Antitrust and Commercial Arbitration: An Economic Analysis

Mark R. Lee
ANTITRUST AND COMMERCIAL ARBITRATION: AN ECONOMIC ANALYSIS

MARK R. LEE*

Broad scope arbitration clauses appear in many of the written agreements that help govern on-going commercial relationships. Presumably, they appear frequently because a promise to arbitrate disputes growing out of such relationships is of substantial value to many enterprises. The reason it is of value is that it permits the beneficiary of the promise to economize on transaction costs—not only the cost of enforcing the agreement of which the promise is a part, but also, as I shall explain shortly,\(^1\) the cost of negotiating that agreement in the first place. Of course, just how much value any promise has depends on the beneficiary’s perception of how likely it is that the party who made it will keep it; and for promises to arbitrate, that is where antitrust law comes into play.

The United States courts of appeal for seven of the circuits, beginning with the Second Circuit in *American Safety Equipment Corp. v. J.P. McGuire & Co.*,\(^2\) have ruled that, when it comes to antitrust claims, federal courts shall not enforce such promises.\(^3\)

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\* Professor of Law, Southern Illinois University School of Law, Carbondale, Illinois. B.A. 1971, Yale University; J.D. 1974, University of Texas.

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\(^1\) See *infra* note 45.

\(^2\) 391 F.2d 821 (2d Cir. 1968).

\(^3\) Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *aff’d in part, rev’d in part, and remanded*, 473 U.S. 614 (1985); Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Buffler v. Electronic Computer Programming Inst., Inc., 466 F.2d 694 (6th Cir. 1972); Helfenbein v. International Indus., 438 F.2d 1068 (8th Cir.), *cert. de-
The implications of this judicially created doctrine are far broader than its narrow language might suggest. This is so because it is easy to state an antitrust claim that will survive a motion to dismiss or even a motion for summary judgment. In particular, it is easy to characterize many of the terms of ordinary commercial agreements, and many of the dealings between the parties to those agreements, as either “restraints of trade” or “monopolizing” practices. And it is child’s play to make claims for breach of contract or tortious interference with a commercial relationship sound in antitrust. As a result, if one party to a commercial agreement containing an arbitration clause wished to avoid or substantially delay the arbitration of a dispute with the other party, he would probably experience little difficulty successfully invoking the *American Safety* doctrine. In short, because of this doctrine, enforcing promises to arbitrate is rather problematic. The more problematic it is to enforce arbitration clauses, the less likely it is that the parties who made the promises will keep them—and the beneficiaries undoubtedly perceive this. Thus, in the final analysis, the doctrine reduces the value of all such promises—in my judgment, significantly.

Consider the consequences. Because promises to arbitrate are valuable only in so far as they permit the beneficiaries to economize on transaction costs, a reduction in their value necessarily implies an increase in those costs. Increases in transaction costs always result in decreases in the rate of exchange. People make fewer exchanges, and in the exchanges that they do make, they exchange goods having less total value. It is not at all clear that these consequences are consistent with, much less required by, the antitrust laws in whose name they have been wrought.

Although its consequences seem perverse, the doctrine could be justified if the controlling statutes clearly required it, but they do not. Courts embracing the *American Safety* doctrine have done

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* After a party successfully invokes the *American Safety* doctrine, the court must decide whether to permit or to stay the arbitration of nonantitrust claims. If the court finds that the antitrust claims “permeate” the dispute, it normally orders a stay. *See Mitsubishi Motors Corp.*, 723 F.2d at 169. *See also infra note 21* (factual and procedural setting of *Mitsubishi*).
so despite, not because of, the language of those statutes. The Federal Arbitration Act requires courts to compel the arbitration of all claims that are arguably covered by an arbitration clause valid under traditional contract principles; and neither that act nor the Sherman or Clayton Acts expressly exempt antitrust claims from this requirement. Since the doctrine lacks a statutory mandate and has perverse consequences, one might have expected that courts embracing it would have gone to great lengths to explain the doctrine’s rationale, but they have not. In fact, they have never even expressed the rationale clearly.

Perhaps none exists. The doctrine may be no more than a naïve extension of populist notions about the distribution of wealth which sometimes infects antitrust decision-making. The courts, however, have identified four factors that purportedly support the doctrine. Three of them, even when dressed up as arguments, are makeweights. Dressed up, the three are: courts should not compel the arbitration of antitrust claims because (1) the judicial process is better suited than the arbitral process to resolving the complex issues sometimes raised by these claims and to handling the diverse and extensive evidence sometimes offered in connection with litigating them; (2) commercial arbitrators are likely to harbor hostility toward antitrust law; and (3) the contracts containing the applicable arbitration clauses are likely to be “contracts of adhesion.” As I shall show in the course of reconsidering the doctrine, these arguments are either facially unsound or rest on premises that are at best questionable; and they bear little, if any, relevance to the type of antitrust claim that is likely to be subject to an arbitration clause.

The fourth factor that purportedly supports the American Safety doctrine, when presented as a sophisticated argument,
does not suffer these flaws. The argument is that federal courts should not compel the arbitration of antitrust claims because doing so would tend to reduce the deterrent effect of antitrust law. It would do that, according to this argument, primarily by reducing the incentive to pursue private antitrust suits. This incentive would allegedly decline because arbitrators would tend to deal with antitrust claims differently than would judges. In particular, arbitrators would more likely err in favor of defendants either by resolving antitrust claims incorrectly on the merits or by failing to award treble damages and attorney’s fees. This argument—the “reduced deterrence argument”—is the doctrine’s core. It even rests, in part, on the other “arguments,” the three makeweights. To illustrate, if commercial arbitrators did harbor hostility toward antitrust law then, ceteris paribus, they would be more likely than judges to err in favor of antitrust defendants. The reduced deterrence argument does not rest entirely, however, on these makeweights. It also rests, for example, on the proposition that commercial arbitrators, unlike judges, are not bound to apply antitrust law when presented with a claim arising under that law. So the reduced deterrence argument is not a makeweight, but it has yet to undergo thorough analysis. In particular, it has yet to be examined in light of (a) post-American Safety scholarship that bears directly on the argument—recent advances in the theory of adjudication, and the “new learning” about optimal damages and deter-

... [a] conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a ‘prompt, economical and adequate solution of controversies.’” Id. (quoting Wilko v. Swan, 346 U.S. 427, 438 (1953)).

14 See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The Supreme Court, in Mitsubishi, rejected three of the American Safety factors but accepted the fourth factor; namely, the importance of the “regime of the antitrust laws” to the American capitalist system. Id. at 634. To their credit, some American Safety proponents have advanced an argument of this sort. See, e.g., Pitofsky, Arbitration and Antitrust Enforcement, 44 N.Y.U. L. Rev. 1072 (1969) (appropriateness of arbitration should be determined by applicability of the issues rather than exclusive favoring of public interest).

15 Mitsubishi, 473 U.S. at 635.


17 See, e.g., Private Alternatives to the Judicial Process, 8 J. LEGAL STUD. 231-415
rence, and (b) post-American Safety developments in antitrust law, especially the decline of populism and the rise of efficiency as the touchstone of antitrust jurisprudence. I undertake that examination in this Article.

Given the perverse consequences of the American Safety doctrine, the failure of the applicable statutes to lend any support to it, and the unhelpful or unexamined reasoning offered by the courts to justify it, reconsideration of the doctrine in light of first principles is clearly in order. The Supreme Court's recent decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*19 and *Shearson/American Express, Inc. v. McMahon*20 make reconsideration timely.

In *Mitsubishi*, the Court upheld an order compelling the arbitration of antitrust claims where they arose in an international setting.21 There are two features of the *Mitsubishi* opinion, each rein-

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21 *Mitsubishi*, 473 U.S. at 616. Like too many other private antitrust cases, this one arose out of a once rosy franchise relationship that faded—badly. On the franchisor side of the relationship were Chrysler International, S.A. ("CISA"), Chrysler's Swiss-incorporated subsidiary, through which the parent distributed vehicles outside of the continental United States, and Mitsubishi Motors Corporation ("Mitsubishi"), a joint venture of CISA and Mitsubishi Heavy Industries, Inc., the Japanese conglomerate. *Id.* Under the joint venture agreement, Mitsubishi manufactured cars and trucks and CISA-franchised dealers retailed them. *Id.* at 617.
forced by Shearson, that make reconsideration timely. One is the opinion's assault on the arguments advanced in support of the American Safety doctrine. Confessing to some “skepticism of cer-

Soler Chrysler-Plymouth became one of those dealers in 1979. Soler was the party on the franchisee side of the relationship. Id. In a “Sales Procedure Agreement” Mitsubishi promised to supply vehicles and parts while Soler promised to discharge certain sales-related responsibilities. In particular, Soler promised: that it would sell some minimum number of vehicles annually—the number to be determined by mutual agreement each year; that it would sell those vehicles only within its assigned territory, which was the San Juan area of Puerto Rico; and that if it ever refused to take delivery of vehicles that it had ordered or was obliged to order, it would pay Mitsubishi not only all amounts due on their wholesale price but also storage fees and penalties. See id. at 617-18. Soler further promised that it would arbitrate disputes with Mitsubishi related to these promises and most of the other promises memorialized in the Sales Procedure Agreement. The agreement provided that all disputes would be arbitrated in Japan in accordance with the rules and regulations of the Japanese Commercial Arbitration Association. Id. at 617.

By 1981, the bloom was off the franchise rose. Apparently, the number of new cars demanded in Soler's assigned territory turned out to be far smaller than the number Soler had anticipated when it agreed to its annual minimum for that year. Id. In any event, it did not sell as many cars as it had promised to sell. Id. In what was perhaps an effort to avoid reneging on that promise, Soler asked for a release from its other promise, to sell vehicles only in its assigned territory. See id. Mitsubishi, however, denied the request, citing reasons related for the most part to quality control and goodwill. Id. at 618. At about the same time, Soler began to refuse to take delivery of vehicles that it had ordered or was obliged to order, so that in the end Mitsubishi had stored almost 1000 vehicles in Japan that allegedly belonged to Soler. Id. at 618. The end came when Soler disclaimed any financial responsibility for those vehicles. Id.

Mitsubishi's efforts to obtain satisfaction informally on its claims against Soler came to naught. After its call for arbitration was refused, Mitsubishi petitioned the District Court for the District of Puerto Rico—pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (entered into force Dec. 29, 1970), as implemented by 9 U.S.C. §§ 201-08 of that Act—for an order compelling arbitration of its claims against Soler. Mitsubishi, 473 U.S. at 618-19. Soler disputed those claims and counterclaimed that Mitsubishi had, inter alia, violated the antitrust laws by entering into an agreement with Chrysler to “divide markets,” pursuant to which it had (1) denied Soler's request to sell vehicles outside of Soler's assigned territory; (2) refused to ship vehicles that would be suitable for sale elsewhere and refused to ship parts, like heaters and defoggers, that Soler required to make the vehicles on hand suitable for such sale; and (3) terminated Soler's dealership. Id. at 620. Invoking the American Safety doctrine, inter alia, Soler moved that the court deny Mitsubishi's petition. Id. at 620-21.

The court denied Soler's motion and granted Mitsubishi's petition. Id. at 620. On appeal, the United States Court of Appeals for the First Circuit reversed in part and affirmed in part holding, inter alia, that the district court could not compel the arbitration of Soler's antitrust counterclaims or Mitsubishi's related claims. See Mitsubishi, 723 F.2d 155, 169 (1st Cir. 1983). The court remanded the case so that the district court could decide whether to permit or stay the arbitration of the parties' other claims, a decision that the First Circuit said would turn on whether the antitrust counterclaims “permeated” the case and on the likelihood that Soler would prevail on those counterclaims. Id. Both parties then successfully petitioned the Supreme Court for a writ of certiorari. Mitsubishi, 473 U.S. at 624.
tain aspects of the American Safety doctrine," the Court demolished the three makeweight arguments. By doing so, it necessarily undermined the foundation upon which the reduced deterrence argument rests. The Court further undermined this foundation by suggesting—if not holding—that commercial arbitrators confronted with antitrust claims might be obliged to apply antitrust law.23

The Court continued its destructive handiwork in Shearson. Shearson involved a claim by two investors that their brokers had violated section 10(b) of the Securities Exchange Act of 193424 by churning their account and by giving them advice that included misstatements and excluded material information.25 The trading agreement into which the parties had entered when the investors opened their account contained a broad scope arbitration clause.26 Nevertheless, the investors resisted arbitration, relying on Wilko v. Swan,27 a 1953 decision in which the Supreme Court refused to compel the arbitration of claims arising under section 12(2) of a companion statute, the Securities Act of 1933.28 The Wilko opinion advanced arguments analogous to the arguments advanced in support of the American Safety doctrine.29 In fact, in formulating the doctrine, the American Safety court relied heavily on those arguments and on the Wilko decision.30 In Shearson, the Supreme Court attacked the Wilko arguments, making considerable use of Mitsubishi, and upheld the district court's order.31

The other feature of the Mitsubishi opinion that makes reconsideration timely is that it supplies a test for determining the arbitrability of all antitrust claims, be they claims arising in an international or a domestic setting. The test is whether compelling arbitration would likely yield more gains or more losses in terms of effectuating the policies implicated by such compulsion. The Court

22 Mitsubishi, 473 U.S. at 632.
23 Id. at 636-37.
26 Id.
28 Id. §77l(2) (1982). See 482 U.S. at —, 107 S. Ct. at 2341-42.
29 See Wilko, 346 U.S. at 435-38.
did not expressly adopt this test, but it is the one that is most consistent with its justification for the decision. The Court observed that, in an international setting, compelling arbitration implicated both the policy of the antitrust laws and the policies captured by the phrase “international comity.” The Court assumed that compelling arbitration would yield losses in terms of effectuating antitrust policy. The Court was obliged to make this assumption because it is the central premise of the American Safety doctrine and the Court was unwilling to repudiate the doctrine. The Court predicted, however, that these losses would be minimal—a prediction based on its critical analysis of the “arguments” supporting the doctrine. Conversely, it predicted that compelling arbitration would yield gains in terms of effectuating the policies captured by the phrase “international comity” and that those gains would be considerable. Because the probable gains exceeded the probable losses, the Court concluded that antitrust claims arising in an international setting are arbitrable.

For claims arising in a domestic setting, the claims explicitly addressed by American Safety, the test for determining arbitrability in an international setting should remain the same—only the implicated policies should vary. Indeed, in its Shearson opinion, the Court minimized the importance of the international/do-

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32 See 473 U.S. at 629.
33 Id. The Court said, “[w]e find it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions.” Id. Of course, if the Court had repudiated the doctrine, the Court would have found it unnecessary to consider the matters that it asserted were determinative: “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes.” Id.
34 See id. at 632-38. In its critical analysis, the Court stated that “[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted” since a party that wants to avoid arbitration may always attack the validity of the agreement. Id. at 632. Complexity of the issues should not “suffice to ward off arbitration” since the same courts that follow American Safety have allowed arbitration after the dispute arises. Id. at 633. The Court also rejected the suggestion that arbitration panels will be innately hostile to the constraints on business conduct that antitrust law imposes since those panels are made up of individuals from the business and legal community. Id. at 634. The Court finally addressed the core argument of American Safety by saying that there is no reason to assume that an international tribunal will be biased to the norms of particular states but instead it will “effectuate the intentions of the parties.” Id. at 636. If the parties choose to be subject to the American antitrust law, the tribunal “should be bound to decide that dispute in accord with the national law giving rise to the claim.” Id. at 636-37.
35 Id. at 640.
mestic distinction for resolving issues of arbitrability. The Court did acknowledge that it had previously compelled the arbitration of a claim arising under section 10(b) of the Securities Exchange Act of 1934 only in Scherk v. Alberto-Culver Co., an international case, and that it had done so on the assumption that Wilko would have required a different result in a domestic case. The Court stated, however, that the setting had little relevance to the arguments bearing on arbitrability and used the Mitsubishi facts to illustrate its argument, notwithstanding the Mitsubishi opinion’s reliance on Scherk and the international/domestic distinction that Scherk drew.

When employing the test suggested by Mitsubishi in the domestic setting, the critical policy would be that of the antitrust laws since the only other policy that is even relevant is that of the Federal Arbitration Act which obviously militates in favor of arbitrability. Therefore, the arbitrability of antitrust claims arising in the domestic setting should turn on whether compelling arbitration would probably yield more gains or more losses in terms of effectuating antitrust policy. This is precisely the question which a reconsideration of the doctrine must address.

The reconsideration undertaken in this Article shows that compelling antitrust claims to arbitration would almost certainly effectuate antitrust policy. This conclusion holds regardless of whether antitrust policy is defined exclusively as maximizing efficiency or—mistakenly in my opinion—as some combination of maximizing efficiency and redistributing wealth in a manner that purportedly furthers populist goals. To bring this point home, I have divided this reconsideration into two parts, one corresponding to each definition of antitrust policy.

Accordingly, Part I analyzes the likely consequences of compelling the arbitration of antitrust claims in terms of efficiency. It consists of two sections, the first devoted to readily apparent efficiency gains and the second to purported efficiency losses. Because promises to arbitrate are supposed to yield efficiency gains, the

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38 See Shearson, 482 U.S. at ——, 107 S. Ct. at 2339 (Wilko bars “waiver of judicial forum only where arbitration is inadequate to protect substantive rights at issue”).
39 See id. at ——, 107 S. Ct. at 2338-39.
40 Id. at ——, 107 S. Ct. at 2340-41.
first section focuses on the function served by such promises. Once this function is understood, these gains should become readily apparent.

Of course, there are no corresponding losses, so the second section analyzes purported efficiency losses—those that the proponents of the American Safety doctrine allege would result if courts compelled the arbitration of antitrust claims. These allegations are implicit in their arguments. Thus, the principal purported efficiency loss—the one on which the analysis concentrates—is the loss implicit in the reduced deterrence argument, the proponent's only non-makeweight. Recall that they predict that compelling the arbitration of antitrust claims would reduce the deterrent effect of antitrust law. A reduction in deterrence would necessarily entail an increase in the number and scope of unpunished antitrust offenses. The implicit allegation is that this increase would result in an efficiency loss.

I treat this purported loss in three subsections. Each corresponds to one of the ways in which American Safety proponents predict that compelling the arbitration of antitrust claims would reduce the law's deterrent effect. The three are: (i) decreasing the number of antitrust opinions that are published; (ii) increasing the proportion of antitrust decisions that are incorrect on the merits; and, most importantly, (iii) decreasing the number of antitrust claims that are pursued. The analysis shows not only that the predicted effects are unlikely to materialize, but that even if they did, they would have no appreciable impact on antitrust deterrence. More surprisingly, the analysis also shows that if they were to appreciably reduce deterrence, this reduction would be efficient.

To summarize, Part I of this reconsideration shows that, in terms of efficiency, the gains from compelling the arbitration of antitrust claims would probably dwarf the losses, if indeed there would be any losses. Part II shows that, in terms of wealth redistribution, compelling the arbitration of antitrust claims would probably have negligible consequences. Thus, no matter how antitrust policy is defined, compelling the arbitration of antitrust claims would effectuate that policy—contrary to the American Safety doctrine.
I. THE EFFICIENCY CONSEQUENCES OF COMPELLING ANTITRUST CLAIMS TO ARBITRATION

A. Readily Apparent Efficiency Gains

Whatever other consequences compelling the arbitration of antitrust claims might have, it would at minimum permit promises to arbitrate to serve their intended function more effectively. This function must be an instrumental one since people do not exchange promises to arbitrate independent of an agreement to exchange other products or services. These promises must help effectuate the exchanges—or patterns of exchange—contemplated by the written agreements of which they are a part.

Promises to arbitrate can serve this function in two ways. First, they may enable the parties to economize on the cost of enforcing their agreement. For example, the parties may find it cheaper in terms of out-of-pocket expenses to resort to arbitration rather than traditional litigation in order to remedy breaches of their agreement. And, cheaper or not, they may find it more cost effective.41 This is so largely because arbitration may do less harm to intangible capital that is of considerable value to one or both of the parties. This capital might be whatever remains of their mutual goodwill. Alternatively, it might be the reputation one of them enjoys among his other commercial relations—specifically those relations who either occupy, or contemplate occupying, the same kind of position as that occupied by the other party to the dispute. To illustrate, the arbitration of a dispute between a car manufacturer, like Mitsubishi, and one of its franchised dealers might do less harm than traditional litigation, not only to their mutual goodwill, but also to the manufacturer’s reputation among its more satisfied dealers. Such intangible capital is likely to be of considerable value where the parties have exchanged promises to arbitrate because the relationships typically involved are continuing ones.42

41 See Allison, supra note 16, at 221-22 (arbitration normally faster and cheaper means for settling controversies than litigation); see also Ferguson, The Adjudication of Commercial Disputes and the Legal System in Modern England, 7 BRIT. J.L. & SOC'y 141, 146-47 (1980) (commercial preference for arbitration obviously attributable to some extent to speed and economy); Mentschikoff, Commercial Arbitration, 61 COLUM. L. REV. 846, 850 (1961) ("reasons . . . for arbitration—speed, lower expense, more expert decision, greater privacy").

42 See Allison, supra note 16, at 222. "In most cases in which the antitrust arbitrability issue arises, the underlying transaction involves a franchise, a licensing agreement, or some other arrangement that normally contemplates a business relationship of substantial dura-
Promises to arbitrate may permit the parties to take relatively efficient enforcement action, but this hardly exhausts their potential for economizing on enforcement costs. The very prospect of arbitration may significantly reduce the number of occasions for taking any enforcement action at all. The parties will know quite a bit about the likely arbitrator—his experience and his familiarity with their agreement, the customs and practices of their market—and about the incentives he will face as a privately-employed dispute resolver. As a result, they may enjoy a greater degree of certainty about the outcome of arbitration than they would about the outcome of traditional litigation. Their knowledge of the likely arbitrator may give them more confidence that he would understand their agreement, in particular their specifications of how they want to respond in the event of various occurrences; and their knowledge of his incentives may give them more confidence that he would resolve any disputes triggered by these occurrences accordingly. The greater the parties' certainty about the outcome of arbitration, the less they would have to gain by engaging in opportunistic behavior that might either generate a dispute or hold up the settlement of one.

Perhaps it goes without saying that by enabling the parties to economize on the cost of enforcing their agreement, promises to arbitrate help effectuate the exchange of products and services. As a result, the parties may secure at lower cost the benefits for which they bargained. What is most helpful about enforcement economies, however, is not their realization but their anticipation. If anticipated, the parties are more likely to agree to an exchange and to exchange more.

Promises to arbitrate may help effectuate exchange in another way as well. They may enable the parties to economize on the cost of negotiating their agreement. Once again, the explanation for this is rooted in the parties' knowledge of the likely arbitrator and his incentives and the relative certainty about the outcome of arbitration which that knowledge may give them. Here, however, our
focus shifts to disputes triggered by occurrences for which the parties fail to provide. There are always such occurrences, and they are the ones that are most likely to trigger disputes. Knowledge of the likely arbitrator would give the parties more confidence that, in the event of such a dispute, he could do an acceptable job of figuring out what they would have provided had they anticipated the triggering occurrence and specified how they wished to respond. Knowledge of the arbitrator's incentives would give them more confidence that he would resolve such a dispute in accordance with that nonexisting provision. It is this confidence that would make the parties more certain about the outcome of these disputes. The greater their certainty about the outcome, the less risk they would associate with failure to provide for occurrences and, therefore, the more readily they would substitute promises to arbitrate for such provisions. It is by substituting for such provisions that promises to arbitrate may help the parties to economize on negotiating costs. It is difficult not only to anticipate occurrences, but also, having anticipated them, to specify how the parties wish to respond to them. "Difficult" means "expensive," and the more the parties try to anticipate and specify, the more expensive these activities become. Indeed, providing for occurrences is one of the principal costs of negotiating an exchange agreement. Minimizing these costs may permit the parties to agree to an exchange when otherwise they would not have agreed, or it may induce them to exchange more than they otherwise would have exchanged. In other words, by enabling the parties to economize on negotiating costs, promises to arbitrate help to effectuate exchange—which is their intended function.

Of course, they do not always serve their intended function well; sometimes the people who exchanged the promises will reasonably conclude that they made a mistake by doing so. Enforcing these "mistaken" promises exacts a price in terms of efficiency, but trying to avoid paying it by permitting courts to second-guess all promises to arbitrate would exact an even higher price. Courts would err. They would enforce some promises that were "mistaken," and refuse to enforce some that were not. Most of the errors, however, would probably be refusals to enforce promises that were not "mistaken" simply because, in the aggregate, promises to arbitrate must function as they are supposed to function, else people would stop exchanging them. The risk that a court might make one of these errors is what would exact such a high price. This risk
would reduce the value of all promises to arbitrate.

To the extent that promises to arbitrate serve their intended function, they tend to maximize efficiency. They help effectuate the exchange of products and services, and, in the aggregate, exchange puts resources to higher value use, which tends to efficiency. Aside from mistakes, there are only two categories of exchange that may tend to inefficiency. One consists of exchanges that are ancillary to cartelization. The other consists of exchanges that are predatory—"predatory" in Judge Bork's sense of that word—an action "that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening."46 Exchanges made pursuant to a written agreement containing a broad scope arbitration clause are unlikely to fall into either one of these categories. An arbitration clause implies that people who are not parties to the agreement will be involved in its enforcement. Such involvement would be an anathema to the members of a cartel for it would significantly increase the risk that they would be apprehended. Therefore, exchanges made pursuant to such an agreement are unlikely to fall into the ancillary-to-cartelization category. A written agreement of any kind implies that the parties plan to cooperate with one another. Such cooperation is hardly the hallmark of actions designed to crush or chasten rivals, especially when it is the rival's cooperation that the would-be predator must have in order to succeed. Therefore, exchanges made pursuant to agreements containing arbitration clauses are unlikely to fall into the predatory category. We may conclude, then, that such exchanges probably maximize efficiency. Since the promises to arbitrate embodied in such clauses probably function to help effectuate these exchanges, and since compelling the arbitration of antitrust claims permits such promises to serve this function more effectively, it is readily apparent that such compulsion would yield an efficiency gain.

B. Purported Efficiency Losses

The proponents of the American Safety doctrine do not deny

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that compelling the arbitration of antitrust claims would permit
promises to arbitrate to serve their intended function more effec-
tively.⁴⁷ Rather, they assert that it would have other consequences,
all of which would be unpleasant.⁴⁸ Conveniently, when these con-
sequences are distilled for their relationship to efficiency, they boil
down to a reduction in the deterrent effect of antitrust law. The
proponents of the doctrine assert that this reduction would be
inefficient. They implicitly allege that the readily apparent effi-
ciency gain from compelling the arbitration of antitrust claims
would pale in comparison to this more subtle loss. To evaluate this
allegation, we must analyze both of their assertions: that compel-
ling arbitration would reduce the deterrent effect of antitrust law
and that that reduction would be inefficient.

Recall that American Safety proponents predict that compel-
lung the arbitration of antitrust claims would reduce the deterrent
effect of antitrust law because it would cause (1) a decline in the
number of antitrust opinions that are published; (2) a rise in the
proportion of antitrust decisions that are incorrect on the merits;
and, most importantly, (3) a decline in the number of antitrust
claims that are pursued.⁴⁹ I will analyze these predictions seriatum.

1. The “Fewer Published Opinions” Prediction

The “fewer published opinions” prediction rests on the follow-
ing chain of logic: compelling the arbitration of antitrust claims
would slow the rate at which such claims would be re-
solved—wholly or partially—through standard litigation; that
slowdown would in turn slow the rate at which antitrust opinions

⁴⁷ See, e.g., Pitofsky, supra note 14, at 1072-73 (enforcing arbitration clauses would: (1)
speed disposition of complicated commercial litigation; (2) permit more efficient and eco-
nomic disposition of antitrust litigation; (3) reduce judicial burden from protracted multiple
litigations); Sterk, supra note 16 at 504. Sterk puts it this way, “[a]rbitrators are entrusted
with the responsibility of working justice between the parties) [which he defines as protect-
ing their contractual expectations], id. at 491, “[a]ntitrust laws, by contrast, have little to do
with justice between the parties.” Id. at 504.

⁴⁸ See supra note 16. Among these consequences are (1) lack of guidance, in the form of
precedent, for businessmen and lawyers; (2) relatively high error rates; (3) enforcement of
contracts of adhesion; (4) deprivation of important statutorily guaranteed entitlements such
as liberal venue, treble damages and attorney's fees; and (5) inadequate protection of the
“public interest.” See also Leovinger, supra note 16, at 1089-91 (twelve disadvantages of
arbitral process applied to antitrust issues); Pitofsky, supra note 14, at 1076-81 (reasons
why arbitration and antitrust incompatible).

⁴⁹ See supra note 48. Although the proponents’ predictions could be rearranged or sub-
divided further neither would change the substance of the analysis. Id.
would be published and hence precedent produced; and a slowdown in the rate of precedent production would reduce the deterrent effect of antitrust law. Problems beset each link in the chain, and they become progressively more acute.

Consider the link between compelling the arbitration of antitrust claims and the rate at which those claims would be resolved through standard litigation. It is true that compelling arbitration could slow the rate of such resolutions, but only to the extent that it diverted a select group of antitrust claims: those that would have been adjudicated on the merits either on motion or through final judgment. There is little reason to believe that it would divert more than a trivial number of such claims. Compelling arbitration would probably divert some antitrust claims, but the odds are that the bulk of these claims would be ones that would have been settled prior to any adjudication on the merits. Most antitrust claims are so settled and no doubt would continue to be even if courts began to compel the arbitration of those subject to an arbitration clause. It is especially likely that antitrust claims diverted because of compelled arbitration would be ones that would have been settled since the *American Safety* doctrine itself creates an incentive to settle. When invoked, the doctrine makes arbitration unavailable, and the parties may prefer to settle rather than resort to the less cost effective and more uncertain alternative of proceeding to judgment. Moreover, whatever the size of the diversion, its impact on the resolution of antitrust claims through standard litigation is bound to be smaller. The reason is that as the judiciary sheds antitrust claims subject to an arbitration clause, it would simultaneously acquire others not subject to one.

Even if the rate of resolving antitrust claims through standard litigation did slow appreciably, it is unlikely that the rate of publishing antitrust opinions would do likewise. This link is even weaker than the preceeding one. In the first place, the rate of such resolutions could have an appreciable impact on the rate of publication only if antitrust claims subject to an arbitration clause held the potential for generating an appreciable number of published opinions. Such claims do not now generate an appreciable number,

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60 Compelling the arbitration of antitrust claims would almost surely result in the arbitration of more antitrust claims, but the additional claims would not necessarily be diverted ones; they might be claims that would not have been pursued at all. *See infra* notes 107-09 and accompanying text.

and even if we generously allow for an increase in the number of such claims once courts began compelling them to arbitration, it is unlikely that they would hold the potential to do so. The fact is that few antitrust claims of any kind generate published opinions. Some cannot—those resolved by the parties prior to any adjudication and those resolved exclusively by juries. The remainder, claims resolved at least in part by trial judges, often do not. Sometimes trial judges do not issue an opinion, and when they do, they frequently order it withheld from publication. Of course, antitrust claims resolved by judges without published opinions and those resolved initially by juries, may still generate published opinions. There may be an appeal. But in the majority of cases, there is no appeal, and even when there is, appellate judges often follow the lead of their district court brethren by ordering their opinions withheld from publication.\textsuperscript{52}

Secondly, whatever the size of the slowdown in resolving antitrust claims through standard litigation, the slowdown in the publication of antitrust opinions would probably be smaller. As the rate of such resolutions slowed, judges would probably publish opinions that they otherwise would have ordered withheld from publication. They might even hear claims generating publishable opinions that they otherwise would not have heard. For that matter, to the extent that compelling arbitration would divert claims from settlement, the rate at which opinions were "published," in the most general sense, would tend to increase. The arbitral process requires the parties to take steps, including the presentation of their cases, that tend to spread word of a dispute and so its resolution is more likely to become known to outsiders than if it had been resolved through settlement.

The link between the rate at which antitrust opinions are published and the deterrent effect of antitrust law is the weakest of the three. In fact, a slowdown in the rate of publication would probably have no impact on deterrence. To have an impact, the slowdown would have to cause such a decline in the production of antitrust precedent that uncertainty about how courts would interpret the law would rise appreciably. A decline of that size, how-


ever, is unlikely to occur. The number of antitrust claims subject
to arbitration clauses would almost certainly be too small to create
even the potential for such a decline. Casual empiricism suggests
that even if the number of claims were large enough, the potential
would not be realized because many of the opinions that would
have purportedly been published—like many of those that are
published—would have added precious little, if anything, to the
existing stock of antitrust precedent. Moreover, any decline in the
production of precedent sufficient to cause an appreciable rise in
uncertainty about how courts would interpret the law would tend
to be self-correcting. The uncertainty would itself spawn addi-
tional litigation—in part, perhaps, because parties would less fre-
quently agree to arbitrate their disputes—and more litigation
would in turn cause a rise in the production of precedent.

To sum up, the fewer published opinions prediction is unlikely
to come true. American Safety proponents are wrong about the
likely consequence of compelling arbitration: it would probably not
cause an appreciable decline in the rate at which antitrust opinions
would be published. And even if they were right about that, they
would nonetheless be wrong about the significance of any such de-
cline: it would probably not trigger a reduction in antitrust deter-
rence. Besides, if this prediction were to come true, the reduction
in deterrence could be remedied by measures which would be more
efficient—and more consistent with the Federal Arbitration
Act—than refusing to compel the arbitration of antitrust claims.
For example, courts could compel arbitration on the condition that
(a) the dispute and its outcome be noted in some readily accessible
registry; or (b) the arbitrator prepare an opinion and file it with
the courts. Of course, imposing either condition would reduce the
potential gains from arbitration—although not by as much as re-
fusing to compel it—but the parties could best evaluate whether
the gains still exceeded the costs.

2. The “More Incorrect Decisions” Prediction

The other two predictions made by American Safety doctrine

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53 See generally Landes & Posner, Private Good, supra note 17, at 272-73. When a
court resolves a dispute, its resolution, especially if embodied in a written opinion, provides
information regarding the likely outcome of similar disputes in the future thus quenching
uncertainty through judicial extrapolation of issues. Id.

54 See Comment, Commercial Arbitration Under the Federal Act: Expanding the
proponents invite similar criticisms. Consider the “more incorrect decisions” prediction. Its logic is: compelling the arbitration of antitrust claims would divert to arbitration some claims that would have been adjudicated on the merits; this diversion would increase the proportion of incorrect decisions because arbitration is more likely than adjudication to produce them; and an increase in the proportion of incorrect decisions would reduce the deterrent effect of antitrust law.

Here the critical consequence, of course, is a rise in the proportion of incorrect decisions. Whether American Safety proponents are right or wrong about it depends largely on whether arbitration is really more likely than adjudication to produce incorrect decisions. It would be quite difficult to prove empirically that either process is more likely than the other to produce incorrect decisions. The nonpublic nature of arbitration proceedings would make collecting information regarding outcomes a formidable challenge; and the American Safety doctrine insures that whatever information might be collected would be biased. Yet, even if unbiased information about arbitration outcomes were readily available, it would still be difficult to marshal empirical proof because evaluating outcomes as correct or incorrect would be highly problematic.

Accordingly, American Safety proponents support their position not with data but with arguments. Arbitration is more likely to yield incorrect decisions, they assert, because of the nature of the process and the behavior of arbitrators. These arguments bear a heavy burden since adjudicated outcomes of antitrust claims betray an embarrassing degree of inconsistency and prompt a disturbing number of logically flawed opinions. They cannot bear it. Indeed, they consist largely of the makeweights that courts em-

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55 It also depends on the strength of the first link in the chain of logic underlying this prediction, the diversion link. Problems beset that link similar to the ones that beset the diversion link in the chain of logic underlying the “fewer published opinions” prediction.

56 See, e.g., McChesney, Law’s Honour Lost: The Plight of Antitrust, 31 Antitrust Bull. 359 (1986). McChesney analyzes the “courts’ inability to distinguish procompetitive from anticompetitive contracts,” and concludes that “[t]here can be no confidence . . . that judges will reach right results under the rule of reason standard.” Id. at 366-70. McChesney also criticizes the courts’ “dogged adherence to per se rules, long after their rationales have been shown erroneous.” Id. at 365. In short, “[m]ost of the wrongheaded substantive rules of antitrust are judge-made” and result in harm, demoralization and delegitimization of the antitrust system. Id. at 366-67. “The resulting damage to the prestige of antitrust,” McChesney concludes, “is inestimable.” Id.
bracing the doctrine have offered in support of it.

One of these arguments is that the judicial process is better suited than the arbitral process to resolving the complex issues sometimes raised by antitrust claims and to handling the diverse and extensive evidence sometimes offered in connection with the litigation of those claims. This argument is facially unsound. Consider the problems posed by complex issues. The cure for them, to the extent there is one, is expertise, and the arbitral process is more likely than the judicial process to provide a healthy dose of it. The principal reason is that participants in the arbitral process can take effective steps to ensure that those who resolve their disputes possess the requisite expertise, whereas the participants in the judicial process cannot. Participants in the arbitral process can establish a pool of eligible arbitrators consisting largely or exclusively of experts, adopt a mechanism for appointing arbitrators likely to result in the appointment of experts, and in the event of an arbitration, actually appoint one or more experts to serve as the decision-making panel. Not only can the participants take these steps, they will have an incentive to do so whenever they anticipate a continuing commercial relationship.

Participants in the judicial process exercise no comparable powers. They can do almost nothing about the pool of eligible judges. The pool, of course, consists entirely of sitting judges who are appointed through the highly political process of presidential appointment and senatorial consent. Parties can do little more about the selection of a presiding judge. Obviously, they cannot choose him outright; about as close as any participant can come is to choose the district in which to file a claim. The exercise of that power, however, is unlikely to cause the judicial process to bring expertise to bear on complex issues because of three features of our court system: (i) the law of jurisdiction and venue; (ii) multi-judge districting; and (iii) the right to a jury trial. The laws of jurisdiction and venue limit the situations in which a claimant will have a choice about the district in which to file, and where he has one, it

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67 See Allison, supra note 16, at 244. "Two of the rationales employed by the American Safety court, which subsequently have been reiterated by other courts and voiced by several commentators, relate to the perceived lack of arbitrator expertise in dealing with antitrust claims and the normal evidentiary complexity of antitrust cases." Id.

68 See generally id. at 245 ("vast diversity of training and background among . . . arbitrators").

69 See id. at 245.
will limit his options considerably. Multi-judge districting means that choosing a district is tantamount to appointing the judge only when a claimant chooses one of the three single-judge districts—Guam, Vermont, and Wyoming; when a claimant chooses one of the ninety multi-judge districts, the local court rules for assigning cases will come into play, and those rules tend to assign antitrust cases to experts only by chance. The right to a jury trial means that in any case where a jury is demanded, the presiding judge, expert or not, must share decision-making authority with non-experts. Besides, when a claimant does choose a district, he is likely to do so for the purpose of securing the application of favorable law or of fixing a site for the trial that is convenient for himself and inconvenient for the other party; and if he did choose a district for the purpose of obtaining a particular judge, he would almost surely try to obtain one who was sympathetic, not expert.

Some *American Safety* proponents argue that the judicial process is better suited than the arbitral process to resolving complex issues not only because of the way it utilizes information but also because of the way it generates information.\(^{60}\) The argument is that the Federal Rules of Civil Procedure provide for more extensive discovery than does the Federal Arbitration Act, that the provisions for more extensive discovery lead to the consideration of additional evidence, and that the consideration of additional relevant evidence increases the probability of correct decisions.\(^{61}\) The argument is unpersuasive. Its premise is overstated, its reasoning is flawed, and these problems aside, it simply does not show that adjudicating antitrust claims would be more efficient than arbitrating them. The premise is overstated in that the difference in discovery permitted under each statute is not as great as might appear at first blush. The Federal Arbitration Act grants an arbitrator the authority to compel witnesses to testify before him and bring “any book, record, document, or paper which may be deemed material as evidence in the case.”\(^{62}\) It also empowers district courts to enforce his authority with mandatory injunctions and contempt cita-

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\(^{60}\) See id. at 246. “The arbitral forum has also been criticized as inherently unsuitable for the disposition of antitrust claims because of its traditionally minimal generation of evidence” due to “the absence of compulsory discovery in arbitration.” Id. See also Loevinger, *supra* note 16, at 1090-91 (disadvantages of arbitral process as applied to antitrust issues).

\(^{61}\) See *supra* note 60.

It is true that the Act grants arbitrators their authority only in connection with proceedings before them—which would appear to make it of little value in terms of prehearing discovery—but arbitrators may effectively circumvent this limitation by the simple expedient of conducting prehearing proceedings.

The reasoning is flawed in two respects. First, it is not at all clear that the provisions in the Rules for more extensive discovery will lead to the consideration of additional relevant evidence. Parties to adjudications may, and often do, cooperate in greater discovery than that for which the Federal Arbitration Act provides. They may do so because the arbitration clause in their agreement so obligates them or because they fear the inferences that an arbitrator might draw from a failure to cooperate. Such discovery, of course, is just as likely as statutorily-provided-for discovery to lead to the consideration of relevant evidence.

The second flaw is that even if more extensive discovery were to lead to the consideration of more relevant evidence, it is doubtful that it would increase the probability of correct judicial decisions. In fact, consideration of additional relevant evidence might do just the opposite. Evaluating the credibility of evidence and assessing its significance are difficult tasks. Beyond some threshold quantity of evidence, these tasks become increasingly difficult, and as they become more difficult, the probability that they will be performed incorrectly rises. And, of course, performing these tasks incorrectly might decrease the probability of correct decisions.

Even on its own terms, overstatement and flaws aside, this discovery argument is unpersuasive. Assuming, arguendo, that the discovery provisions in the Rules do increase the probability of a correct antitrust decision, adjudicating antitrust claims might still be less efficient than arbitrating them because the additional discovery may cost more than the additional correct decisions are worth. In fact, the additional discovery is likely to cost that much because in many cases lawyers probably have an incentive to engage in more than an optimal amount of discovery. A lawyer has an incentive to engage in discovery up to the point where he expects that his risk-adjusted gains from the next unit of discovery will just cover his costs. Because his gains and costs will often diverge from society’s, he may respond to this incentive by engaging in more than an optimal amount of discovery. A lawyer stands to

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63 Id.
gain, of course, from prevailing. Prevailing may bring him a contingent fee or faster payment in full; it will certainly enhance his reputation among clients, potential clients, and those who refer clients to him. Prevailing, however, is hardly synonymous with a correct decision, and some discovery will advance the former much more than the latter. We would expect a lawyer to engage in such discovery. Of course, we would not expect him to engage in it without limit. Discovery is costly to the lawyer. First, it requires that he forego other activities. Because his costs will often diverge from society's, however, this constraint is unlikely to limit discovery to the optimal amount. In fact, discovery may increase the probability of prevailing precisely because the party opposing the lawyer's client must bear a disproportionate share of its cost. Second, a lawyer might have to forego future income if a client who was billed by the hour were to become dissatisfied upon receiving a bill for discovery-related legal services. Because of the difficulty a client has in monitoring his lawyer's activities, however, there is little reason to believe that this constraint would be much more effective than the other one.

Now consider the problems posed by the diverse and extensive evidence sometimes offered in connection with the litigation of antitrust claims. That the evidence is diverse means that even a decision-maker possessed of considerable expertise may not understand the meaning and significance of all of it. The cure for this problem, like the cure for the problem of complex issues, is expertise—but, here, the expertise of people other than the decision-maker. A non-expert arbitrator can probably utilize such expertise more fully than can a non-expert judge. It is not that arbitrators are more adept; it is that the rules governing the arbitral process typically give them quite a bit more discretion in how to proceed than the federal rules give to judges. That the evidence is extensive means that the decision-maker will encounter more difficulty organizing it and retrieving those items in which he is especially interested. The palliative for these problems—there probably is no cure—is the use of nontraditional procedures, along with related technological devices, that will make it easier to perform

64 Not only might the dissatisfied client decline to pay the entire bill, he might fire the lawyer, hire another one the next time he needed legal services, or inform other clients and potential clients about his dissatisfaction.

65 Of course, the expertise of people other than the decision-maker could also help solve the problem raised by complex issues.
these tasks. Because the arbitrator has greater discretion than a judge, the arbitral process could more readily accommodate these procedures and devices than the judicial process. At the very least, their use by an arbitrator would be subject to less scrutiny on appeal than their use by a judge.

As the Supreme Court remarked in Mitsubishi, "adaptability and access to expertise are hallmarks of arbitration." That is why, if either process is better suited to resolving the complex issues sometimes raised by antitrust claims and to handling the diverse and extensive evidence sometimes offered in connection with the litigation of those claims, it would likely be—contrary to the opinions of the courts embracing the American Safety doctrine—the arbitral, not the judicial, process.

Even if it were the judicial process, however, that would tell us precious little about whether a court should order antitrust claims to arbitration. Claims subject to arbitration clauses are unlikely to raise complex issues or to call forth diverse and extensive evidence. These claims typically challenge "vertical" restraints of trade—limitations on competition in the distribution of goods. Unlike cases involving "horizontal" restraints—like mergers between, or cooperation among, erstwhile rivals—they do not "often occasion the monstrous proceedings that have given antitrust litigation an image of intractability." Moreover, if any errors were attributable to the nature of the arbitral process, they could not affect the probability of a correct decision unless they systematically favored antitrust defendants, and there is little reason to believe that they would do so.

American Safety proponents do offer another argument to support their position that arbitration of antitrust claims is more likely than adjudication to yield incorrect decisions. The argument is that arbitrators are less likely than judges to apply antitrust law. The proponents rely on two interrelated points. The first is that arbitrators are not legally obligated to apply antitrust law ex-

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66 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985). "The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." Id.
67 Id.
68 "Applying antitrust law" includes permitting claimants to use judgments obtained by the Department of Justice against the alleged offenders as prima facie evidence of liability and refusing to permit alleged offenders to use defenses like in pari delicto and "passing on."
cept in the unlikely event that the relevant arbitration clause so provides.69 It is not clear, however, whether this point survives the Supreme Court's opinion in Mitsubishi. "The [arbitration] tribunal . . . is bound to effectuate the intentions of the parties," observed the Court.70 "Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes . . . those arising from the application of American antitrust law, the tribunal should be bound to decide that dispute in accord with the national law giving rise to the claim."71 What makes this observation so far reaching is that the Court inferred that the parties had "agreed that the arbitral body [was] to decide . . . claims . . . arising from the application of American antitrust law" merely from the parties' failure to expressly exempt such claims from the scope of the arbitration clause in their agreement.72 The Court also suggested that an arbitrator's failure to apply antitrust law might justify a court's refusal to enforce the decision. "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."73 Indeed, such a failure might well constitute "manifest disregard of law," an error that has traditionally justified a refusal to enforce an arbitrator's decision.74

Whether this point survives Mitsubishi or not, however, it hardly shows that arbitrators are less likely than judges to apply antitrust law. For even if arbitrators were not legally obligated to apply antitrust law, they might do so anyway. In fact, they might have a powerful incentive to do so: from their perspective, applying antitrust law might well be the least costly method of ruling on

69 See Allison, supra note 16, at 242-44. "Arbitrators normally are not required to follow pertinent rules of law precisely unless the parties have contractually created such an obligation, and arbitrators' decisions are subject to little judicial review." Id. at 242.
70 Mitsubishi, 473 U.S. at 636.
71 Id. at 636-37 (emphasis added).
72 Id. at 636.
73 Id. at 638.
74 See, e.g., Trafalgar Shipping Co. v. International Mill, 401 F.2d 568, 572-73 (2d Cir. 1968) ("manifest disregard" of the law subject to judicial review); San Martine Compania De Navegacion, S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796, 801 (9th Cir. 1961) ("manifest disregard" occurs when arbitrators understand and state the law but do not apply it); Dundas Shipping & Trading Co., Ltd. v. Stravelakis Bros., Ltd., 508 F. Supp. 1000, 1003 (S.D.N.Y. 1981) (judicial review "severely limited" when award is product of "manifest disregard").
antitrust claims. In terms of personal labor, it might be less costly than developing an alternative set of principles and acceptable modes of reasoning and then applying that set to the claim at hand. And in terms of income from serving as an arbitrator in subsequent proceedings, it might be less costly than any other method of ruling on antitrust claims because applying antitrust law might be most consistent with the well-counseled expectations of parties to agreements containing broad scope arbitration clauses.

So it is that the proponents of the American Safety doctrine make their second point, which seems to be that commercial arbitrators are likely to harbor hostility toward antitrust law. I say


76 This alleged hostility is one of the two ideas that American Safety proponents may have in mind when they argue that courts should not compel the arbitration of antitrust claims because contracts containing a broad scope arbitration clause are likely to be contracts of adhesion. “Adhesion” is a slippery concept. About all one can be sure of is that, for a contract to qualify under that rubric, its terms must not be the product of explicit bargaining between the parties. (This probably is a necessary but not sufficient qualification) Why a lack of explicit bargaining would justify, on any grounds, a court’s refusal to enforce a contract’s arbitration clause, or any clause for that matter, is far from clear. It certainly does not justify such a refusal on antitrust grounds. Lack of explicit bargaining almost invariably reflects the efficient operation of a competitive market. See R. Posner, supra note 17, at 102. Just as that kind of market drives sellers to offer higher valued products and to limit their prices, it also drives them to economize on transaction costs. Id. For a seller of goods that are purchased by a substantial number of people and are not custom tailored, doing business on the basis of a standard form contract could serve as a rather effective method of economizing on some of those costs. It will so serve as long as the terms of the contract are efficient, and in a competitive market, one would certainly expect them to be.

It is conceivable, of course, that lack of explicit bargaining might simply reflect the decision of a single firm with market power. Indeed, when judges bandy about the contract of adhesion concept, they usually write as if they have that situation in mind—although they almost always confuse market power with the number of zeros required to express the value of the selling firm’s assets. If lack of explicit bargaining were to reflect the decision of a firm with market power, then it might give rise to an antitrust concern—but not necessarily. The firm might simply be economizing on transaction costs. In fact that is the most likely explanation for such a decision. If the firm were not economizing on transaction costs, that would mean that the terms of the contract were inefficient. Doing business on the basis of such a contract might lure potential rivals into the firm’s market. In fact, it probably would do so unless the firm somehow credibly threatened those potential rivals with the prospect of suffering costs greater than those suffered by the firm. Only if doing business on the basis of a standard form contract were ancillary to such a threat would the lack of explicit bargaining give rise to an antitrust concern, and then the concern would be about the terms of the contract, not about the process that produced them. It is difficult to see, however, how a broad scope arbitration clause either in and of itself or in conjunction with other terms of a contract could possibly serve this predatory function. Thus, even if all of the contracts containing a broad scope arbitration clause that were likely to generate antitrust claims were contracts of adhesion, that would not justify a court’s refusal to enforce such a clause, at least not on antitrust grounds.
"seems to be" because proponents have often expressed this point in the form of colorful, but false, analogies that are more suggestive than definitive. For example, the First Circuit put it this way: "[just as] issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged on arbitrators chosen from the business community." As far as I know, no one has ever marshalled any empirical evidence to support the point, and my own research has yielded not a shred. There probably is none since it is implausible. In the first place, commercial arbitrators frequently come from the law and academic communities as well as from the business community. In the second place, antitrust is not anti-business. For that matter, businessmen are antitrust plaintiffs as well as antitrust defendants. In fact, of necessity, they will play both roles in any antitrust litigation between parties to an agreement containing a broad scope arbitration clause.

Even if arbitrators were to ignore antitrust law when ruling on antitrust claims, their decisions would probably be correct on the merits just about as often as judges' decisions. That is because it is unlikely that the cases presented to them would involve an antitrust offense. Recall that the very existence of a written agreement

In fact, the contracts containing such a clause that are most likely to generate antitrust claims—contracts for the distribution of goods—are especially unlikely to be contracts of adhesion. Their terms are commonly the product of explicit bargaining. Thus, this argument, like the other two makeweights, bears little if any relevance to claims that are likely to be subject to an arbitration clause.

The other idea that American Safety proponents may have in mind when they advance this argument is simply that, in the name of distributing wealth in certain ways, judges should sometimes permit parties who have voluntarily entered into agreements to welch on their promises. This idea is consistent with much of the judicial and academic commentary about contracts of adhesion. See, e.g., Chandler v. Aero Mayflower Transit Co., 374 F.2d 129, 135 n.11 (4th Cir. 1967); Standard Oil Co. v. Perkins, 347 F.2d 379, 383 n.5 (9th Cir. 1965); Keesler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 640-41 (1943); Macneil, Bureaucracy of Contracts of Adhesion, 22 Osgoode Hall L.J. 5, 15-17 (1984). This is also consistent with the populist strand of antitrust law. See infra notes 129-39 and accompanying text.


78 See American Management Ass'n, Resolving Business Disputes 68-69 (1965). This study found that of the 20,000 arbitrators affiliated with the American Arbitration Association, the largest single group was comprised of attorneys. Id.

79 The doctrine and the "public interest" argument advanced in support of it may reflect the opposite view: that antitrust law is a device for impairing business efficiency. See infra notes 129-38 and accompanying text.
containing an arbitration clause suggests the absence of both cartelization and predation.\textsuperscript{80} Recall, too, that antitrust claims subject to an arbitration clause typically challenge a limitation on competition in the distribution of goods, and as post-\textit{American Safety} developments in antitrust law have confirmed, these vertical limitations are quite unlikely to facilitate cartelization or predation.\textsuperscript{81} In the absence of an antitrust offense, effectuating the agreement of the parties would tend to maximize efficiency, and that is precisely what arbitrators who ignored antitrust law would do. These decisions would therefore be consistent with what we assume here is the purpose of antitrust law.\textsuperscript{82}

Arbitrating antitrust claims is not more likely than adjudicating them to produce wrong decisions, and so once again, the proponents of the \textit{American Safety} doctrine are incorrect about the consequence of compelling arbitration. It is not likely to cause a rise in the proportion of antitrust decisions that are incorrect on the merits. They are also wrong about the likely significance of any such rise. It would not reduce the deterrent effect of antitrust law.

To do that, the rise would have to cause an appreciable decline in the risk of apprehension and conviction\textsuperscript{83}—no small job since the magnitude of this risk depends on a lot more than the probability of an incorrect decision. It is quite unlikely that the rise would be great enough to cause such a decline even if arbitrating an antitrust claim were several times as likely as adjudicating one to produce an incorrect decision. The number of claims subject to an arbitration clause would simply be too small. Could the rise at least be great enough to cause an appreciable decline in the risk of apprehension and conviction borne by a select group: the parties to agreements containing an arbitration clause? Probably not. At most, the rise could provide each such party with some relief from

\textsuperscript{80} See supra notes 46-47 and accompanying text.


\textsuperscript{82} In fact, they would be consistent with the purpose of antitrust law regardless of how it is defined. See infra notes 129-39 and accompanying text.

\textsuperscript{83} See Breit & Elzinga, supra note 18, at 407-09 (discussing relationship between risk of apprehension and conviction and the deterrence of criminal activity).
the risk of antitrust prosecution by the other party to the agreement. Relief from this risk, however, would provide little relief from the risk of prosecution generally because non-parties, including public enforcement agencies, could still bring suit. Unless the rise provided this select group with substantial relief from the risk of prosecution generally, it would have little impact on the risk of apprehension and conviction borne by group members.

Like the "fewer published opinions" prediction, the "more incorrect decisions" prediction is unlikely to come true. If it were to come true, the reduction in deterrence would be offset somewhat by the fact that arbitral decisions rarely find their way into published opinions. Moreover, whatever reduction did occur, it could again be remedied by measures that were both more efficient and more consistent with the Federal Arbitration Act than refusing to compel antitrust claims to arbitration. For example, courts could review arbitral decisions involving antitrust claims more closely than other arbitral decisions which have traditionally been subject to minimal appellate review. After all, the arguments offered by the American Safety proponents merely raise the possibility of error, and courts have long dealt with that possibility through appellate review. Of course, appellate review would probably necessitate a record of the proceedings and a written opinion from the panel. Requiring these devices, which involve additional expense, procedural niceties, formality and delay, would to some extent

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84 To the extent that the makeweights offered in support of this prediction reflect a concern about the litigants in any particular case where the American Safety doctrine is invoked—and courts often express them as if they do—they need not occupy us any longer. If the parties wish to give up their interest in the "better suited" judicial process or in less hostile judges in return for some other good of more value to them, there is no antitrust related justification for preventing them from doing so. Even courts embracing the American Safety doctrine have recognized, in part, the validity of this waiver. They have created an exception to the doctrine for situations where the parties agree to arbitrate their dispute after the dispute arises. See, e.g., Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974) (post-controversy arbitration agreements are not within the general prohibition laid down in American Safety).

The exception itself shows that neither of these arguments requires that antitrust claims be nonarbitrable. The timing of the arbitration agreement has nothing whatsoever to do with the nature of the issues and evidence common to antitrust controversies or to the propriety of entrusting their resolution to commercial arbitrators.

85 See Comment, supra note 54, at 813-16 (discussion of the reasons for changing the tradition of subjecting arbitral decisions to limited appellate review).

86 Id. See also Administrative Procedure Act, 5 U.S.C. § 702 (Supp. IV 1986) (providing judicial review of federal administrative agency action).

 frustrate the purposes of arbitration, but not nearly as much as refusing to compel it.

Courts could also compel arbitration conditionally. If the problem were the allegedly inferior way in which the arbitration process utilized information, courts could compel arbitration on the condition that the parties select one or more antitrust experts as the panel and permit that panel to use all procedures, and related technological devices, that a trial judge might use. If the problem were the allegedly inadequate discovery authorized by the Federal Arbitration Act, courts could compel arbitration on the condition that the parties consent to the discovery devices authorized by the Federal Rules of Civil Procedure. Lastly, if the problem were the alleged hostility of businessmen-arbitrators to antitrust law, the court could bar the parties from making businessmen the majority of the arbitration panel or could itself vet the arbitrator pool.

If we were to experience the reduction in deterrence contemplated by the "more incorrect decisions" prediction, however, we would probably have no efficiency-related reason for remedying it at all because the reduction would itself probably be efficient. It would be efficient because the reduction in deterrence would affect only those practices that might be condoned by an arbitrator when they would have been condemned by a judge. Most, if not all, of these practices would cause either no net efficiency loss or a loss whose value would be less than the value of the resources required to challenge them as antitrust offenses. If offenses at all, these practices would be what the "new learning" about optimal damages and deterrence identifies as "efficient violations."

There are two reasons why this is so. One is simply that only cartelization and predation are at all likely to cause net efficiency losses, and since an arbitration clause suggests the absence of both, neither is likely to be involved in the cases that would be presented to arbitrators. Unfortunately, antitrust claimants may make colorable claims against practices that are neither ancillary

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88 In addition or in the alternative, courts could instruct arbitration panels on antitrust law. See Allison, supra note 16, at 270.
89 See id. at 250-51.
90 See id. at 270.
91 See Easterbrook, Detrebuling Antitrust Damages, 28 J.L. & Econ. 445, 447 (1985); Landes, supra note 18, at 653-61.
92 See supra notes 46-47 and accompanying text.
to cartelization nor predatory. The claimants who make them are often those who would employ antitrust law to undo the verdict of the marketplace, invalidate contractual limitations on business autonomy, or gain negotiating leverage in an otherwise pedestrian business dispute.

The second reason is a bit more complicated. Courts have created a powerful incentive to attack practices that are, at worst, "efficient offenses." The incentive is the prospect of obtaining a money judgment that far exceeds the net efficiency loss that they cause. Courts have created this incentive by using the wrong measure of damages in cases where the alleged offender is sued by a business rival or distributor. In such cases, courts use "lost profits" as the measure of damages instead of the monopoly overcharge which is the measure that they should use.\(^93\)

Courts usually calculate "lost profits" as "the difference between a firm's 'costs' and its 'sales' for some period, discounted to present value."\(^94\) "Lost profits" calculated in this way tend to be inversely proportional to whatever efficiency loss might be attributable to a challenged practice.\(^95\) Suppose the efficiency loss is great because the challenged practice drove a more efficient rival from the market, thereby permitting the offender to earn monopoly rents. The "lost profits" will be low or non-existent because the driven-out rival could enter another market and earn the same competitive return he had been earning in the offender's market. Conversely, where the efficiency loss is small, the "lost profits" will tend to be great. In fact, "lost profits" will tend to be greatest when the challenged practice caused an efficiency gain—for exam-

\(^93\) Breit & Elzinga, supra note 18, at 410-12, 415-22; Easterbrook, supra note 91, at 462; Landes, supra note 18, at 671. The monopoly overcharge measure is customarily used in suits brought by consumers. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) (individual consumers may recover damages when they purchase goods at artificially inflated prices within the meaning of section 4 of Clayton Act).

\(^94\) Easterbrook, supra note 91, at 462. "A terminated dealer will project how much it would have sold had it not been cut off—a figure that usually is claimed to increase at an exponential rate—and subtract its costs per unit, which are assumed to be constant or falling as sales increase." Id.

The value arrived at by the above process will be quite large. See, e.g., Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1240-44 (7th Cir. 1982) (jury determination that "lost profits" were $3.5 million even though dealer's accounting profits had not exceeded $89,000 in any year before termination and terminated products only amounted to 20% of the business based on evidence of pretermination profits appearing in trial record), aff'd on other grounds, 465 U.S. 752 (1984).

\(^95\) Easterbrook, Treble What?, 55 ANTITRUST L.J. 95, 96 (1986).
ple, by preventing distributors, including the antitrust claimant, from earning monopoly rents.96

Because "lost profits" tend to be inversely proportional to the efficiency loss attributable to a challenged practice, the prospect of obtaining a money judgment equal to "lost profits" would probably induce attacks on practices that were, at worst, efficient offenses. The prospect of obtaining three times this amount plus the costs of suit—as the Clayton Act provides—would almost certainly do so.97 Thus, these practices are the ones likely to be challenged in cases where courts would use the "lost profits" measure of damages; cases where the alleged offender is sued by a business rival or distributor.

These cases will encompass almost all of those in which one party to an agreement containing a broad scope arbitration clause pursues an antitrust claim against the other. Typically, one party will be the rival of, or distributor for, the other. Of course, if courts compelled the arbitration of antitrust claims, such cases would be presented to arbitrators, if presented at all. So, practices that might be condoned by an arbiter even though they would have been condemned by a judge would likely be, at worst, "efficient offenses."

Curiously, the higher the probability that arbitrators would make such an error, the more likely it is that practices challengeable in the cases presented to them would be, at worst, efficient offenses. As the probability that arbitrators would make such an error approaches one, the more an arbitration clause becomes a waiver of the right to take antitrust enforcement action against the other party to the agreement. No one is likely to waive such a right unless he expected to gain by doing so.98 When could both parties

96 See Breit & Elzinga, supra note 18, at 418 (asserting that the "lost profits" method should be abolished because loss from an antitrust violation is "in the transaction costs incurred in shifting resources from one market (or use) to another").

97 15 U.S.C. § 15 (1982). Section 4 provides in pertinent part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws...shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Id.

98 The reason, of course, is that the expected value of "rights" secured by the antitrust laws is likely to be significantly greater than zero. That cannot be said about the expected value of some of the "rights" secured by the securities laws. Take the right to obtain information from a broker about an issuer. Since the same information will almost always be available from other sources for free, the expected value of the right to obtain it from a broker is likely to be close to zero. Thus, a potential investor might waive this right, even though he expected to gain next to nothing by doing so.
expect to gain? When each expected that the other would engage in challengeable practices that were, at worst, efficient offenses. In that situation, a joint waiver would permit them to share the gains attributable both to whatever efficiencies were generated by their challengeable practices and to the savings from foregoing antitrust enforcement. Therefore, the higher the probability that an arbitrator would condone what a judge would condemn, the higher the probability that practices challengeable in cases presented to arbitrators would be, at worst, efficient offenses.

If any of these practices were "inefficient" offenses, it is unlikely that arbitrators would condone them if judges would have condemned them. In the first place, even if arbitrators were more likely than judges to disregard antitrust law, the difference in their proclivities would be quite small.99 Secondly, if arbitrators were to disregard antitrust law at all, they would probably disregard only the populist strand of antitrust law—the strand embodied in cases whose outcomes seemingly turned on populist notions about the distribution of wealth—and failing to apply this populist strand would have no impact on their treatment of inefficient offenses.

In fact, failing to apply this populist strand would tend to maximize efficiency. The populist strand of antitrust law rests on the notion that some agreements providing for voluntary exchange should be condemned in order to prevent the distribution of wealth in ways that would allegedly threaten certain loosely Jeffersonian political and social goals.100 An arbitrator might disregard this strand because it would lead him to rule on antitrust claims in a way that might well clash with the reasonable expectations of parties to agreements containing an arbitration clause, and ruling in that way would reduce the chances that such parties would choose him to arbitrate their disputes.

One of the reasonable expectations of parties to such agree-

The securities laws appear to be predicated on the assumption that if all potential investors waived this right, the market would yield an inefficiently low level of accurate information. So if a broad scope arbitration clause—appearing, for example, in a brokers' standard form customer agreement—constitutes such a waiver, one could argue on efficiency grounds that, when it comes to securities claims, courts ought not to enforce the clauses. Shearson/American Express, however, holds precisely to the contrary; and if courts should enforce arbitration clauses when it comes to securities law claims, a fortiori they should enforce them when it comes to antitrust claims.

99 See Allison, supra note 16, at 242-43 (asserting that arbitrators are likely to adhere to basic spirit of antitrust laws because they have strong incentives to do so).

100 See infra notes 129-39 and accompanying text.
ments is that in resolving disputes an arbitrator would try to effec-
tuate their agreement, but the populist strand of antitrust law
could easily lead him to frustrate it. Another of their reasonable
expectations is that an arbitrator would resolve disputes in a pre-
dictable pattern. Indeed, predictability is one of the features that
makes arbitration attractive; it permits parties to economize on
transaction costs by promising to arbitrate their disputes. The
populist strand of antitrust law, however, would likely yield resolu-
tions that followed no pattern at all. Too much would turn on
fuzzy factors like: which groups an arbitrator believed antitrust law
favors; whether the antitrust claimant “belonged” to a favored
group and the antitrust defendant to a non-favored one; and what
balance the arbitrator thought antitrust law strikes between effi-
ciency and favoring one group at the expense of another. More-
over, if parties to a commercial relationship really did include an
arbitration clause in their agreement for the purpose of evading
the judicial interpretation of antitrust law, they would certainly
expect that an arbitrator’s interpretation would be more effi-
cient. Only this expectation would prompt the parties to bear
the expense of negotiating about the arbitration clause.

Two features of the arbitrator’s mind set would work to rein-
force his incentive to disregard the populist strand of antitrust law.
One is the arbitrator’s familiarity with the parties’ agreement and
with the customs and practices of the market in which the parties
operate. This familiarity would make it easier for him to see how
each party reasonably expected to benefit from the agreement, and
that perception should reduce the appeal of the populist notion
that one party’s expectations should be frustrated to prevent that
party from gaining “at the expense of” the other. The second fea-
ture is the arbitrator’s knowledge that his decision will have little,
if any, precedential value. This knowledge would tend to extin-
guish whatever naive hope which might otherwise have flickered
that his decision would affect the distribution of wealth
generally.


102 See Pitofsky, supra note 14, at 1076-77 (arbitrators not required to file a written opinion and consequently consistent interpretations of antitrust law not possible).

103 The hope would be naive because, even if the arbitrator’s decision were to have affected significant precedential value, those would blunt the decision’s impact on wealth distribution by taking the prospect of such a decision into account in arranging their affairs.
3. The "Fewer Claims Pursued" Prediction

Finally, consider what is by far the most important, and most plausible, prediction made by proponents of the American Safety doctrine, "the fewer claims pursued" prediction. Its logic is that compelling the arbitration of antitrust claims would divert to arbitration some claims that would have been adjudicated on the merits; this diversion would decrease the frequency with which prevailing antitrust claimants obtained awards of treble damage and attorneys' fees because arbitrators are less likely than judges to make such awards; a decrease in the frequency of such awards would, by reducing the incentive to pursue antitrust claims, cause a decline in the number pursued; and a decline in the number of claims pursued would reduce the deterrent effect of antitrust law.

Once again, problems beset each link in the logic. Take the link between the diversion of claims to arbitration and the frequency with which prevailing claimants obtain awards of treble damages and attorneys' fees. This link rests on the assertion that arbitrators would be more likely than judges to decline to make such awards. This assertion suffers, though not severely, from problems similar to the ones that plagued the assertion that arbitrators would be more likely than judges to fail to apply antitrust law: Mitsubishi may obligate arbitrators to make awards of treble damages and attorneys' fees; and even if it does not, they may have other incentives to do so. Why does it not suffer as severely? The relevant language of the Supreme Court's opinion in Mitsubishi focuses more on whether arbitrators must let deserving antitrust complainants prevail than on whether they must let prevailing complainants have what they deserve. An arbitrator's incentive to make awards of treble damages and attorneys' fees to prevailing claimants would not be nearly as strong as his incentive to apply substantive antitrust law. An alternative standard would be readily available and might even better conform to the expectations of the parties—single damages to the prevailing claimant with each side bearing the cost of its own attorney.

Now turn to the link between the frequency of treble damage

See infra note 136 and accompanying text.


105 See supra note 75 and accompanying text.

106 Often the parties to agreements containing arbitration clauses explicitly provide that each side is to bear the cost of its own attorney.
awards and the number of antitrust claims pursued. It is true, of course, that a decrease in the frequency of these awards would reduce the expected gain from pursuing antitrust claims—although only for claimants seeking damages, and many of those pursuing antitrust claims subject to an arbitration clause seek only equitable relief. That only means, however, that compelling these claims to arbitration might reduce the number pursued by parties to agreements containing a broad scope arbitration clause against one another. It probably would not even do that because compelling arbitration would not only reduce the expected gain from pursuing an antitrust claim but also reduce the expected cost of pursuing one. Recall that arbitrating antitrust claims would probably be cheaper than adjudicating them, and it would almost certainly be more cost effective. Ironically, perhaps, one of the factors giving arbitration this advantage is that an arbitrator’s decision would have far less precedential value than a judge’s. As a result, an alleged offender might devote significantly fewer resources to defending a claim heard by an arbitrator than he would have devoted had it been heard by a judge. If fewer resources were devoted to defending claims, the cost of pursuing them would decline, thereby increasing the incentive to pursue them. In fact, if this countervailing effect were great enough, compelling arbitration could result in more, rather than fewer, claims being pursued. In any event, proponents of the American Safety doctrine are again wrong about the likely consequence of compelling the arbitration of antitrust claims.

Even if the proponents were right about this consequence, they would still be wrong about the likely significance of a decline in the number of antitrust claims pursued. In order to reduce the deterrent effect of antitrust law, the decline would have to cause an appreciable reduction in the risk of apprehension and conviction. Yet, the number of claims subject to an arbitration clause would almost certainly be too small to create even the potential for

109 In any event, compelling arbitration would probably not reduce greatly the number of claims pursued in arbitration. When one party to an agreement containing an arbitration clause has a colorable antitrust claim against the other, he almost always has other colorable claims as well, and, in many cases, the additional cost of pursuing the antitrust claims would be small enough so that even a reduction in expected gain of more than two-thirds would not have much impact.
110 See supra note 83 and accompanying text.
such a precipitous decline.

The "fewer claims pursued" prediction, then, is unlikely to come true—but it is more plausible than the other two predictions. Ironically, this plausibility weakens rather than strengthens the case for the American Safety doctrine. If compelling arbitration were to reduce the deterrent effect of antitrust law in the manner contemplated by this prediction, the reduction in deterrence would almost certainly be efficient. Consequently, there would be no efficiency-related reason for remedying it, even with measures like closer appellate review or conditional arbitration.\textsuperscript{111}

The explanation for this counterintuitive conclusion lies in the "new learning" about optimal damages and deterrence. Damages are "optimal" when they induce litigants to create an efficient level of deterrence, a level at which the gain from any additional deterrence would fall short of the cost of creating it.\textsuperscript{112} If apprehension and conviction were certain and enforcement were costless, optimal damages would equal the value of the "net harm [suffered as a result of the offense] to persons other than the offender."\textsuperscript{113} Of course, the probability of apprehension and conviction is significantly less than one and the cost of enforcement is substantially more than zero—especially for antitrust offenses—so the measure for optimal damages must be adjusted to take these facts into account.\textsuperscript{114} The adjustment takes the form of a multiplier.\textsuperscript{115} For example, optimal damages might equal triple the value of the net harm suffered by persons other than the offender.

If the multiplier is too low, there will be too little deterrence. Some offenses will be committed which could have been deterred at a cost that was less than the value of the net harm. If the multiplier is too high, there will be too much deterrence. Some efficiency-enhancing behavior will be foregone simply to avoid antitrust challenge;\textsuperscript{116} and some offenses will not be committed even

\textsuperscript{111} See supra notes 86-90 and accompanying text (discussing judicial review and conditional arbitration alternatives).


\textsuperscript{113} Landes, supra note 18, at 656.

\textsuperscript{114} See id. at 657.

\textsuperscript{115} See id. A fundamental characteristic of the multiplier is that it is inversely proportional to the probability of apprehension and conviction.

\textsuperscript{116} See Austin, The Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy, 1978 Duke L.J. 1353, 1369-70; Breit & Elzinga, Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages, 17 J.L. & Econ. 329,
though the cost of deterring them exceeded the value of the net harm.\textsuperscript{117} Moreover, some victims will behave perversely; in order to maximize their hoped-for antitrust recovery, these victims will refrain from taking some steps that would have reduced their losses, and may even take steps that will increase them.\textsuperscript{118}

Obviously, the multiplier appropriate for one case would not necessarily be appropriate for another. To illustrate, consider two antitrust cases. Case #1 involves classic cartelization: the chief executive officers of the only three firms manufacturing widgets meet clandestinely to set the price of widgets at no less than $10 each and allocate output among the firms. Case #2 involves resale price maintenance: the chief executive officer of the firm with a widget monopoly enters into written agreements with the chief executive officer of each of the two widget distributors pursuant to which the distributors obligate themselves to sell widgets for no less than $10 each. The multiplier for Case #1 should be higher than the one for Case #2 because it is easier to conceal classic cartelization than resale price maintenance. The easier it is to conceal the offense, the lower the probability of apprehension and conviction; and the lower the probability of apprehension and conviction, the higher should be the multiplier for calculating optimal damages.\textsuperscript{119}

If we knew what the appropriate multiplier was, then we could easily assess the efficiency of the reduction in deterrence contemplated by the "fewer claims pursued" prediction. In fact, we could make the assessment even if all we knew was whether it was closer to the multiplier presently employed by courts or to the one that, according to American Safety proponents, arbitrators would often employ. If it were closer to the multiplier presently employed by the courts, we would conclude that the present level of deterrence is probably more nearly optimal than the level that American

\textsuperscript{117} See Easterbrook, supra note 91, at 447; Landes, supra note 18, at 656.

\textsuperscript{118} See Breit & Elzinga, Antitrust Enforcement, supra note 116, at 339-40; Breit & Elzinga, supra note 18, at 430-33. The higher the probability of apprehension and conviction, the greater are the incentives to behave perversely. See Breit & Elzinga, Antitrust Enforcement, supra note 116, at 339-40; Breit & Elzinga, supra note 18, at 430-33. For a discussion of the probability of apprehension and conviction for practices likely to be challengeable before arbitrators, see infra note 123 and accompanying text.

\textsuperscript{119} See supra note 115.
Safety proponents predict would exist if courts compelled the arbitration of antitrust claims; and a reduction from the present level to the predicted level would be inefficient. We would reach the opposite conclusion, however, if the appropriate multiplier were closer to the multiplier that, according to American Safety proponents, arbitrators would often employ.

Unfortunately, we do not have the data to “prove” that it is closer to one than the other. What we do have, however, is the characteristics of cases likely to be arbitrated, and the “new learning” shows that the appropriate multiplier is a function of some of these characteristics. The most important characteristic is the difficulty of concealing the alleged offense. In cases likely to be arbitrated, the alleged offender would probably find it almost impossible to conceal his alleged offense. At the very least, the alleged victim would very likely know all about it. Once again, the more difficult it is to conceal the offense, the higher is the probability of apprehension and conviction; and the higher the probability of apprehension and conviction, the lower the appropriate multiplier.

A second significant characteristic is the relative concentration of property rights in antitrust enforcement. In cases likely to be arbitrated, these rights will tend to be relatively concentrated. They will not be shared, for example, by hundreds of end users. The more concentrated the property rights in enforcement, the more likely it is that one of the right holders would take enforcement action; and the more likely it is that one of the right holders would take enforcement action, the higher the probability of apprehension and conviction and the lower the appropriate multiplier.

A third significant characteristic is the probability of a decision that will condemn an efficiency enhancing practice as an antitrust offense—what Professors Breit and Elzinga call the “misinformation effect.” In cases likely to be arbitrated, the probability of this kind of error is relatively high simply because almost all of the claims in such cases will challenge “vertical restraints of trade”

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120 See Easterbrook, supra note 91, at 448-55.
121 See id. at 454-61.
122 See supra note 115 and accompanying text.
123 See Easterbrook, supra note 91, at 459 (discussing concentration of the property right in enforcement as one of determinants of appropriate multiplier).
124 See Breit & Elzinga, Antitrust Enforcement, supra note 116, at 340; Breit & Elzinga, supra note 18, at 433.
or other forms of contractual integration, and these practices are rather likely to be efficiency enhancing. Condemning efficiency enhancing behavior is one of the costs of enforcement, and the higher the cost of enforcement, the lower the appropriate multiplier.

These three characteristics are reinforced by the fact that employing a lower multiplier would probably not induce anyone to take inefficient precautions to insulate themselves from the effects of antitrust offenses. In cases likely to be arbitrated the party with an antitrust claim would almost always be able to seek full redress under some other law for any wrong suffered at the hands of the alleged offender. Additionally, end users would have no reason to substitute away from the products or services provided by parties to agreements containing a broad scope arbitration clause.

In my judgment, these characteristics strongly indicate—they cannot "prove"—that the appropriate multiplier is closer to one, the explicit multiplier that, according to American Safety proponents, arbitrators would often employ, than it is to three, the explicit multiplier employed by courts. In fact, they need not indicate even that much in order to show that the reduction in deterrence contemplated by the fewer claims pursued prediction would be efficient. Recall that in cases between parties to an agreement containing a broad scope arbitration clause, courts are likely to measure "actual damages" in terms of "lost profits." This measure tends to dramatically overstate the harm, and overstating this harm is the equivalent of employing an implicit multiplier. Thus, in these cases the multiplier employed is equal to the explicit one times the implicit one. To illustrate, suppose that "lost profits" overstate net harm merely by a factor of two. Courts would then employ a multiplier of six (three times two) and arbitrators, according to American Safety proponents, a multiplier of two (two times one). If the characteristics of cases likely to be arbitrated indicated only that the appropriate multiplier was closer to two than to six, we could still conclude that the reduction in deterrence contemplated by the "fewer claims pursued" prediction would be efficient.

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125 See supra notes 81-82 and accompanying text.
126 See supra note 93 and accompanying text.
C. Summary of Part I

The analysis of the purported efficiency losses reveals that compelling the arbitration of antitrust claims is unlikely to reduce the deterrent effect of antitrust law in any of the ways predicted by the proponents of the *American Safety* doctrine. It further reveals that if compelling arbitration were to cause such a reduction, this reduction would probably be efficient. This purported efficiency loss is, if anything, a subtle efficiency gain.

To these two efficiency gains we must add a third. When, pursuant to the *American Safety* doctrine, a court refuses to compel the arbitration of an antitrust claim, it must then decide whether to permit or to stay the arbitration of nonantitrust claims. To do that, the court must ascertain whether the antitrust claim "permeates" the dispute and whether the party pursuing it is likely to prevail. This is an onerous task. If courts were to compel the arbitration of antitrust claims they would free the resources now devoted to performing that task and simultaneously relieve businessmen of considerable uncertainty.

II. The Wealth Distribution Consequences of Compelling the Arbitration of Antitrust Claims

For the past decade, efficiency has been ascendant as the touchstone of antitrust jurisprudence, but not all are happy with this state of affairs. Some scholars still argue that, and some judges still resolve antitrust claims as if, the policy of antitrust law is some combination of maximizing efficiency and distributing wealth in ways that, these scholars and judges assert, will further some loosely Jeffersonian political and social goals. This populist notion can trace its lineage at least as far back as Justice Brandeis' opinion for the Court in *Board of Trade of the City of Chicago v. United States*, and at times since, it has had great influence. In fact, the *American Safety* doctrine was probably a naive extension of this populist notion.

The *American Safety* decision came down during the last pe-
period of populist ascendancy in antitrust law. Indeed, the influence of populist notions was probably at its peak. The opinion reflects this influence. Into the language with which the Court expressed its principal argument the Court inserted a classic populist nostrum—"inferior bargaining position": "we find in this case . . . [a] conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a 'prompt, economical and adequate solution of controversies.'" The Court also invoked a related populist nostrum, "contracts of adhesion," in support of the doctrine. What is perhaps most indicative of the doctrine's populist parentage is that the courts embracing it created an exception for situations where the parties agree to arbitrate their dispute after the dispute arises. If there really were a conflict between "federal statutory protection of a large segment of the public . . . and encouragement of arbitration as a[n] . . . 'economical . . . solution of controversies,'" the conflict would be just as great whether the agreement preceded the dispute or followed it. For that matter, the temporal relationship between the dispute and the agreement has nothing to do with whether the judicial process is better suited than the arbitral process to handling an antitrust claim, or whether judges are really more likely than arbitrators to apply antitrust law. If the doctrine were rooted in concerns about efficiency, the exception could not be reconciled with it; but it could if the doctrine was an extension of populist notions about the distribution of wealth—notions that are notoriously malleable.

The doctrine is a naive extension, however, since compelling the arbitration of antitrust claims would probably have a negligible impact on the distribution of wealth. Consider the likely impact of refusing to compel it. In the first place, it is quite likely that in


132 See American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968). It is true that if the customers of a firm with significant market power tried to take collective action to obtain a greater output at no higher price, they would incur prohibitive transaction costs. This condition is the sine qua non of "significant market power." But it is not the condition to which American Safety proponents refer when they write about "inferior bargaining position."

133 See id. at 827.

134 See supra note 84.

135 American Safety, 391 F.2d at 826.
arranging their commercial relationships, parties to agreements containing an arbitration clause act as if they take the American Safety doctrine into account. By acting this way, the parties would blunt any impact that the policy of refusing to compel arbitration might otherwise have had on the distribution of wealth between them.136 Secondly, even on the assumption that the parties do not act this way, refusing to compel arbitration could not have an appreciable impact on the distribution of wealth unless those who stood to gain and those who stood to lose from this policy belonged to distinct wealth groupings, one of which was supposedly favored by antitrust law and the other disfavored.137 It is impossible to believe that they would do so. In fact it is impossible to believe that they would belong to distinct wealth groupings of any kind. Parties to agreements containing a broad scope arbitration clause must find that in some situations a refusal to compel arbitration would benefit them (in the short run) and in other situations it would hurt them.

Thirdly, if we assumed not only that these parties do not act as if they take the doctrine into account, but also that those who stood to gain and those who stood to lose from the policy of refusing to compel arbitration belonged to the required wealth groupings, then this policy could affect the distribution of wealth only on select occasions. The occasions would be those in which one party objected to the arbitration of a dispute and a court properly sustained the objection solely on the basis of the American Safety doctrine. Such occasions are unlikely to arise frequently. Parties to agreements containing an arbitration clause do not often object to the arbitration of disputes; and when such a party does object, a court may sustain the objection on the basis that the arbitration clause was the product of fraud, duress, or overreaching.138

Thus, refusing to compel the arbitration of antitrust claims probably has a negligible impact on the distribution of wealth. This implies that compelling the arbitration would probably do likewise. It would, however, produce sizable efficiency gains, and so it would further the policy of antitrust law even if that policy were

137 See id. at 111-12.
some combination of maximizing efficiency and distributing wealth in populist preferred ways.

III. CONCLUSION

This reconsideration of the *American Safety* doctrine shows that compelling the arbitration of antitrust claims is likely to further the policy of antitrust law regardless of how that policy is defined. This showing is utterly inconsistent with the central premise upon which the doctrine is founded. We may therefore conclude that not only does the doctrine have perverse consequences and lack statutory support, it is also without logical foundation. The courts ought to discard it.\(^{139}\)

\(^{139}\) In Gemco Latinoamerica, Inc. v. Seiko Time Corp., 671 F. Supp. 972 (S.D.N.Y. 1987), Judge Knapp did discard the *American Safety* doctrine. Id. at 980. In September 1985—after the Court had decided *Mitsubishi*—Seiko Time pursued claims against one of its dealers, Gemco Latinoamerica, by demanding arbitration as provided in their distribution agreement. Id. at 974. Gemco asserted a number of affirmative defenses and filed counterclaims against Seiko Time. Id. When the arbitrators awarded Seiko all that it had sought, Gemco recast its counterclaims to sound in antitrust (among other things) and attempted to pursue them in court. Id. at 975. Seiko Time moved to dismiss the recast counterclaims on the ground that the arbitration award barred them. Id. at 977. Gemco argued that the award could not bar its antitrust claims because, under *American Safety*, it could not pursue them in arbitration. Id. at 978. Judge Knapp rejected the argument on the theory that, after *Mitsubishi*, "none of the justifications for the . . . doctrine retain their vigor and that [the *American Safety*] court would now hold that domestic antitrust claims are subject to arbitration." Id. at 980.