportunities to

¹⁴⁹ For more on this argument, see Rau, *supra* note 50 at 37-46.

¹⁵⁰ Rau, *supra* note 50 at 31. (calling this "the most mystifying sentence to be found in any opinion ever written by the Supreme Court on the subject of arbitration").

¹⁵¹ See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997).

¹⁵² Weidemaier, *supra* note 7, at 1954.

¹⁵³ See *supra* text accompanying notes 87-91.

¹⁵⁴ See *supra* note 88.

interpret the relevant contract. Yet unlike labor arbitrators, AAA employment arbitrators almost never cite to the large body of extensively reasoned arbitration awards.¹⁵⁵ This is true even though the awards are available on-line in fully searchable format (albeit with party and witness names redacted).¹⁵⁶

Perhaps there is a straightforward explanation for why arbitral precedent plays such a negligible role.¹⁵⁷ Many of these, however, only beg the question. For example, it is possible that litigants do not cite past awards in their submissions, and arbitrators simply follow their lead.¹⁵⁸ I do not have access to party submissions, so I cannot test this proposition directly.¹⁵⁹ But even if this is the explanation, the question remains: Why

¹⁵⁵ Recall that arbitrators were somewhat less likely to cite to precedent in awards that did not address a statutory discrimination claim, over half the awards cited to at least one precedent. See *supra* text accompanying note 82.

¹⁵⁶ The awards do include the arbitrator's name. The Lexis dataset is not available with every subscription, and many lawyers will not have access. Lawyers who specialize in employment law and businesses that experience a high volume of employment disputes, however, may find it worthwhile to pay for access.

¹⁵⁷ One possibility is that employers are very good at resolving disputes before they reach arbitration. See, e.g., Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, 13 ADV. IN INDUS. & LAB. REL. 71, 75–87 (2004) (finding that only 3 of 72 workplace disputes within one manufacturer reached mediation or arbitration); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1587–88 (2005) (reporting that only 5% of claims submitted to one employer's dispute resolution program reached arbitration); Lewin, *supra* note 89, at 386 (estimating that 4–5% of grievances are resolved in arbitration for employers with formal dispute resolution programs). Thus, it is possible that even large employers with uniform workplace policies do not routinely appear in arbitration.

Because the AAA employment awards redact the name of the employer, I cannot say how frequently particular employers appear in the sample. But given the size of the sample (231), it is plausible to assume that some employers appear more than once. For example, the AAA website provides extensive data on cases filed and lists the name of the non-consumer party in each case. See AAA Provider Organization Report, available at <http://www.adr.org/sp.asp?id=22042>. Using this dataset, I drew a random sample of 231 cases decided under the AAA's employment arbitration rules. This random sample included 37 cases in which the non-consumer party also was involved in another dispute in the sample. This is not the same, of course, as drawing a random sample from published awards, but it gives further reason to believe that the sample includes a number of repeat employers.

¹⁵⁸ For example, a study of arbitrations administered under the ICSID Additional Facility Rules found that arbitrators sometimes cited Iran-United States Claims Tribunal precedent, but only when one of the parties had previously cited the same precedent. See Gibson & Drahozal, *supra* note 10 at 543–44.

¹⁵⁹ Most of the labor awards summarize the parties' arguments, and many list the precedents cited by the parties. By comparing these citations to those in the award itself, past researchers have constructed a rough proxy for the extent to which the arbitrator has

don't parties look to past arbitration awards to support their arguments? There is no clear answer to this question, but one possibility is that arbitration awards simply are not seen as valid precedent. Put somewhat differently, parties and arbitrators sometimes rely on arbitration awards to fill gaps in government-created law, but only when they view the awards as legitimate sources of authority.¹⁶⁰

D. An (imperfect) comparison to litigation

Except in the context of securities arbitration, it seems that arbitrators in these regimes behave much like judges. But how do they really compare? To get a better sense of how arbitrators and judges decide similar disputes, I attempted to construct roughly comparable samples of judicial opinions and arbitration awards.¹⁶¹ I began with the subsample of 25 awards rendered in AAA statutory employment discrimination cases. I selected employment discrimination disputes for several reasons. First, these disputes appear routinely in both arbitration and litigation. Second, concerns about arbitration are most acute when disputes involve claims arising under mandatory, government-supplied law, especially when the parties are of unequal bargaining power and thus have unequal influence over the arbitration process.¹⁶² And third, selecting statutory discrimination cases facilitated a rough comparison with earlier research finding, in cases alleging harassment on the basis of race, "that arbitrators are beginning to sound, think, and act like judges."¹⁶³

conducted independent research. *See* Cooper *et al.*, *supra* note 36; Greenfield, *supra* note 36, at 690; Harris, *supra* note 36, at 28–29. Note that this proxy likely understates the extent to which arbitrators simply cite cases supplied by the parties. *See* Cooper *et al.*, *supra* note 36, at 32 & n.43. Although I have doubts about its validity, I constructed a similar proxy in a random sample of 40 labor awards in which the arbitrator cited some form of arbitral precedent. Based on this subset of awards, it appears that labor arbitrators perform a significant amount of independent research. In just over 20% of the cases, the arbitrator cited only awards that had first been cited by the parties. In more than half the cases, however, the arbitrator cited 3 or more awards not cited by the parties, and in 13% of the awards the arbitrator cited 10 or more awards not cited by the parties. Once again, however, the patterns may simply mean arbitrators do not report every case cited by one of the parties—a possibility that seems especially likely when the parties cite lots of precedents.

¹⁶⁰ *See* Weidemaier, *supra* note 7, at 1951–55.

¹⁶¹ Note that I am *not* trying to determine whether the collective activities of AAA employment arbitrators produce a system of precedent as robust as that produced by the whole of the federal judiciary. I am instead asking whether arbitrators and judges use precedent in comparable ways when making comparable decisions. For further discussion, see *infra* text accompanying notes 189–193.

¹⁶² *See supra* text accompanying notes 27–29.

¹⁶³ *See* Chew, *supra* note 8, at 207.

The comparison sample includes published federal district court opinions after a bench trial or resolving a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or a motion for summary judgment.¹⁶⁴ Bench trials are perhaps the closest analog to arbitration, because the judge (like the arbitrator) resolves merits-related fact disputes. But bench trials are rare, and they often occur after the judge already has whittled down the issues in dispute by granting a summary judgment motion or a motion to dismiss with respect to some claims.¹⁶⁵ Arbitrators, by contrast, typically reserve most legal questions until the final award on the merits.¹⁶⁶ Thus, I also included rulings on summary judgment motions and motions to dismiss, as these motions offer district judges their primary opportunities to make and apply precedent in a way that relates directly to the merits of the dispute.¹⁶⁷

I ran a Westlaw search designed to identify a pool of relevant opinions, and I randomly selected 25 for coding.¹⁶⁸ I coded each opinion in the same way as the arbitration awards, although I did not count citations that related to procedural matters that have no analog in arbitration.¹⁶⁹ In

¹⁶⁴ I limited the sample to federal rather than state judges because most of the AAA employment disputes involve federal statutory claims, and most of these are litigated in federal court.

¹⁶⁵ Selection bias, moreover, likely means that bench trials are not representative of trials overall. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1148-61 (1992). A variety of selection mechanisms affect the cases arbitrators hear, see Weidemaier, *supra* note 73 at 847-56, but parties who have agreed to arbitrate must submit factual disputes to the arbitrator (unless they jointly agree otherwise).

¹⁶⁶ I am not saying that all arbitration proceedings involve only a single award that resolves all factual and legal issues. But the final award will often be the most important decision, and it may be the only one that is published or even written. By contrast, significant judicial opinions will often be rendered early in the dispute before any meaningful factual development.

¹⁶⁷ Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 878 (1999).

¹⁶⁸ I limited my search to cases decided since 1999, when the AAA began publishing its employment discrimination awards. I ran the following search in Westlaw's DCTR database: "discrimin! retaliat! harass! /s rac! sex! gender age disab! & "summary judgment" "bench trial" "motion to dismiss" & da(aft 1999 & bef 2010)." I generated numbers randomly and selected the opinion corresponding to the relevant number for coding.

¹⁶⁹ For example, I did not include citations to cases setting out the standard for ruling on a summary judgment motion. Arbitrators have the authority to rule on such motions, see, e.g., *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650, 659-60 (1995) (motion for summary adjudication), and when they do it is reasonable to assume they will apply standards similar or identical to those applied by judges, if only to avoid vacatur, see *Prudential Securities, Inc. v. Dalton*, 929 F. Supp. 1411, 1417-18 (N.D. Okla. 1996). But it is rare for arbitrators to consider summary judgment motions and none of the awards in the subsample did so.

total, the comparison sample includes ten opinions issued after a bench trial, twelve rulings on summary judgment motions, and three rulings on motions to dismiss. These numbers are quite small, but there were no apparent differences in how judges used precedent in the various types of opinion. For that reason, I do not attempt to distinguish them in reporting the results that follow.

The comparison between arbitrators and judges complicates the picture of arbitration developed so far. As we shall see, precedent generally played a lesser role in the arbitration awards than in the judicial opinions, although this does not mean that precedent played an *insufficient* role in arbitration.¹⁷⁰ I first discuss these findings and then explain why they must be interpreted with caution.

1. Arbitration as judging-lite?

The core findings of this section can be summarized succinctly: judges cited more total precedent and more unique precedent than arbitrators, and their citations were more likely to be of the “strong” variety. The implications of these findings, however, are less clear.

In the two small samples, the arbitration awards devoted somewhat more pages to legal analysis—an average of 9.7 pages versus 7.6 for the judicial opinions—but this difference was not significant.¹⁷¹ With respect to how arbitrators and judges used precedent, however, a somewhat different picture emerged. To begin with, each judicial opinion cited at least one form of precedent, while four arbitration awards cited no precedent at all. Even after excluding these four awards from the analysis, the judicial opinions included a significantly greater number of strong citations (mean (M)=9.6) than the arbitration awards (M=5.2).¹⁷² The judicial opinions also included more total citations ($M_{\text{(court)}}=33.8$, $M_{\text{(arb)}}=28.4$) and more unique citations ($M_{\text{(court)}}=24.0$; $M_{\text{(arb)}}=21.6$) than the arbitration awards. The differences in the total and unique citations variables were not significant, but they point in the same direction as the strong citations variable.¹⁷³

¹⁷⁰ See *supra* text accompanying notes 189–191.

¹⁷¹ Two-sample $t(48)=-1.29$, $p=.207$.

¹⁷² The strong citations, unique citations, and total citations variables were all positively skewed. To reduce skew, I performed a square root transformation, which adequately reduced skew and resulted in a more normal distribution than log transformation. Using the transformed variables, judicial opinions included significantly more strong citations than arbitration awards ($t(44)=3.36$, $p<.01$). Non-transformed means are reported in the text.

¹⁷³ Using transformed variables, see *supra* note 172, there were no significant differences between judicial opinions and arbitration awards in total citations to precedent ($t(32)=1.46$, $p=.16$) or unique citations to precedent ($t(30)=1.1$, $p=.28$).

Note that raw citation counts are sensitive to opinion length. All else equal, longer awards and opinions will cite more precedent even if precedent is no more “important,” in a relative sense, to these decisions. For example, a five page opinion that includes a total of 25 strong citations, all to unique precedents, would be coded exactly the same as a 100 page opinion with the same number and pattern of citations. Yet the two opinions unquestionably differ. One is not necessarily *better* than the other. The first, for example, might concisely synthesize an important area of law, in the process providing important guidance to future parties and adjudicators. Or it might be larded with unnecessary quotations and woefully short on analysis. What seems clear, however, is that precedent plays a more prominent role—for good or ill—in the first opinion.

To facilitate a more direct comparison, I computed total citations, unique citations, and strong citations per page of legal analysis for each opinion and award.¹⁷⁴ As Figure 4 depicts, opinions by federal district judges used significantly more of each type of citation per page than the arbitration awards. The judicial opinions contained an average of 4.6 total citations per page, versus 2.5 for the arbitration awards.¹⁷⁵ In addition, the opinions used an average of 3.3 unique citations and 1.4 strong citations, per page, compared to 1.9 unique and 0.5 strong citations for the arbitration awards.¹⁷⁶ An additional difference, not depicted in Figure 4, is that strong citations comprised a significantly higher proportion of total citations in the

¹⁷⁴ The coding focused on the legal analysis portion of each opinion and award. This was because citations appearing earlier in the opinion or award very rarely bore any relation to the narrative justification offered for the decision by the judge or arbitrator. In disputes involving a statutory claim, for example, many opinions and awards included a perfunctory reference to the relevant statute in the introductory paragraph. These references, however, did nothing to link the statute to any *reason* for the decision in the case.

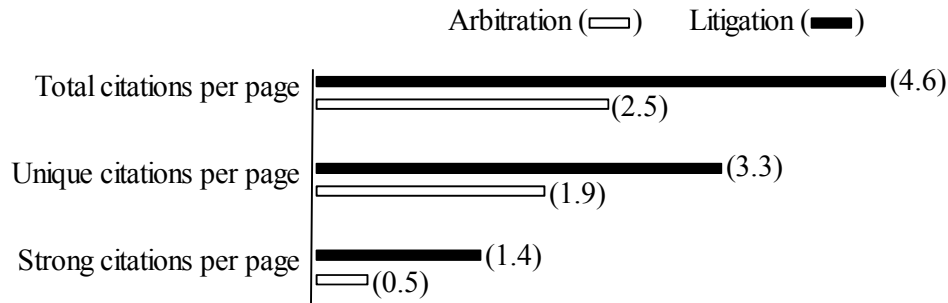
¹⁷⁵ For the total citations per page variable, the 95% confidence interval for the judicial opinions was 4.0–5.3 versus 1.8–3.2 for the arbitration awards. Once again, *see supra* note 172, these variables were positively skewed. Square root transformation adequately reduced the skew and produced a more normal distribution than log transformation. Using the transformed variables, judicial opinions used more total citations per page than arbitration awards ($t(44)=4.82$, $p<.001$). Means and confidence intervals are reported in non-transformed data.

¹⁷⁶ As noted previously, *see supra* note 175, these variables were transformed using the square root (although non-transformed means are reported in the text). Using the transformed variables, judicial opinions used more unique citations ($t(44)=4.03$, $p<.001$) and strong citations ($t(44)=5.07$, $p<.001$) per page than arbitration awards. Using non-transformed data, 95 percent confidence intervals for the judicial opinions and arbitral awards were:

	Unique cites per page	Strong cites per page
District court	2.8-3.9	1.1-1.6
Arbitration	1.3-2.6	0.3-0.7

judicial opinions ($M=.31$, $SD=.15$) than in the arbitration awards ($M=.21$, $SD=.15$).¹⁷⁷

Figure 4. Mean total, unique, and strong citations per page of legal analysis.



In the employment discrimination cases, then, the district court opinions made more extensive use of precedent than the arbitral awards and used a higher proportion of strong citations. These differences were significant notwithstanding the small sample size. If arbitrators in employment discrimination disputes generally cite less precedent—or if this is true of arbitrators generally—what should we make of the difference? As the next section explains, there is no easy answer.

2. The difficulty of comparing arbitrators to judges.

The initial problem is a fundamental one: process differences between arbitration and litigation make any comparison imperfect at best. As noted above, many events that produce judicial opinions—like motions under Fed. R. Civ. P. 12(b)(6) and motions in limine to exclude evidence—rarely occur in arbitration.¹⁷⁸ Judges, moreover, rarely bear primary responsibility for resolving merits-related factual disputes. In short, even if judges and arbitrators hear the same kind of cases, it is difficult to find awards and opinions in which they are doing the same kind of work.¹⁷⁹

Other differences further complicate the comparison. Perhaps the most significant is that arbitrated disputes tend to involve lower financial

¹⁷⁷ $t(44)=2.23$, $p=.03$. Proportional data was transformed using the arcsine. See David C. Howell, *STATISTICAL METHODS FOR PSYCHOLOGY* 341 (2010).

¹⁷⁸ See *supra* text accompanying notes 164–167.

¹⁷⁹ Arbitrators and judges probably do *not* hear the same kind of cases, even when the substantive legal claims are formally identical. For general discussion, see W. Mark C. Weidemaier, *From Court Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 MICH. J. L. REF. 843, 847-56 (2008); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 755-57 (2001).

stakes than cases brought in court.¹⁸⁰ It is reasonable to assume that litigants make greater investments in litigation as the stakes increase.¹⁸¹ By hypothesis, this means that parties to arbitrations will invest less in legal research and in making legal arguments.¹⁸² To a degree, both arbitrators and judges are dependent on the litigants to identify relevant precedent, and this is especially true of arbitrators. Thus, one might expect arbitrators to use less precedent, or a different kind of precedent, simply because they are presiding over lower-stakes disputes.¹⁸³ But let us assume the differences in these small samples reflect underlying differences in the how AAA employment arbitrators and federal district judges behave in comparable cases.¹⁸⁴ Is the difference an important one?

Perhaps not. For example, consider the strong citation variable, which is a proxy for “quality” citations—i.e., those that reflect meaningful engagement with the cited precedent. It is not surprising that opinions by federal district judges tend to include more strong citations. Unlike arbitrators, these judges may delegate research and writing tasks to law

¹⁸⁰ Many awards contained too little information to allow me even to estimate the employee’s monetary demand, much less the amount realistically in controversy. But there is some evidence that arbitrated disputes tend to involve lower stakes. *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J., 44, 48–49 (Jan. 2004); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 8, 10–12 (May – July 2003); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 239 (1997–1998). Likewise, there is reason to believe that litigated disputes tend to involve higher stakes, William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 44 (Oct.–Dec. 1995); Eisenberg & Hill, *supra* at 27–28.

¹⁸¹ Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1437–40 (2000).

¹⁸² Other differences further complicate the effort to compare arbitrated to litigated disputes. For example, employers who worry about creating adverse precedent – perhaps because they have a propensity to discriminate – might have reason to prefer arbitration. *See* Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 874–89 (2004).

¹⁸³ One possibility, for example, is that parties and arbitrators will invest little in legal research and will instead rely on old briefs (or awards) to lay out the relevant law. If this is so, we might expect arbitrators to cite precedent that is somewhat older than the precedent cited by judges. *See infra* text accompanying note 192.

¹⁸⁴ The AAA requires employment arbitrators to be “experienced in the field of employment law.” AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 12 (Nov. 1, 2009). In practice, AAA arbitrators tend to be lawyers and sometimes former judges, although only one of the arbitrators in the 25 award sub-sample was a former state or federal judge. (One additional arbitrator had been an administrative law judge for a state employment agency). When arbitrators are not lawyers, it is plausible to assume that precedent plays a smaller role in their awards.

clerks. They also may invest time in opinion writing if they choose and need not ask the parties to pay them for it. But perhaps these apparent advantages simply result in opinions crammed with unnecessary or extensive quotations, rather than useful analysis. Law clerks, for example, tend to be recent law school graduates, and perhaps they are more comfortable quoting descriptions of legal rules than stating the rule directly. Unnecessary quotations of this sort permeate some of the judicial opinions in the sample.¹⁸⁵ They also highlight the fact that the strong citation variable is over-inclusive as a proxy for quality citations.¹⁸⁶ Perhaps an adjudicator's efforts to *distinguish* precedent would make a better proxy for citation quality, for these efforts at least inform litigants and third parties about the criteria by which arbitrators identify relevant precedent.¹⁸⁷ And on this variable, there was no difference between the arbitration awards and the judicial opinions.¹⁸⁸

More broadly, any difference between citation practices in arbitration and litigation may be unimportant in terms of the functions that precedent is supposed to serve. Assume, for example, that citations to precedent facilitate private ordering by signaling that adjudicators will honor past decisions.¹⁸⁹ It is not obvious that this function is materially better served in a system where the average opinion includes 3.3 citations to unique precedents per page, rather than a "mere" 1.9. In other words, even if arbitrators and judges observe different citation practices, it is a separate

¹⁸⁵ For example:

The Seventh Circuit has defined an adverse employment action as "more disruptive than a mere inconvenience or an alteration of job responsibilities;" rather, an employee must show that "material harm has resulted from the challenged actions." [citation omitted]. In other words, "[t]he adverse action must materially alter the terms and conditions of employment." [citation omitted]. "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." [citation omitted].

Covello v. City of Chicago, 448 F. Supp. 2d 987, 993 (N.D. Ill. 2006).

¹⁸⁶ See *supra* text accompanying note 107.

¹⁸⁷ Cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576–78 (1986–1987) (describing function of rules of relevance in selecting precedent).

¹⁸⁸ Explicit efforts to distinguish precedent were rare in both systems, although arbitrators distinguished a slightly higher percentage of overall citations (3.2% vs. 2.2%). One outlier arbitration award included 13 citations to precedent that the arbitrator distinguished as inapposite. There was also no difference in the frequency of citations to statutes, formal regulations, or treatises and law reviews.

¹⁸⁹ See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy In Dispute Resolution*, 51 HASTINGS L.J. 1199, 1202 (2000). See also *supra* text accompanying notes 68–71.

question whether the collective efforts of arbitrators result in a system of precedent that is materially worse, in functional terms, than the precedent produced by judges.¹⁹⁰

The evidence presented here does not attempt to answer that question.¹⁹¹ At most, it indicates that arbitrators use somewhat less precedent than judges and (perhaps) that they use precedent in slightly different ways. That alone is worthy of further investigation. Moreover, the data hint that arbitration and litigation may differ not only in number and quality of citations but also in the *kinds* of precedent cited. Looking only at citations to judicial opinions, for example, district court judges tended to cite somewhat *newer* cases, although the difference was not significant.¹⁹²

Without further evidence, however, the evidence provides little reason to believe that arbitration awards are qualitatively different than judicial opinions.¹⁹³ What is undeniable, however, is that arbitrators are private actors who are chiefly accountable to the parties who pay their fees. It is a fair question whether they will *apply* legal rules in the same way as

¹⁹⁰ It is tempting to say that arbitration will produce a less robust system of precedent because there is no appellate mechanism to resolve conflicts. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 239 (1979). But when arbitration consumers agree on the correct rule, market forces will solve this problem. *See* Bruce, *supra* note 36, at 8. For further discussion, *see supra* note 69.

¹⁹¹ The question requires that we measure the *effects* of precedent, not the behavior of judges and arbitrators. For example, one benefit of precedent is that it facilitates settlement. If arbitration results in a weaker system of precedent, we might expect settlement rates to drop relative to litigation. Evidence of such a drop might support the (theoretically sound) claim that judges will be better than arbitrators at producing precedent and other social goods. I know of no data allowing a meaningful comparison of settlement rates, but there is some tantalizing evidence that settlement rates are indeed lower in arbitration. *See* Weidemaier, *supra* note 73, at 853. Assuming this is so, there are many potential explanations. The most relevant here is that precedent creates asymmetric stakes in many disputes because precedent is primarily of concern to defendants. *Id.* at n.37. For example, in employment discrimination cases, an adverse precedent arguably imposes greater costs on the defendant, which incurs adverse publicity and is more likely to be a repeat player than the plaintiff or (by hypothesis) the plaintiff's lawyer. If arbitration awards have less value as precedent, this asymmetry would be more pronounced in disputes litigated in court. In that case, some theories would predict both lower settlement rates and higher claimant win-rates in arbitration, and this prediction is consistent with the limited evidence. *Id.*

¹⁹² I computed the age of each citation to a judicial opinion and then, for each opinion or award, computed the mean and median age of the cases cited. For judicial opinions, the mean age was 8.8 years and the median age was 6.6. For the arbitration awards, the mean age was 10.6 years and the median age was 8.9 years. These differences were not significant, but this may be a function of the relatively small sample.

¹⁹³ *See also* Chew, *supra* note 8, at 207 (concluding from a comparison of judicial opinions and arbitration awards "that arbitrators are beginning to sound, think, and act like judges").

judges, and it is equally fair to wonder why their activities—so like judges in one sense—should be effectively immune from judicial review. I briefly return to this point in the final section, when I discuss some implications of these findings.

IV. IMPLICATIONS AND CONCLUSION

As I have noted, citation practices reveal a good deal about how arbitrators justify their decisions, but less about how they actually make them.¹⁹⁴ The absence of citations, for example, does not mean the tribunal ignored precedent in reaching its decision.¹⁹⁵ But evidence of citation practices adds important context to debates over how arbitrators make decisions and informs our understanding of how and whether arbitration generates precedent. It bears repeating that other arbitration regimes may differ from those studied here. In the employment context, for example, the AAA has a relatively firm commitment to transparency and abides by due process protocols requiring that arbitrators “should be bound by applicable agreements [and] statutes” and “should be empowered to award whatever relief would be available in court.”¹⁹⁶ Employers do not have to choose the AAA to administer their arbitration programs; those that do are opting in to a relatively “judicialized” process.¹⁹⁷ With this caveat, however, we can draw some tentative conclusions about arbitrator behavior, at least in the regimes studied here.

First, outside of securities disputes, there is little evidence that arbitrators render ad hoc decisions.¹⁹⁸ In the three regimes that feature reasoned awards, arbitrators wrote reasonably lengthy decisions that were substantially devoted to legal analysis and that made ample use of

¹⁹⁴ A different methodological approach, focusing on a wider range of case, party, and arbitrator characteristics, would be necessary to isolate the determinants of arbitral decision-making. As is evidenced by continuing debates over how best to understand judicial behavior, that project would yield no easy answers. For a summary of theories and evidence of the determinants of judicial behavior, see Epstein & Jacoby, *supra* note 69; Baum, *supra* note 69. See also Michael J. Gerhardt, THE POWER OF PRECEDENT 67–77 (2008) (summarizing and critiquing attitudinal and rational choice models of precedent as applied to Supreme Court cases).

¹⁹⁵ See David S. Law & Wen-Chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. U. L. REV. ____ (2011).

¹⁹⁶ Employment Due Process Protocol ¶ 5, available at <http://www.adr.org/sp.asp?id=28535>.

¹⁹⁷ See Weidemaier, *supra* note 13 at 677–78.

¹⁹⁸ As noted, securities arbitrators may take account of precedent in making decisions. See *supra* text accompanying notes 96–97. But their awards give no sign of this. Cf. David S. Law & Wen-Chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. U. L. REV. ____ (2011) (concluding after study of Taiwanese Constitutional Court that measures of citation frequency understate the extent to which the court considers foreign law).

precedent.¹⁹⁹ Even in the labor sample, where a bare majority of awards cited no precedent at all, arbitrators tended to provide a reasonably lengthy narrative explanation for the result.²⁰⁰ To be sure, the awards may not fully describe the actual considerations underlying the decision—but the same is true of judicial opinions.²⁰¹

Second, except for labor arbitration, the overwhelming majority of awards cite primarily or exclusively to judicial precedent. Thus, all signs indicate that litigants want arbitrators in these regimes to resolve disputes by applying government-created law. I have no doubt that parties can use arbitration to “produce a sophisticated, comprehensive legal system,”²⁰² but there is no evidence of that intent in the employment or class arbitration disputes. Again, this does not mean that arbitrators make unbiased decisions. But the similarity between arbitration awards and judicial opinions is striking and, perhaps, unsurprising. Arbitration law in the United States may have its roots in the informal procedures employed by merchant communities,²⁰³ but this form of arbitration has been supplanted in many contexts—including those studied here—by a much more legalized process.²⁰⁴ Arbitration regimes often are populated by lawyers, both as party representatives and as arbitrators. Arguments from authority play a significant role in legal discourse, especially in the context of adjudication.²⁰⁵ So it may be routine for lawyers trained in common law methods to invoke rules and standards derived from past cases to support their arguments and for arbitrators to do the same to justify their awards.²⁰⁶

¹⁹⁹ Again, this may be less true of unpublished reasoned awards.

²⁰⁰ This conclusion is based on the 25 award sub-sample. In that group of awards, the mean length of analysis was 3.6 pages—not especially long, but also not consistent with the notion that arbitrators produce ad hoc decisions.

²⁰¹ See *supra* note 68.

²⁰² Ware, *supra* note 20, at 747.

²⁰³ See Benson, *supra* note 18 at 481-85 (detailing historical use of arbitration in the US); Brunet, *supra* note 5 at 43-45 (same).

²⁰⁴ Brunet, *supra* note 5, at 45-64.

²⁰⁵ One might say that what makes a lawyer is the ability to *talk* like a lawyer, and much lawyer-talk involves the invocation of precedent. Cf. Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* 16–30 (Oxford: Oxford University Press 2007) (exploring the role of language in law and legal education); John M. Conley, *Can You Talk Like a Lawyer and Still Think Like a Human Being?* Mertz’s “*The Language of Law School*,” 34 LAW & SOC. INQ. 983, 989 (2009) (“The practice of law is all words.”).

²⁰⁶ Only the labor awards clearly indicate whether lawyers appeared on behalf of the parties and whether the arbitrator was a lawyer. Although the subject is beyond the scope of this paper, lawyers exerted surprisingly little influence on the use of precedent in labor arbitration. One would expect, of course, that parties would more often choose to be represented by a lawyer, and would more often select a lawyer as arbitrator, when they expect their dispute to turn on the application of legal rules. So it seems reasonable to suppose that the presence of lawyers would correlate positively with citations to precedent.

It remains possible, of course, that widespread arbitration will gradually erode government-created law. If arbitration awards have no value as precedent, but most disputes in a particular area are arbitrated, then the law may ossify.²⁰⁷ I close with two observations related to this subject. First, there is reason to believe that arbitrators can produce extensive bodies of precedent, even if they rarely do so now. Second, it is unusual and perhaps unfortunate that there is no meaningful dialogue between judges and arbitrators. Arbitration awards are subject only to limited judicial review, but a less formal dialogue between courts and arbitrators is both possible and potentially beneficial. Such a dialogue does not presently exist, but not because arbitrators do not take judicial opinions seriously. The evidence suggests that they do. Instead, the problem is that judges seemingly do not view arbitration awards even as persuasive authority.²⁰⁸

With respect to the first point, I already have noted that labor arbitrators mostly preside over disputes that do not appear in court. Thus, labor arbitrators do not compete with judges as suppliers of dispute resolution services, and this perhaps explains why they use arbitral precedent so freely.²⁰⁹ But class arbitration demonstrates that arbitrators view past awards as precedent in a wider array of circumstances, including on procedural and substantive questions that courts rarely address.²¹⁰ The consistent theme, however, is that arbitrators cite other arbitrators primarily when there is no judge-made law to cite—and, as the employment awards indicate, not always then.

But what about when arbitration entirely replaces litigation, as is the case for many securities industry disputes?²¹¹ In that context, arbitrators cannot look to judicial opinions for guidance—there are no opinions to guide them. And while it may not be ideal for arbitrators, rather than judges, to supply the content of the securities laws, there may be little choice. If securities laws are to evolve under the present system, that evolution will

But preliminary analyses revealed no significant increase in the proportion of awards that cite legal or arbitral authority in cases where the parties were represented by lawyers, the arbitrator was a lawyer, or both.

²⁰⁷ Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 873–76 (2002).

²⁰⁸ It is extremely rare and perhaps unheard of (in the context of domestic arbitration) for a judge to discuss an arbitrator's award in the same way the judge might cite, say, an opinion from a coordinate court in another jurisdiction. Certainly that did not happen in any of the judicial opinions I reviewed.

²⁰⁹ See *supra* page 35.

²¹⁰ And as noted above, evidence from international arbitration is consistent with this conclusion. See *supra* note 35.

²¹¹ See THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 15.1, at 638–41 (2009); Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 181, 182 (2008).

take place in arbitration. As one securities arbitration panel noted in a rare reasoned award:

[W]e must recognize the obvious effect that [federal arbitration law] ... has had on what would have been the normal case law development of state securities laws by state courts.... [A]lmost no customer/broker cases have been submitted to state courts. Thus, we have no way of knowing how the courts of Washington or California might now rule on the issues before this panel.... [A]rbitration decisions have generally omitted any explanation of the bases for the awards. This leaves the field of broker/dealer liability to customers bereft of persuasive legal precedent... We hope our willingness to take on this task will encourage future NASD panels to be more forthcoming, so that a body of meaningful precedents, interpreting the securities laws of the various states, may become available, absent the ability of the various state courts to develop their respective state laws.²¹²

The passage is noteworthy, for it highlights why reasoned awards alone will not produce a system of precedent. Arbitral precedent is a necessity, the passage implies, but only because courts no longer produce relevant law. Securities disputes are therefore unlike employment disputes, where parties and arbitrators may draw on a relatively thick body of judicial precedent. Likewise, securities arbitration differs from class arbitration, for the gaps in securities law more often extend beyond questions of procedure and contract interpretation. For these reasons, the passage implies that arbitral precedent is both more important and less controversial in the securities context.

FINRA, and before it NASD and the NYSE, have been reluctant to require reasoned awards, in all likelihood because these self-regulatory organizations have long been ambivalent about whether arbitrators should decide cases based on legal or equitable principles.²¹³ To a degree, that system may have worked—well enough, at least, to persevere through repeated calls for change. But if FINRA were to change its policies, or if change were mandated, a system of arbitral precedent might well emerge. Hints of such a system, after all, arose in only a few short years in class arbitration.

²¹² *Koruga v. Ming Wang*, Case No. 98-04276, 2000 WL 33534559 (N.A.S.D.) at **11–12 (2001).

²¹³ See Brunet & Johnson, *supra* note 12, 474–86.

This possibility highlights the need for meaningful dialogue between courts and arbitrators. Federal arbitration law sharply limits judicial review of arbitration awards.²¹⁴ Thus, courts have limited power to grant relief to parties injured by an arbitrator's mistake of law.²¹⁵ This is problematic enough when arbitrators merely apply mandatory laws as interpreted by courts, as in many of the AAA employment disputes. It is more problematic still when arbitrators effectively *create* that law, as might occur if securities arbitrators begin to produce reasoned awards. In fact, the lack of dialogue is unfortunate even in disputes governed by default rules that parties may alter directly in their contracts—or indirectly through arbitration.

One reason is that arbitrators might have something useful to say on many of the questions courts confront. By definition, arbitrators' decisions are the product of a market for dispute resolution services.²¹⁶ It is reasonable to suppose that successful arbitrators have answered legal questions in ways that market actors find satisfactory.²¹⁷ In contexts where it is appropriate for law to be set by market actors, judges—who are to varying degrees sheltered from the incentives markets provide²¹⁸—might find arbitral awards persuasive sources of authority.²¹⁹ Indeed, even when courts ought to retain final authority to make law, rules or practices that have evolved in arbitration might supply helpful context or persuasive reasoning. This would be especially likely when the relevant question

²¹⁴ 9 U.S.C. § 10 permits vacatur in very limited circumstances, and parties cannot easily expand the scope of review by contract. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Notwithstanding the narrow statutory grounds for vacatur, there is a plausible argument that courts should engage in limited review of arbitral awards. These are, after all, merely contract terms created ex post by the arbitrator as the parties' agent. For various treatments of this question, see, e.g., Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review is not Always Pro-Arbitration*, John M. Olin Law & Econ. Working Paper No. 502 (Dec. 2009), available at <http://www.law.uchicago.edu/files/file/502-tg-arbitrator.pdf>; Kirgis, *supra* note 23; Ware, *supra* note 20; Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998).

²¹⁵ For evidence of vacatur rates, see LeRoy, *MORAL HAZARD*, *supra* note 67, at 1041-48; LeRoy, *MISGUIDED FAIRNESS*, *supra* note 67, at 581-89.

²¹⁶ See Rutledge, *supra* note 14, at 160-65.

²¹⁷ See Bruce, *supra* note 36, at 8.

²¹⁸ See, e.g., Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 4-7 (2003). This is not to say that judges do not respond to similar incentives—such as the desire to please the lawyers who make case filing decisions. The point is only that the incentives are much more concrete and immediate for arbitrators.

²¹⁹ For example, rules adopted by arbitrators might be superior majoritarian default rules—i.e., rules designed to mimic the rules parties would choose if they had to make their preference explicit.

relates to the arbitration process itself. For example, judges have occasionally looked to rules established by arbitration institutions to inform their decisions about what constitutes fair arbitration procedure.²²⁰ From there, it is a short step to treating arbitration awards as potentially relevant inputs into the judge's decision on questions of substantive law.

It might seem problematic for judges to assign any precedential value to arbitration awards. Indeed, when the market is flawed—as may be true in some employment markets and markets for consumer goods and services—arbitrators may be especially likely to answer legal questions in ways that undercut the values the law is designed to promote.²²¹ This concern underlies most objections to “mandatory” arbitration. But it is precisely in these cases that the dialogue might be most productive. Judges may have limited authority to vacate arbitration awards, but they have ample power to engage with these awards in their own opinions just as they might any other form of non-binding precedent. If a judge considered and rejected a rule announced by an arbitrator, for example, there is every reason to think that arbitrators and litigants would take the hint. Perhaps the most striking implication of the awards studied here is that judicial precedent, when it exists, enjoys unquestioned authority relative to arbitration awards.

Oddly enough, then, a system in which judges viewed arbitration awards as relevant but non-binding precedent—akin to an opinion from a judge in a coordinate court—might temper some of the worst fears about arbitration. Judges would remain limited in their ability to correct mistaken awards, but they could exercise significant control over the content of the law as announced by arbitrators. And in some subset of cases, judges might even find arbitral awards persuasive. After all, judging-lite is still judging. Arbitrators seem to apply the law, and they are certainly capable of creating it. Either way, the process demands some meaningful dialogue between arbitration and the courts.

²²⁰ See, e.g., *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 974 (W.D. Miss. 2005); *Parilla v. IAP Worldwide Servs.*, 368 F.3d 269, 280 & fn.10 (3d Cir. 2004); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 95–96 (2000) (Ginsburg, J., dissenting).

²²¹ Even when markets are not flawed, arbitrators may have incentives to provide rules that confer private benefits on the parties, and these rules may not be socially optimal. See Landes & Posner, *supra* note 31, at 239.

Table 1. Overview of awards by system

	Employment	Labor	Securities	Class Arbitration
N	231	208	203	206
Date Range	1999-2008	1980-2009	1995-2009	2003-2009
Claim Type	Attorney's fees (5) Contract claim only (49) Contract and other non-statutory claims (7) Other non-statutory claims (11) 1+ statutory claim, incl. discrimination (159)	Employee discipline/discharge (137) Other (71)	Broker-dealer (183) Employment (20)	Class certification only (25) Class certification + settlement (21) Class certification + other (13) Clause construction (97) Other (50)

Table 2. Length of award in pages (at 500 words/page)

	Full Award		Analysis portion only	
	Mean (SD)	Range	Mean (SD)	Range
Labor	8.6 (4.1)	3.5-19.2	3.6 (2.3)	0.9-9.6
Class Arbitration	10.2 (11.1)	3.4-42.8	8.8 (10.4)	1.7-39.2
Employment	15.0 (10.2)	0.8-42.7	9.7 (7.3)	0.5-27.3

Table 3. Mean (SD) citations, per award, to different sources of precedent. Excludes awards that do not cite any precedent.

	Unique citations	Total citations	Judicial opinions	Arbitration awards	Statutes	Administrative materials	Other
Labor	8.7 (7.3)	9.4 (8.3)	3.9 (2.7)	4.5 (5.4)	0.1 (0.3)	0.2 (0.4)	1.9 (2.7)
Class Arbitration	17.6 (19.1)	24.8 (32.5)	21.8 (29.9)	1.2 (3.7)	1.0 (2.2)	0.04 (0.2)	0.8 (1.6)
Employment	21.6 (20)	28.4 (25.9)	25.1 (24.6)	0.2 (0.9)	2.4 (3.3)	0.5 (1.3)	0.2 (0.5)

Table 4. Strong citations and distinguished precedents. Excludes awards that do not cite any precedent.

	Strong cites		Citations to distinguished precedent	
	Mean (SD) per award	Pct. of total citations	Mean (SD) per award	Pct. of total citations
Labor	2.4 (3.2)	33.3%	0.4 (1.1)	5.4%
Class Arbitration	6.9 (7.5)	30.1%	2.1 (4.9)	9.1%
Employment	5.2 (4.9)	20.7%	1.3 (3.1)	9.2%

Appendix

Sample composition, by year

Year	Arbitration type			
	Employment	Labor	Securities	Class Arbitration
1980	0	2	0	0
1981	0	1	0	0
1982	0	8	0	0
1983	0	6	0	0
1984	0	4	0	0
1985	0	4	0	0
1986	0	5	0	0
1987	0	7	0	0
1988	0	4	0	0
1989	0	4	0	0
1990	0	6	0	0
1991	0	4	0	0
1992	0	4	0	0
1993	0	5	0	0
1994	0	5	0	0
1995	0	12	2	0
1996	0	2	2	0
1997	0	6	7	0
1998	0	6	0	0
1999	7	15	2	0
2000	22	16	23	0
2001	13	13	23	0
2002	31	13	23	0
2003	39	2	28	1
2004	21	12	17	10
2005	41	17	14	55
2006	33	12	22	37
2007	18	3	18	60
2008	6	9	4	43
2009	0	1	18	0
Total	231	208	203	206

Citation Frequencies by Arbitration System*

System	Sample size	Some Authority Cited	Of subset that cites 1+ judicial or arbitral precedents			
			Cites 1+ Arb. Award	Cites Only Prior Award	Cites Judicial Opinion	Cites Only Judicial Opinion
Labor	208	48.6% ^b	76.2% ^c	35.6% ^b	55.4% ^b	14.9% ^c
Class	206	71.8% ^c	15.5% ^b	1.4% ^a	98.6% ^a	83.8% ^b
Employment	231	66.7% ^c	1.3% ^a	1.3% ^a	98.7% ^a	98.7% ^a
Securities	203	1% ^a	N/A	N/A	N/A	N/A

*Values in a column followed by the same letter are not significantly different at the 5% level of significance. P values adjusted by Bonferroni method.