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**ARBITRATION, THE LAW MARKET,
AND THE LAW OF LAWYERING**

by

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ABSTRACT

This paper builds on Larry Ribstein's path-breaking work concerning the role of lawyers and bar associations in jurisdictional competition and law production. According to Ribstein, unauthorized practice of law (UPL) rules, which create barriers to entry preventing out-of-state attorney and other professionals from providing services, can actually encourage the development of higher quality legal rules in a state. Ribstein's work also focused on the role of contractual choice clauses in promoting jurisdictional competition for substantive and procedural legal rules. This paper builds on his insights by incorporating the increasingly important role of arbitration into Ribstein's framework and testing empirically for possible effects of jurisdictional competition for arbitration business. We also consider and empirically test for the potential effects of jurisdictional competition on the production of law, including special rules exempting arbitration from ordinary UPL rules and state laws concerning arbitration. Our findings suggest that while some legal changes (such as the adoption of general UPL carveouts) do not have a significant effect on attracting legal business, others (such as the enactment of special rules governing international arbitration) can have an effect, even on the state's domestic arbitration caseload. Moreover, our findings also suggest that some (although not all) of these legal reforms are enacted as coordinated packages, validating Ribstein's insights about the political economy

¹ Milton R. Underwood Chair in Law, Vanderbilt University Law School. This article is dedicated to the memory of our friend, colleague, and collaborator, Larry Ribstein. Although we miss him very much, we remain inspired by his ideas and firmly believe that the best way to honor his memory is to continue to carry them forward.

² Herman E. Talmadge Chair of Law, University of Georgia Law School. We are grateful to the American Arbitration Association, especially Ryan Boyle,, for making available caseload data discussed in this paper. Special thanks to Matthew O'Brien and Anna Beth Martin for valuable research assistance. Thank you also to participants at the research roundtable and Unlocking the Law conference, both held at George Mason University School of Law, in conjunction with this project.

of law production. Finally, our findings suggest that lawyers in many states are finding ways to cleverly respond to international competitive pressures while simultaneously insulating domestic dispute resolution from similar forces, a dynamic not explored in Ribstein's work, and the Supreme Court's strong preemptive stance toward the Federal Arbitration Act may be fueling this segregation.

I. INTRODUCTION

During his extremely productive academic career, Larry Ribstein was central to furthering our understanding of how jurisdictional competition operates to shape the laws of a state. In his work, the market for legal services and lawyer licensing rules played an important role in fostering jurisdictional competition for the provision of law.³ Although states do not always have strong independent incentives to compete to provide desirable laws, attorneys can and often do drive such legal reforms.⁴ In particular, Ribstein insightfully observed that the incentives of a state's bar depends critically on the ability of local lawyers to reap the benefits of law reform, which in turn depends, at least in part, on a jurisdiction's lawyer licensing rules.

To illustrate the nuances of Ribstein's analysis, consider his treatment of the enforcement of contractual choice clauses. Contracting parties often attempt to choose the governing law and the forum in which future disputes will be resolved. Although traditionally treated as mundane boilerplate terms, these provisions can play an important role in enhancing jurisdictional competition because, if enforced, private parties can obtain the benefits of desired laws without having to physically move to that jurisdiction. Regarding the enforcement of choice-of-law clauses, parties typically can contractually choose the law that applies to their relationship so long as (1) the state whose law is chosen has a

³ Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 *Mo. L. Rev.* 299 (2004) [hereinafter *Lawyers as Lawmakers*]; see also Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 *WASH. U. L. Q.* 369 (1995).

⁴ *Id.*; see also ERIN A. O'HARA AND LARRY E. RIBSTEIN, *THE LAW MARKET* 78-80 (2009).

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substantial connection to the parties and/or the transaction; and (2) application of the chosen law would not violate a fundamental public policy of the forum or other state with critical connections to the parties and the transaction.⁵

Although the public policy limitation makes intuitive sense in that it enables states to protect important in-state interests, the connection requirement seems puzzling. Why require that parties choose the law of a state that is connected to the transaction? One might think that the connection requirement serves to limit the ability of private parties to circumvent state laws by requiring them to choose among only those states that might already have a legitimate claim to regulating the relationship. In reality, however, the connection requirement provides relatively little constraint, because mobile and sophisticated parties often can easily create the requisite connections with a desired state. Ribstein and O'Hara posited several alternative functions that a connection requirement can serve.⁶ Importantly, the connection requirement serves to attract assets, jobs, tax revenues, etc. to the state, and these benefits provide an incentive for states to create and maintain desirable laws. In addition, the connection requirement helps to provide an incentive for local lawyers to promote desirable state laws because those local connections enhance the likelihood that local legal services will be utilized.

This latter insight draws on Ribstein's earlier work on lawyer licensing rules and their effect on attorney investment in local law.⁷ In that earlier work, Ribstein began with the observation that lawyer licensing rules provide local attorneys with a mechanism for excluding nonlawyers and lawyers from

⁵ Restatement (Second) of Conflict of Laws § 187 (1971). The Second Restatement approach to choice-of-law clauses seems to enjoy nearly universal appeal in the state courts, even in states that have not otherwise adopted the Second Restatement approach to choice of law more generally. Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 n.96 (1996).

⁶ O'HARA AND RIBSTEIN, *THE LAW MARKET*, *supra*.

⁷ Ribstein, *Lawyers as Lawmakers*, *supra* note 3.

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other states from using local laws to earn professional fees.⁸ As a group, local lawyers then have greater incentives to advocate for the creation of home state laws that increase the demand for their services.⁹ These demand-increasing incentives can work to promote more efficient state laws, but they can also work to produce laws that benefit lawyers at the expense of others. Regarding the more efficient state laws, lawyers have an incentive to help create laws that attract clients and their business to the state,¹⁰ and in doing so, the lawyers can internalize the long term benefits and costs of legal rules. On the other hand, lawyers may also have incentives to lobby for laws that increase (1) the costs of and need for legal advice; and (2) the frequency and cost of litigation, including rules that attract local litigation.¹¹ In the end, the efficiency effects of state lawyer licensing rules are uncertain.

Importantly for present purposes, Ribstein also noted that subgroups of lawyers can face conflicting incentives.¹² Litigation attorneys might have an incentive for creating plaintiff-friendly rules to be applied in local courts because that attracts litigation to the state. In contrast, transactional attorneys likely prefer to create laws that enhance the long-term interests of commercial parties. These latter rules should, at least in sophisticated commercial settings, be more neutral in their content.¹³

Although Ribstein's work was rich with insights about private law creation and dispute resolution,¹⁴ he never incorporated the implications of private dispute mechanisms into his theoretical work on the law of lawyering. In this article, we extend Ribstein's analysis to take into account the role of arbitration as a potential substitute for both courts and the use of local lawyers for dispute resolution. Understanding the impact of arbitration on Ribstein's framework is important for several reasons. First,

⁸ *Id.* at 332-34.

⁹ *Id.* at 335-37.

¹⁰ *Id.* at 345-46.

¹¹ *Id.* at 347-48.

¹² *Id.* at 350-51.

¹³ *Id.* at 350.

¹⁴ O'HARA & RIBSTEIN, *THE LAW MARKET*, *supra* note 4, at ch.5; Bruce Kobayashi & Larry E. Ribstein, *Law as a ByProduct: Theories of Private Law Production*, draft manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884985.

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as a theoretical matter, arbitration affects the distribution of benefits across lawyers. As we explain in Part II below, the political economy of arbitration is a complex story because arbitration can potentially benefit the interests of some constituencies in a local bar while undermining the interests of others. Thus, rent-seeking lawyers might attempt to shape the law governing resolution of arbitrations within their jurisdictions, but it is also possible that subgroups of lawyers with conflicting incentives can work at cross-purposes.

Moreover, as a practical matter, several jurisdictions, both within the United States and abroad, have deliberately liberalized their home legal regimes, including their lawyer licensing rules, in order to market themselves as more “arbitration friendly.” Under a jurisdictional competition theory, states have a variety of means that can be used to attract arbitration, including providing effective court assistance with arbitration¹⁵ as well as reducing opportunities for judicial interference with the arbitration.¹⁶ For example, France recently completely overhauled its arbitration law to add a number of features designed to deregulate arbitration agreements and institutions (such as eliminating form requirements for arbitration agreements and authorizing arbitrators to order the production of evidence from parties).¹⁷ Likewise, in response to severe criticism from the international bar, Singapore substantially relaxed its restrictions on foreign lawyers appearing before arbitral tribunals in Singapore.¹⁸ Available evidence suggested that this move was part of a larger effort to “market” Singapore as a

¹⁵ See, e.g., 28 U.S.C. §1782 (authorizing United States Courts to order the production of documents or testimony for use in a proceeding before a foreign or international tribunal); *In re Application of Consorcio Ecuatoriano de Telecomunicaciones, S.A.*, 685 F.3d 987 (2012) (holding that the term “foreign or international tribunal” encompassed a private arbitral tribunal).

¹⁶ For example, under Swiss and Belgian law, foreign parties are permitted to contractually exclude judicial review of an arbitration award by way of annulment proceedings. See also French law on challenges to arbitration agreements, which provides for the enforcement of arbitration agreements regardless of form.

¹⁷ The French Arbitration Law is codified within the French Code of Civil Procedure (C.C.P.): Articles 1442-1527.

¹⁸ The new regulation came after a Singapore court enjoined a US law firm from representing its client in in arbitral proceedings sited in Singapore. *Builders Federal (Hong Kong) Ltd. and Joseph Gartner & Co. v. Turner (east Asia) Pte Ltd*, 5 J. INT’L ARB. 140 (1988).

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desirable venue for resolving disputes.¹⁹ These sorts of friendly arbitration laws have caused some scholars to label those jurisdictions as ones competing for arbitration business.²⁰ These innovations are not limited to the international stage. A number of state jurisdictions, beginning with New York in the 1970's and most recently Georgia in 2011, have relaxed their rules on the unauthorized practice of law to enable unlicensed attorneys to appear in arbitrations in that state.²¹ While these innovations are often defended as part of an effort to attract arbitral business to a particular jurisdiction, the effectiveness of this strategy has, to our knowledge, not been subjected to serious empirical testing. As a theoretical matter, it is alternatively possible that France and Singapore reformed their laws just to mollify local arbitration interests, and those local interests spuriously claimed that the legal change would benefit the jurisdiction in general.

Finally, the lawyer licensing rules applied to arbitration could influence the incentives of local lawyers to invest in the more general development of local law. On the one hand, if outside attorneys and others can reap part of the local lawyer's financial advantage to desirable local laws, on the margin the local lawyers can be expected to invest less in sound legal rules. But it is alternatively possible that relaxing the lawyer licensing rules brings more outside attorneys but also more dispute resolution business to the state, ultimately increasing the local attorney benefit to the development of sound laws. Consider for example a case that might have been arbitrated in Ohio because one of the parties is represented by an attorney licensed to practice in Ohio but can now be brought in Tennessee because Tennessee chooses to allow out-of-state attorneys to arbitrate cases in state. If one attorney is from

¹⁹ Gary B. Born, INTERNATIONAL ARBITRATION 970-71 (2011).

²⁰ Willam W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 680 (1989) (noting that Western European nations have scrambled to reform their arbitration laws to garner arbitration business)); Cf. Caron & Harhay, *A Call to Action: Turning the Golden State Into a Golden Opportunity for International Arbitration*, 28 BERKELEY J. INT'L L. 497 (2010) (arguing that California should relax its rules regarding foreign lawyer participation in arbitration in order to attract international commercial arbitration to the state).

²¹ See Part III, *infra*.

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Ohio but the other retained in Tennessee as a result of the arbitration's location, then one attorney (or firm) from Tennessee is able to obtain business that would not have been available to her under stricter licensing rules.

Our goal in this paper is to address a series of questions at the intersection of lawyer licensing rules, arbitration and the law market. First, do arbitrations occur in states with arbitration-friendly laws, or is arbitration venue in the US determined by other means (i.e. by the location of the parties or the drafting attorneys' firms)? Second, are state unauthorized practice of law ("UPL") rules as applied to arbitration correlated with the other features of a state's arbitration law, and, if so, are UPL rules that open the door to representation in local arbitration more likely to occur with state laws friendly or hostile to arbitration? One might view arbitration laws as a bundle offered to private parties. If so, arbitration-friendly UPL rules should be positively correlated with other friendly arbitration laws. But there is an alternative agency cost theory of state incentives: if private parties pay little actual attention to arbitration laws at the time of contracting, the best way to attract arbitration to the state might be to forgo arbitration-friendly laws in general but then appeal to lawyer self-interest by assuring the lawyers licensed elsewhere that they will be able to arbitrate their disputes in state. Third, are intrastate litigation and arbitration complements, substitutes, or neither? Put differently, do intrastate arbitration rates affect local litigation rates positively or negatively, or is there no relationship between the two? This inquiry is important to a determination of how various interests within the state bar might be affected by legal reforms that increase the demand for arbitration. And finally, are arbitration-friendly laws positively or negatively correlated with pro-contract regimes more generally? If positively correlated, that suggests that states compete for economic opportunity with pro-contract laws, including pro-arbitration laws. If they are instead negatively correlated, that suggests states mitigate the effects of their business-hostile regimes by enabling parties to circumvent state courts. The answers

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to these questions can help to guide both the theoretical debate stimulated by Ribstein's work and the policy debate about the proper direction of state lawyer licensing rules and state arbitration laws.

We develop our analysis in three parts. Part II of this paper offers a conceptual account of the intersection between the law market, the law of lawyering and arbitration. Part III explores some of the empirical questions raised by our conceptual approach, in particular by considering the extent to which arbitration friendly laws attract arbitration to the state and the extent to which arbitration friendly laws coexist with laws that relax lawyer licensing rules for arbitration conducted locally. Part IV traces the implications of our findings for future work.

II. Conceptual Framework

This section presents a conceptual framework for thinking about markets for law and markets for the provision of dispute resolution services, the role that lawyers play in these markets, and the effects that lawyer incentives might have on the market for the provision of legal services. Our analysis will generate a number of theoretical uncertainties, warranting empirical investigation of the questions that we have posited. We take as a given, however, that the production of law, the provision of private dispute resolution services, and the provision of legal services each are capable of operating in at least somewhat competitive marketplaces. We begin in subpart A with the analysis of the market for law, as described in Ribstein's prior work, and then, in subpart B we use analogous reasoning to address the market for the provision of arbitration laws.

A. The Market for the Provision of Substantive Legal Rules

This subpart very briefly recaps the demand and supply sides of the market for substantive legal rules, and the role of attorneys in that market, as described in *The Law Market*. According to O'Hara

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and Ribstein, the demand side of the market for governing rules consists of private parties each seeking a jurisdiction, including its governing law, that best suits its individual needs.²² State laws can poorly suit a party's needs for many reasons, including interest group capture of the legislature,²³ the knowledge limitations of lawmakers,²⁴ and the heterogeneous needs of parties subject to a given law.²⁵ In addition, businesses operating in multiple jurisdictions might place a high value on having a single set of governing rules applied to all of its transactions.²⁶ For all of these reasons, private parties can value the ability to choose governing laws. Functionally, this choice occurs either through the use of a choice-of-law clause or the strategic location of assets, or by a combination of the two.

In the law market, states supply the legal rules, through legislatures, courts, and administrative agencies, although states' incentives to compete with one another to provide legal rules preferred by the parties varies with the subject matter.²⁷ In the law market, the strength of state competition depended on the balance of local interest groups actively involved in a given legal subject area. For any particular subject area, individual states could fall into one of three groups: active competitors, passive competitors, and those hostile to party choice altogether.²⁸ Active competitors consisted of those states that actively pursued legal reforms and enforced party choice-of-law clauses as a way to attract assets to the state. Passive competitors were states that lacked powerful interest groups motivated to ensure that the state win a competition for assets and other opportunities, but the states were willing to open the door to party choice of law in order to prevent an exodus from the state. States hostile to

²² See generally O'Hara & Ribstein, *The Law Market*, *supra* note 4, at 66-73.

²⁴ *Id.* at 23-24.

²⁵ *Id.* at 20, 31-32.

²⁶ *Id.* at 8.

²⁷ In some of Ribstein's work, private entities could, at least in theory, supply the governing legal rules. See Larry E. Ribstein, *Sticky Forms, Property Rights and Law*, 40 HOFSTRA L. REV 65 (2012); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Bruce H. Kobayashi & Larry E. Ribstein, *Law as Product and ByProduct*, (2012) working paper, available on SSRN. However, in *The Law Market* the suppliers typically were states.

²⁸ See O'Hara & Ribstein, *The Law Market*, *supra* note 4, at 80 (describing these states).

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competition would expansively apply local law and would refuse to honor parties' contractual efforts to circumvent state law. States in the last category often had reason to believe that parties value the state for other reasons so that party exit from the state as a consequence of insistence on the application of local law was unlikely.

Critics of the law market concept tend to question the extent to which states actually compete for the provision of laws. In the corporate law context, for example, some have argued that Delaware has an incentive to attract incorporations because a very large fraction of state revenues come from filing and franchise fees,²⁹ but other states are unlikely to be able to finance much by way of local needs through such fees. In the corporate law context, then, some charge that Delaware is the only potential competitor, undermining the market for law.³⁰ In other contexts, there is no Delaware poised to gain substantially by filing fees or otherwise. Thus, claim the critics, a vibrant market for law is highly unlikely to exist.

Larry Ribstein spent much energy during his career defending the notion of a marketplace for law. As he pointed out, in many contexts, states benefit with jobs, tax revenues, and otherwise by attracting parties to the jurisdiction. If party choice is associated with those parties connecting themselves to the state in meaningful ways, then the state can garner a benefit with the provision of desirable laws. But equally important to the supply of desirable laws was the role of the local lawyer. Lawyers have a comparative advantage in lobbying for laws in that they organize through bar associations for other reasons, they are trained in law, and they often benefit professionally as

²⁹ See Lucian Arye Bebchuck & Assaf Hamdani, *Vigorous Race or Leisurely Walk; Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553 (2002).

³⁰ *Id.*; Macel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002)

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individuals from engaging in law reform.³¹ Thus, one might expect lawyers to disproportionately influence the content of law in a state.³²

Lawyers as a group can often benefit if their state promulgates desirable laws because private parties seeking those laws will have greater demand for the local lawyers as experts in that law. As Ribstein recognized, lawyers do not just compete with one another for static and local legal business. State bars also compete with each other to attract legal business to their respective communities.³³ In order to keep outside lawyers from dissipating the benefits of desirable laws, lawyer licensing laws at least prevent the outside lawyers from engaging in the practice of law in the state. Moreover, lawyers not licensed in a particular state might have difficulty convincing clients that they are experts in that state's laws. As mentioned earlier, the connection requirement for choosing at least a state's mandatory law physically brings clients to the state, further increasing the demand for local lawyer services.³⁴

Of course, lawyers have interests in passing laws other than those that mutually benefit transacting parties. Litigation lawyers, for example, can increase demand for their services by lobbying for plaintiff-friendly laws or laws that are uncertain, creating a demand for litigation.³⁵ And lawyers as a group have an incentive to lobby for laws that benefit lawyers as a group at the expense of others. In fact, the lawyer licensing laws might fall into this category because they can work to increase barriers to entry to local practice, which in turn creates an ability to charge higher fees for attorney services. In general, these latter laws are not likely to be efficient. However, Ribstein's analysis causes us to see

³¹ Ribstein, *Lawyers as Lawmakers*, *supra* note 3, at 328-30.

³² For an elaboration of the argument as applied to corporate law, see Erin A. O'Hara & Larry E. Ribstein, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 680. The role of lawyers as a powerful interest group involved in the creation of Delaware law was first explored in Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

³³ Ribstein, *Lawyers as Lawmakers*, *supra* note 3.

³⁴ O'HARA & RIBSTEIN, *THE LAW MARKET*, *supra* note 4, at 79.

³⁵ See, e.g., Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998).

potential efficiencies in lawyer licensing laws in that lawyer licensing rules can help to create a market for the provision of substantive laws. Cutting in the other direction, they seem to have the effect of significantly hindering another market, the market for legal services.

B. The Market for the Provision of Arbitration Laws

To what extent does the market for the provision of arbitration laws resemble the analysis of the general law market, and what is the role of lawyer licensing rules within that market? Subpart 1 discusses the market for the provision of dispute resolution services. Subpart 2 uses that general grounding to explore the market for arbitration laws, and subpart 3 extends the analysis to lawyer licensing rules. Uncertainties produced by this law market conceptual framework raise a number of empirical questions that we explore, at least preliminarily, in Part III of the paper.

1. The provision of dispute resolution services

Before we turn to a market for the provision of arbitration laws, consider first the market for the provision of dispute resolution services. When parties have a legal dispute that they are unable to resolve on their own, they seek help from third parties, in the form of courts, arbitrators, and/or mediators. On the demand side of this market, parties seek a venue that serves their particular needs. These parties might seek quick and relatively cheap proceedings, or they might seek informal rather than formal, and/or conciliatory rather than adversary proceedings. They might seek assistance from a person expert in their industry or in the subject matter area of their dispute, and/or they might seek particular discovery or procedural rules, jury pools, rights of appeal, etc. With regard to several of these matters, parties may have divergent interests once a concrete dispute arises, but ex ante at least general agreement about a preferred dispute resolution mechanism often is possible.

As with the provision of substantive laws, private parties have diverse needs and can therefore benefit when they are able to choose among an array of varied dispute resolution services. Parties seeking a binding resolution of their disputes can choose dispute resolution forms through the use of arbitration or court-selection clauses.³⁶ In a perfectly rational world where the parties have perfect information, the choice reflects an assessment of the marginal benefits of each form to each party, with the possibility of a side-payment by one party to the other in order to obtain its preferred form of dispute resolution.³⁷

On the supply side of the market sit the third parties who assist disputants: courts, arbitrators and arbitration associations, mediators and mediation firms, and other providers of dispute resolution services.³⁸ Private dispute resolution entities can be expected to compete vigorously for dispute resolution business by offering packages of dispute resolution services suited to consumers' needs. In the area of arbitration, for example, a large number of arbitration service providers offer a wide variety of packages designed to provide administrative structures for different types of arbitration. For example, JAMS and the American Arbitration Association are general arbitration and mediation service providers centered in the US that provide arbitration services for a broad variety of types of lawsuits, including consumer, labor and employment, commercial, international, insurance, health care, technology, and other disputes. Each of these service providers has developed a number of governing arbitration rules for these different types of disputes, and each offers both more formal and streamlined rules of procedure for dispute resolution. Other organizations are more specialized. For example, the International Chamber of Commerce ("ICC") offers dispute resolution services to parties engaged in international commerce, the American Health Lawyers Association has set up ADR services that conduct

³⁶ Absent choice, litigation supplies the default form of dispute resolution, with jurisdiction and venue rules providing a residual opportunity for bargaining and strategic decision making over the forum.

³⁷ Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209, 225-26 (2000).

³⁸ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235 (1979).

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arbitrations involving healthcare services and employment disputes, and the International Center for Settlement of Investment Disputes (“ICSID”) conducts arbitration proceedings brought by investors for claims against states pursuant to investment treaties. Sometimes an industry association sets up arbitration services for disputes between industry participants. For example, the Financial Industry Regulatory Authority (“FINRA”) operates a securities industry dispute resolution forum to arbitrate disputes between investors, brokers, and brokerage firms, and the New York diamond merchants’ Board of Arbitrators conducts arbitrations to resolve disputes between member dealers.³⁹ Other organizations support and have interests in the success of arbitration but do not themselves administer arbitrations. For example, the National Academy of Arbitrators is an association of labor arbitrators that promotes and helps to provide guidelines for use in labor arbitrations. These and many other organizations are actively involved in providing desirable alternatives to court resolution of disputes.

Can states, through courts or otherwise, be expected to compete with these service providers? The answer is unclear. Courts typically are financed through tax revenues, and with tight budgets and long litigation queues, some court personnel might prefer that cases be resolved elsewhere.⁴⁰ Of course, some judges enjoy presiding over particular types of cases and shaping laws, and those in specialty courts without life tenure might depend on healthy caseloads in order to maintain their positions.⁴¹ And, as with the provision of law, some jurisdictions feel a need to provide at least minimally adequate courts as part of an overall effort to attract businesses and assets to the

³⁹ Bruce L. Benson, *Arbitration*, in Encyclopedia of Law and Economics, vol. V, The Economics of Crime and Litigation 159, 163 (Bouckaert, Boudewijn & De Geest, Gerrit, eds. 2000).

⁴⁰ In *Hughes v. Fetter*, 341 U.S. 609 (1951), the Supreme Court used the Full Faith and Credit Clause to prevent the Wisconsin courts from refusing to hear wrongful death cases involving deaths that occurred elsewhere, despite the fact that the parties were Wisconsin residents. One could reasonably interpret the Court’s reasoning as expressing a concern that states not attempt to export local litigation to other states’ courts without good justification.

⁴¹ These features are present for bankruptcy courts, causing a potential for bankruptcy judges to skew their decisions toward the debtor, who typically have been able to choose among bankruptcy courts. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005). Of course, a desire to attract cases is not always present in a judge’s motivations, and even where present, that motivation must compete with others. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). However, the potential for corruption by some judges is present.

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jurisdiction.⁴² Occasionally, states express a desire to compete to at least prevent a mass exodus of cases from the state court dockets. For example, several states have experimented with the provision of business courts designed to resolve corporate and commercial law disputes,⁴³ and lawyers, judges, academic, and legal trade journals have characterized these innovations as state efforts to compete with arbitration.⁴⁴ Chief Justice John J. Broderick Jr. of the New Hampshire Supreme Court commented on a state legislative bill creating business courts that “the state is losing market share The number of commercial disputes we are seeing ha[s] diminished. . . . I want us to be competitive so that people have a real choice.”⁴⁵ And the Honorable Suzanne V. Delvecchio, Chief Justice of Massachusetts Superior Court, similarly commented on her state’s experimentation with business courts: “we were losing a body of law in Massachusetts because people were going to private dispute resolution versus keeping these cases in the court.”⁴⁶

States attempting to obtain jurisdiction cannot exert their sovereign authority in order to deprive parties of the private dispute resolution option, however. Under the Federal Arbitration Act (“FAA”),⁴⁷ state courts must respect party agreements to arbitrate their disputes, with limited exceptions,⁴⁸ and they are generally obligated to recognize and to help enforce arbitral awards.⁴⁹ In

⁴² See, e.g., Charles N. Cookson, *Long-Term Direct Investment in Brazil*, 35 U. MIAMI INTER-AM. L. REV. 345, 358 (2004) (noting importance of effective legal system for nation’s ability to attract foreign direct investment); Ibrahim F.I. Shihara, *Judicial Reform in Developing Countries and the Role of the World Bank*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN: PROCEEDINGS OF A WORLD BANK CONFERENCE 219, 220 (1995).

⁴³ See generally Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147 (2003).

⁴⁴ Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 Cardozo J. Conflict Resol. 491, 492-93 & nn. 10-14 (2009).

⁴⁵ *Id.* (citing sources).

⁴⁶ Making a Business Court a Reality, Metro. Corp. Couns., May 2003, at 47.

⁴⁷ 9 U.S.C. §§ 1-16 (1996).

⁴⁸ According to section 2 of the FAA, written agreements to arbitrate disputes associated with maritime transactions and transactions involving commerce “shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.”

⁴⁹ Courts asked to confirm an arbitration award under section 9 of the FAA are obligated to do so unless one of the grounds specified in sections 10 and 11 of the FAA exist to vacate, modify or correct the award. Grounds for vacatur include corruption, fraud, evident impartiality, misbehavior, and significant procedural failures amounting to the prejudicing of a party’s rights. *Id.* at § 10. Significantly, the FAA does not direct courts to review the merits of the arbitrator’s decision.

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recent decades, the Supreme Court has issued a number of opinions affirming and expanding upon parties' freedom to choose their dispute resolution services. For the most part, then, courts actively seeking jurisdiction over private law cases must use means other than force.

Moreover, to the extent that it exists, the form of court competition for cases likely changes in the presence of arbitration. Without contractual forum choice, including arbitration, courts might compete for cases by adopting procedures or rules favorable to plaintiffs because the plaintiff chooses where to file a case. With arbitration clauses, however, the choice is commonly mutual, at least outside of the context of adhesion contracts. Because private dispute resolution is commonly chosen at the time of contracting, arbitrators and mediators must compete for business by providing services that satisfy the interests of both parties. Courts attempting to compete with arbitration and mediation must provide dispute resolution services that are similarly focused on the parties' ex ante needs, and that focus should promote an efficient provision of dispute resolution services.

Note that the same ex ante reasoning could apply in a world with choice-of-court clauses, because courts competing against other courts must appeal to the parties' needs and desires at the time of contracting. However, choice-of-court clauses do not provide courts with the same powerful discipline because unlike arbitration clauses, enforcement of choice-of-court clauses is currently left to the discretion of the state courts.⁵⁰ Thus, a court could attract litigation business by providing plaintiff-friendly services and then refusing to enforce the choice-of-court clause once the plaintiff files her case.

⁵⁰ This discretionary enforcement could be eliminated if the US ratifies the Hague Convention on Choice of Court Agreements (concluded 30 June 2005). Under the Convention, member states would be obligated to respect choice-of-court agreements found in international contracts involving most commercial matters. Article 6 of the Convention does contain a public policy exception, so it is not clear that the Convention would require any real change in US state law on choice-of-court agreements. However, the Convention, if ratified by the US, could give Congress an opportunity to shape enforcement of choice-of-court agreements in US courts. To date, only Mexico has acceded to the Convention. The US and the EU have both signed the Convention, but neither has ratified it. According to the terms of the Convention, it does not come into force until at least two nations have acceded to it. http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited September 2, 2012).

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In any event, states could choose to alter their dispute resolution services only with regard to those categories of cases for which arbitration is a viable alternative and/or for which parties can effectively choose the court where their claims will be heard. The creation of business courts can be viewed as one such targeted mechanism. Rather than changing the way that the general courts conduct litigation, the business courts are created with jurisdiction to resolve cases that arise in circumstances where parties choose their dispute resolution fora. Examples of business court jurisdiction coinciding with the use of arbitration clauses include disputes involving (a) claims arising from breach of contract or fiduciary duties, fraud, misrepresentation, business tort, or statutory violations arising out of business dealings or transactions; (b) claims arising from transactions under the Uniform Commercial Code; (c) franchisee/franchisor relationships and liabilities; (d) obligations between and among owners, including shareholders, partners, or members; or liability or indemnity of managers, including officers, directors, managers, trustees, or members or partners functioning as managers, of corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures, or other business enterprises; and (e) other complex disputes of a business or commercial nature.⁵¹

For cases that fall within its jurisdiction, the business court is typically set up to offer some of the attributes of arbitration, including the avoidance of juries, specialized judges expert in business matters, and streamlined procedures designed to resolve cases expeditiously. Of course, the success of the business court has varied across the states, with some better able than others to provide these advantages. In the end, dispute resolution services offered by the state cannot, consistent with the constitution, provide all of the flexibility present in arbitration. For example, in *Delaware Coalition for*

⁵¹ Drahozal, *Business Courts*, *supra* note [4443](#), at 495-96 (quoting language from New Hampshire statute as illustrative).

Open Government v. Strine,⁵² a federal court reviewed procedures adopted by the Delaware Court of Chancery designed to enable disputes filed there to be resolved according to procedures that resembled arbitration. At the request of the parties, the presiding judge would become an arbitrator, differing procedures could be adopted, the proceedings would thereafter be closed to the public, and review of the decision would be limited. The court concluded that closing the courthouse door to the public ran afoul of the First Amendment; adopting an arbitral stance did not deprive the state court of its character as a state actor. This and other possible limitations on the flexibility of state courts might limit the competitive effectiveness of the state. On the other hand, business courts can provide some benefits not present in arbitration, including expanded appellate review and nominal upfront costs.⁵³

In short, one might expect a variety of state responses to the presence of competition for dispute resolution services, with some actively competing for cases, some pursuing the more modest goal that the local system functions adequately or at least not lose whole categories of cases, and still others actively working to channel cases (and their associated expense) to other venues.

2. Arbitration Laws

a. Demand for arbitration laws

Does the market for arbitration laws operate the same way as the market for substantive laws? These markets share similarities but also exhibit some noticeable differences. On the demand side, private parties seek choice-friendly laws, and they might well strategically locate their assets to enhance the probability that their preferences will be honored. However, it is possible that private parties are a less potent force in this market than in the market for substantive laws. Specifically, the governing substantive laws might appear more salient to private parties because they can affect the daily

⁵² Delaware Coalition for Open Gov't v. Strine, 2012 WL 3744718 (D. Del. 2012).

⁵³ Drahozal, *Business Courts*, *supra* note [4443](#), at 498-500.

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operations of a business, whereas many private parties likely do not routinely contemplate the possibility of disputes. Even if a party is inclined to think about future disputes when contracting, he might prefer to downplay the topic in negotiations out of fear that a focus on disputes could kill the deal.⁵⁴ On the other hand, choice-friendly statutes can be easy, politically nonsalient tools for parties to at least avoid high liability or inefficient legal regimes. Moreover, because arbitrators and some courts are significantly more likely to enforce a choice-of-law clause than are other courts, choice-friendly statutes can quietly facilitate party choice of substantive law.⁵⁵ These factors weigh in favor of interest group involvement.

Industry groups likely differ in the extent to which arbitration (and other choice) clauses can be used to serve their commercial interests. In some commercial contexts, arbitration clauses are common. Studies have found that about half of CEO employment,⁵⁶ franchise,⁵⁷ and technology contracts⁵⁸ contain arbitration clauses. International commercial contracts seem to incorporate arbitration clauses at much higher rates, sometimes approximating 90 percent.⁵⁹ But a study of a number of commercial contracts, including bond indentures, underwriting agreements, and security agreements, indicated that arbitration clauses are almost never used.⁶⁰ Scholars have noted that when

⁵⁴ Cf. Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 369 (2007) (discussing potential signaling problem of party insistence on inclusion of mandatory arbitration clause in contract).

⁵⁵ O'HARA & RIBSTEIN, *THE LAW MARKET*, *supra* note 4, at 82-84, 87-88.

⁵⁶ Randall Thomas, Erin O'Hara & Kenneth Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959, 981 (2010).

⁵⁷ Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight From Arbitration?*, 37 HOFSTRA L. REV. 71, 94 (2008).

⁵⁸ Erin O'Hara O'Connor, *Jurisdictional Competition for Dispute Resolution: Courts Versus Arbitration*, in *REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION* (Horst Eidenmuller, ed., forthcoming 2012).

⁵⁹ See, e.g., CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 59 (2005) (finding that 88% of sample of international joint venture agreements contained arbitration clauses).

⁶⁰ Eisenberg & Miller, *Flight From Arbitration*, *supra* note [54](#), at 350.

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at least one party wishes to rely on the certainty of the legal principles that will be applied to the case,⁶¹ or forecasts a potential need for assistance to foreclose on property,⁶² courts may be preferred. In addition, because of the very limited ability to obtain judicial review of arbitral awards,⁶³ a company concerned about very large judgments relative to the value of the company might prefer the appeals process available in courts.⁶⁴ And there is evidence that parties prefer courts to arbitration when they forecast a need to protect information and innovation, where property-type protections are more valuable and more effectively provided by courts.⁶⁵

The relative demand for arbitration can also depend on the location of parties. Sometimes a party prefers arbitration to courts because its business is multijurisdictional, and it wants to avoid facing potential litigation in the courts of multiple nations. Even when the parties operate within a single jurisdiction, they might prefer arbitration if the courts in that state are sufficiently bad at protecting contractual rights. For example, studies have shown that private parties located in California or choosing California law are significantly more likely to include arbitration clauses in their contracts than

⁶¹ See Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 231 (2000).

⁶² See, e.g., R. Wilson Freyermuth, *Foreclosure By Arbitration?*, 37 PEPP. L. REV. 459, 480–82 (2010) (noting lack of arbitration clauses in secured mortgage agreements, but providing no satisfactory explanation for their absence).

⁶³ The grounds for modifying or vacating an arbitral award pursuant to an agreement covered by the FAA are found in section 10 of that statute and include corruption, fraud or undue means, evident partiality, arbitrator misconduct, or excess use of arbitral authority. 9 U.S.C. § 10 (2006); see also *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (“[I]n reviewing arbitral awards, a district or appellate court is limited to determining ‘whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it.’”) (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc’ns Int’l Union*, 973 F.2d 276, 281 (4th Cir. 1992)); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253–54 (7th Cir. 1994) (“Errors in the arbitrator’s interpretation of law or findings of fact do not merit reversal under this standard. Nor does an insufficiency of evidence supporting the decision permit us to disturb the arbitrator’s order.”) (internal citations omitted); *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991) (“It is well-settled that a court’s power to vacate an arbitration award must be extremely limited . . .”).

⁶⁴ Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 908 (2010).

⁶⁵ Erin O’Hara O’Connor, Kenneth J. Martin, & Randall S. Thomas, *Customizing Employment Arbitration*, ___ IOWA L. REV. ___ (forthcoming 2012); Erin O’Hara O’Connor, *The Choice Between Courts and Arbitration*, draft manuscript on file with authors.

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are parties located or choosing law elsewhere.⁶⁶ The Law Market focused on the influence of exit-affected interest groups who could add their weight to local interests advocating for particular legal rules, but it is also important to factor in the relative interests of local groups. Although it is uncertain, private parties might have less incentive to lobby for arbitration-friendly laws as compared to favorable substantive laws.

Even if private transacting parties focus relatively less on dispute resolution, they are joined on the demand side by the private providers of dispute resolution services, who depend critically on strong pro-arbitration laws. Moreover, the providers can exert special pressure as an exit-affected interest group because an arbitration association is mobile in two senses. First, the arbitration association can determine where it wants to locate its headquarters and administrative offices and where it wishes to open service locations. Second, and perhaps more importantly, the arbitration association plays a critical role in locating the situs of arbitrations. The association can advise private parties to choose (or not) a particular arbitration venue, and, as a choice-of-law matter, the law of the venue chosen governs the arbitration.⁶⁷ And, if the parties have not chosen an arbitral location, the association typically is empowered to choose a location for them.⁶⁸

b. Supplying Arbitration Laws

On the supply side, the incentives of states to compete with desirable arbitration laws may differ from their incentives to provide other laws. First, Supreme Court decisions interpreting the reach

⁶⁶ Eisenberg & Miller, *Flight From Arbitration*, *supra* note [5453](#), at 358-60 (finding that contracts choosing California law were significantly more likely to include arbitration clauses than were contracts choosing other law); O'Connor, et al., *Customizing Employment Arbitration*, *supra* note [6561](#) (finding that companies headquartered in California were significantly more likely to have arbitration clauses in their contracts with the firm's CEO than were firms located elsewhere).

⁶⁷ See, e.g., Alan Scott Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction,"* 21 AM. REV. INT'L ARB. 47, 72-73 (2010) (citing several authorities).

⁶⁸ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1698-99 (2009). However, some arbitration associations require that the location chosen in a consumer contract of adhesion be reasonably convenient to the consumer. See AAA Consumer Due Process Protocol, Principle 7, available at www.adr.org.

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of the FAA under the Supremacy Clause have left the states with relatively little room to vary their arbitration laws. The FAA has been interpreted to bind both state and federal courts,⁶⁹ and it applies to all contracts involving commerce,⁷⁰ which extends to the reach of Congress' Commerce Clause authority.⁷¹ As regards the types of claims that can be arbitrated, the Supreme Court has stated that all claims not specifically excluded by Congress are arbitrable.⁷² States are not permitted to hold state law claims off bounds for arbitration,⁷³ and they are not permitted to pass any regulations that apply only to arbitration.⁷⁴ Even laws applied more broadly than arbitration can be struck down if they are deemed to be inconsistent with the pro-arbitration purposes and objectives behind the FAA.⁷⁵ Thus, big differences across states in the treatment of arbitration are not permitted. Some variation presumably will continue to be permitted, however. State variation continues regarding the strength and speed with which interim measures are granted by the state courts, as well as in the standards to be applied to the vacatur of arbitral awards. And to the extent that the Supreme Court has not yet addressed or has left ambiguity regarding the enforcement of arbitration clauses, states do seem to vary with regard to the attitude that the courts bring to the inquiry. Nevertheless, the relatively small wiggle room left to the states motivates our empirical question regarding the degree to which existent variation makes a difference in arbitration situs choices.

⁶⁹ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁷⁰ Federal Arbitration Act 9 U.S.C. § 2.

⁷¹ *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

⁷² *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668–73 (2012).

⁷³ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (striking state prohibition on arbitration of wrongful death claims brought against nursing homes); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56, 58 (1995) (striking state law that disabled arbitration of claims involving punitive damages); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding that the California Labor Law, which provided that wage collection actions were nonarbitrable, is preempted by the FAA); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (striking law that prohibited arbitration of state financial investment statute claims).

⁷⁴ *Preston v. Ferrer*, 552 U.S. 346, 349–50, 356 (2008) (striking state regulation empowering state commission to decide scope of arbitration); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (striking Montana statute that required that contracts with arbitration clauses provide conspicuous notice of the clause on the first page of the contract).

⁷⁵ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

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Even assuming that the states have the latitude to use their laws to effectively compete with one another for the provision of arbitration services, it is not clear that a state will opt to provide pro-arbitration laws. To the extent that courts compete for the provision of dispute resolution services, they might disfavor pro-arbitration laws. On the other hand, those courts seeking to alleviate docket congestion might advocate for pro-arbitration laws.

From the perspective of the legislature, the state's interest in pro-arbitration laws also is ambiguous. Arbitration can be seen as a virtue for at least four reasons. First, effective arbitral venues can enable the state to shrink its budget commitment to judicial services. Second, a strong commitment to facilitating private arbitration can work as a substitute for providing first-rate legal rules and judicial services, making it both cheaper and easier for a state to attract businesses and assets. This argument has been provided in the context of foreign country reforms, including that of the Democratic Republic of Congo,⁷⁶ and could conceivably (albeit less powerfully) apply to US states as well. Third, if arbitration can be used as a way to mitigate court delays, then the state's courts will be considered more attractive places to litigate other cases. Finally, if parties are willing to travel to the state to conduct their arbitrations, then the local economy benefits from the increased demand for hotels, restaurants and other traveler services. This argument is often made by interest groups lobbying a state for pro-arbitration laws. For example, Arbitration Place, a provider of arbitration services in Toronto, recently hired Charles Rivers Associates to conduct a study to determine the annual impact of domestic and international arbitrations on the Toronto economy. According to the study, the arbitrations were expected to contribute more than 256 million dollars in increased revenue in 2012 and more than 273

⁷⁶ *Democratic Republic of Congo: OHADA comes into force today*, available at www.hoganlovells.com

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million dollars in 2013.⁷⁷ Of course, these effects depend on private parties caring enough about dispute resolution services to factor them into their planned decisions.

If the state competes for business and assets along many dimensions, then we might expect pro-arbitration laws to be positively correlated with other laws designed to promote freedom of contract for sophisticated parties. If instead states enact pro-arbitration laws to compensate for an otherwise unfriendly business environment, then we would expect pro-arbitration laws to be negatively correlated with the presence of freedom of contract principles in the state. We explore this empirical question in the next Part.

Arbitration instead can be seen as a vice for states. Because arbitration services are privately provided, there is no guarantee that a state's substantive laws and policies will be given effect in arbitral proceedings. Pro-arbitration laws could thus be seen as a potential threat to the authority of the sovereign.⁷⁸ If the arbitration interests present within a state conflict, the state could compromise by attempting to preserve current arbitrations without affirmatively competing to expand arbitration business within the state. Alternatively, the state could seek to expand some types of local arbitrations (i.e. commercial disputes) but not others (i.e. employment disputes), depending on the likelihood that state policies would be circumvented in arbitration. States might also distinguish between interstate and international arbitrations, in that international commercial arbitrations may be less likely to involve important local policies and are more likely to attract relatively large revenues to the state. As was the case with the law market, then, one might expect states to vary in the extent to which they will compete for the provision of arbitration-friendly laws, though both the forces within and the constraints on the states vary in the two settings.

⁷⁷ Charles Rivers Associates, *Arbitration in Toronto: An Economic Study*, available at www.crai.com/Publications/Default.aspx.

⁷⁸ If so, this would help to produce a positive correlation between anti-arbitration laws and freedom of contract principles.

What role do lawyers play in influencing state arbitration laws? If attracting arbitration to the state increases the demand for arbitration in the state without negatively influencing the demand for litigation in the state,⁷⁹ then demand for local lawyer services should increase without causing a predicted decrease in the practice prospects of any segment of the local bar. In that case, the state bar should be expected to enthusiastically promote the passage of arbitration-friendly laws. That prediction can be strengthened if pro-arbitration laws actually influence the location of businesses and assets, because then the local transactional lawyers might also expect an increase in demand for their services. If, however, pro-arbitration laws cause parties to gravitate away from courts to arbitration, then local lawyers that specialize in arbitration will benefit at the expense of court litigation attorneys, and the opposing forces could serve to dampen, neutralize, or even reverse the influence of the state bar.

State competition for arbitration law can provide important efficiencies in that it enables sophisticated private parties to reduce the costs and increase the accuracy or other desirable attributes of dispute resolution services while at the same time enabling the state to economize on the provision of such services. However, state competition for arbitration law could prove problematic in cases where (1) third parties are adversely affected, or (2) a more powerful party in the adhesion contract context uses arbitration as a mechanism to deprive a weaker party with the ability to vindicate his or her rights.⁸⁰ For example, critics of arbitration express concern that the diversion of disputes to private processes degrades the quality of legal precedent in the state.⁸¹ Moreover, private actions designed to protect third parties, such as the antitrust laws, are less likely to work effectively when potential cases

⁷⁹ It is possible that an increase in the demand for arbitration in the state could actually increase the demand for court/litigation services in the state because courts are sometimes called upon to facilitate an arbitration, by enforcing an arbitration clause or award, choose an arbitrator if the parties cannot agree on one, or substitute a term of the arbitration clause if some event in the world makes it impossible for a term to be satisfied.

⁸⁰ O'Hara & Ribstein, *The Law Market* 33-36.

⁸¹ See Hylton, *supra* note 3724, at 243; U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, Hearing on S. 1782, the Arbitration Fairness Act of 2007 (Dec. 12, 2007) (testimony of Professor Richard M. Alderman) (lamenting the impact of arbitration on the production of consumer protection precedent), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155245. Note that this assertion assumes that litigation and arbitration are clear substitutes, a question we explore further in Part III.

are diverted to arbitration, if the arbitrators are less sensitive than are courts to ensuring that such laws are vigorously enforced.⁸² Finally, many criticize the strong enforcement of arbitration clauses in consumer and employment contracts.⁸³ State concern about these matters could influence the extent to which its laws are pro-arbitration.

Our goal here, however, is not to engage the normative question of whether arbitration is desirable. We focus instead on the positive question of the circumstances under which law market forces are likely to produce pro-arbitration laws in a state. Nevertheless, our analysis, as well as the answers to the empirical questions we explore in Part III, can certainly help inform the policy debate about the proper shape of arbitration laws.

As a conceptual matter, it seems reasonable to assume that pro-arbitration laws could both increase the overall demand for dispute resolution services and cause some substitution away from the courts. However, it remains unclear the extent to which private parties are likely to respond to such laws. Ultimately, the question of private party response is empirical. And, given that we cannot predict with theory the degree to which courts and arbitration associations serve as substitutes, empirical inquiry of this question could similarly prove useful.

3. Lawyer Licensing Rules

Although Ribstein provided important insights for our understanding of the market for legal services, he never connected that market to the market for private dispute resolution services. We draw that connection here. In the market for legal services, lawyer licensing rules, or rules regulating

⁸² Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1285 (2000) (expressing concern that private dispute resolution could enable parties to avoid mandatory rules designed to protect third parties).

⁸³ See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 670 (1996); Adriaan Lanni, Case Note, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157, 1161 n.25 (1998).

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both the unlicensed practice of law (“UPL rules”) as well as the identity of attorneys who may appear before a court, restrain competition. Lawyer licensing rules restrict the supply of attorneys available to serve a client’s needs in a particular market.

Liberalizing the state’s lawyer licensing rules can work to help facilitate local arbitration, because in theory parties are more likely to choose to arbitrate disputes in state if they can bring their favored representation. Indeed, when providers of these services, such as the American Arbitration Association, seek to encourage consumers of dispute resolution services to utilize their product in lieu of courts, they differentiate themselves in part by granting parties the autonomy to be represented by the individual of their choice. Whereas court rules in many jurisdictions only allow attorneys admitted to the state bar to appear before them (or alternatively require a foreign attorney admitted *pro hac vice* to appear with local counsel),⁸⁴ many sets of arbitral rules expressly authorize parties to be represented by anyone, lawyer or not, and regardless of the jurisdiction in which that counsel is admitted.⁸⁵ The lawyer licensing rules can also influence the choice of arbitral forum because the choice can serve the interests of the agents negotiating the terms of a transaction. In particular, the transactional attorneys might be reluctant to choose an arbitral venue that disenables their firms from representing the client in future disputes.

The UPL rules and rules of professional services can either undercut or complement efforts by providers of dispute resolution services to differentiate themselves. For example, some arbitration associations offer streamlined arbitration where the parties are not represented by professional advocates in order to enable parties to resolve their disputes cheaply. If a state requires parties to in-state arbitration to be represented only by licensed attorneys, then it becomes much more difficult for

⁸⁴ See *infra* Part IIIB.

⁸⁵ For example, AAA Commercial Arbitration Rules, Rule R-24 provides simply: “Any party may be represented by counsel or other authorized representative.”

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the arbitration association to compete with cheap dispute resolution services. Not only will the parties have to pay more for attorney representation, but the very presence of attorneys as representatives will likely dramatically increase the time spent on procedural matters and will likely push the association's arbitrations toward more formal proceedings.

In addition, consider an arbitration sited in a state where a party, pursuant to the applicable arbitration rules, wishes to be represented in the arbitration by an attorney not licensed in that state. If the state treats the attorney's appearance as the unauthorized practice of law, this UPL rule either will restrict the party autonomy afforded by the arbitral rule or, alternatively, may drive the parties to site their arbitration elsewhere. Alternatively, if the state treats the attorney's appearance as falling outside the ambit of its UPL restrictions, this view will buttress the party autonomy principle underpinning the arbitral rules and may encourage the parties to site their arbitration in the "arbitration-friendly" jurisdiction.

Of course, it is not clear how much lawyer licensing rules actually influence the choice of arbitral forum. When parties do carefully consider their options, they choose their arbitral forum for many reasons, not simply the opportunity to be represented by the counsel of their choice. According to arbitration experts, legal considerations such as the jurisdiction's attitude toward the enforceability of arbitration agreements, the availability of procedural tools such as subpoenas, and the standards governing vacatur of the award all can be important.⁸⁶ Given these additional considerations, jurisdictions seeking to promote themselves in the market for dispute resolution services will not simply relax their rules on attorney admissions. Rather, those changes might well be accompanied by other modifications of state laws in order to signal the jurisdiction's arbitration friendliness. On the other hand, if notwithstanding the claims of arbitration experts, permitted state variations in arbitration law

⁸⁶ Gary B. Born, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* (2010).

under the FAA are too small to make a difference, then the effect of the lawyer licensing rules could swamp the effect of any other state laws on arbitration. Indeed, relaxing the lawyer licensing rule can be a way to appeal to the self interest of the transacting lawyer and his law firm, even if the jurisdiction chosen does not provide any expected benefits to the client. Under this latter scenario, lawyer licensing rules need not be positively correlated with other arbitration-friendly laws. We explore this empirical relationship in Part III.

Apart from legal considerations, logistical considerations such as cost, convenience and location of witnesses and evidence can be powerful too. For another thing, arbitration clauses, like other contract terms, can be sticky.⁸⁷ Repeat players in the market for dispute resolution services may be reluctant to alter the existing terms of their arbitration agreements. This may be due to the loss of an informational advantage that parties obtain through recurring use of the same arbitration clause.⁸⁸ It may also be due to the signaling effects of focusing on a particular change in an existing arbitration agreement.⁸⁹ Therefore, we are dubious whether modifications in a jurisdiction's rules governing attorney licensing or arbitration more generally will in fact produce net gains in the share of the dispute resolution marketplace, at least in the short run.

The interests of lawyers may be different for lawyer licensing rules than for other pro-arbitration rules, for obvious reasons. Lawyers have an interest in promoting attractive local venues for dispute resolution only to the extent that doing so increases the demand for their services. Liberal rules for representation in arbitration can have the effect of expanding the market for representation in local dispute resolution to include competition by outsiders. It is not clear as a matter of theory whether on net liberalizing lawyer licensing rules for arbitration helps or hinders local lawyers. If the increased

⁸⁷ Peter B. Rutledge & Christopher R. Drahozal, *Sticky Arbitration Terms* (manuscript on file with authors).

⁸⁸ R. Scott *et al.*, *Origin Myths, Contracts, and the Hunt for Pari Passu*, __ LAW & SOC. INQUIRY __ (forthcoming).

⁸⁹ Stephen Choi and Mitu Gulati, *Innovation in Boilerplate Contracts: The Case of Sovereign Bonds*, 53 EMORY L.J. 929 (2004).

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demand for local attorney services increases more through the attraction of arbitration to the state than it decreases as a result of opening the door to outside attorney representation, then one might expect the bar to support liberal licensing rules. But of course that support could turn on how the distribution of gains and losses fall on the powerful attorney groups within the bar. Somewhat instructive on this matter was attorney involvement in the proceedings conducted by the ABA's Commission on Multijurisdictional Practice, which culminated in the commission's backing of Model Rule 5.5. During the deliberations, several state bar associations advocated for tighter restrictions on multijurisdictional practice, including the rules applied to attorneys representing clients in arbitration outside of the states where they are licensed to practice.⁹⁰ At the same time, White and Case, a firm with a large arbitration practice department, advocated for the liberalization of the rules.⁹¹

As noted earlier in this paper, some jurisdictions have deliberately modified their arbitration laws in an effort to signal their arbitration-friendliness. In some cases, these modifications include relaxation of lawyer licensing rules (at least as to arbitration). For example, New York was one of the first jurisdictions in the United States to formally open the door to representation in arbitration by declaring that the appearance of a foreign attorney in an arbitration sited in New York does not constitute the practice of law.⁹² These shifts in the respective regulatory regimes exemplify the sort of jurisdictional competition that Ribstein and others have described. The changes must either reflect a sentiment within the bar that relaxing the rules would not harm local attorneys on net or the fact that

⁹⁰ These included the State Bar of Arizona, the Florida Bar Association, the Kansas Bar Association, and the North Dakota Bar Association.
www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice/Comm_summ2.html.

⁹¹ White and Case advocated for proposed "commonsense" rules that would enable an attorney to represent her client in arbitration in another state so long as she did not maintain an office in that state and she was in good standing in the state where she was licensed to practice

⁹² Labor Arbitration and the Unauthorized Practice of Law, 30 Rec. Ass'n B. City N.Y. 422, 428 (1975); Williamson v. John D. Quinn Constr. Corp., 537 F. Supp. 613, 616 (S.D.N.Y. 1982); Prudential, 538 F. Supp. 2d at 608; Committee Report, Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York, 49 Rec. Ass'n B. City N.Y., 47, 47-48 (1991).

the interests of other constituents, including arbitral service and traveler service providers, trumped those of the local bar.

New York is a state well known for its efforts to attract international arbitration, and, as such, it must compete not only with other states but also other nations to attract arbitral business. A state hoping to attract international arbitrations must allow non-US attorneys to represent clients, at least in international arbitrations. New York, California,⁹³ Connecticut,⁹⁴ Georgia⁹⁵ and Virginia⁹⁶ are among the states permitting an exception for international arbitrations within the state. Competing interest groups within a state could lead to a situation where state rules seek to attract international arbitration while simultaneously protecting local legal business from attorneys in other states. In this situation, the state could have a rule making it difficult for out-of-state attorneys to represent clients in instate arbitrations but provide that the rule does not apply for international arbitrations. California and Connecticut seem to have put such rules in place.

As regards lawyer licensing rules, then, it is unclear whether the pattern of lawyer licensing rules for arbitration will follow the pattern for other pro-arbitration rules, both because it is not clear the degree to which the rules will actually influence arbitration location and because the incentives of lawyers, critical players in any law market, differ here as compared to other pro-arbitration rules. Thus, we attempt an exploration of the correlation between a state's attorney licensing rules for arbitration and its other arbitration laws.

III. Empirical Questions

⁹³ Cal. Code Civ. Pro. § 1297.351 (2009).

⁹⁴ Conn. Gen. Stat. § 51-88(d)(3) (2009).

⁹⁵ Ga. State Bar Rules & Regs., Rule 4-102, RPC Rule 5.5(c)(3), (e)(3).

⁹⁶ Virginia Rule of Prof. Conduct, Rule 5.5(d)(4)(iii).

A. Hypotheses

The analysis in Part II raised a number of interesting empirical questions designed to help determine whether robust jurisdictional competition for arbitration business exists across the US states, and, if so, whether a state's arbitration laws in fact work to attract arbitration business. To explore this question we ask first whether there is there a relationship between the content of arbitration laws and arbitration caseloads. If parties do not respond to the content of state arbitration laws, then there is little reason for any state to attempt to compete for business and other opportunities with its arbitration law.

Second, what is the relationship between lawyer licensing rules and arbitration caseloads? Even if parties respond to the general content of state arbitration laws, the lawyer licensing laws are but one facet of these laws and may not be the most salient for purposes of party choice. On the other hand, lawyer licensing laws can appeal to the self-interest of the lawyers drafting the contracts, so from an agency theory perspective, they could be most salient to the effective decisionmaker. If the lawyer licensing rules don't affect caseloads much, then we might expect fewer states to ultimately relax their rules for arbitration. But if relaxing the rules actually increases arbitrations within the state, then it is possible that they can work to the advantage of the lawyers even in cases where the other governing laws work to the disadvantage of one or more of the clients. In addition, if relaxing the UPL rules actually increases the local arbitration business, then it is possible (though not yet provable) that lawyer efforts to protect business with licensing rules can in some contexts prove counterproductive.

The internal interest group dynamics within a state could turn on how attracting arbitration to the state influences the demand for other attorney services within the state. To better understand these dynamics, we wish to explore whether litigation and arbitration are substitutes or complements in a state. Does a state establish a reputation for dispute resolution generally, including the use of both its

courts and arbitration? Or instead does a state's demand for arbitration reduce demand for its courts? Relatedly, what is the relationship between arbitration caseloads and the presence business courts in a state. As indicated in Part II, state judges tend to think of business courts and arbitration as substitutes. However, a state competing to be a general dispute resolution venue might work hard to *both* institute effective business courts *and* attract arbitrations to the state. Regarding general state court caseloads, it is possible that pro-arbitration laws relax the demand for court resolution of some problems, enabling them to better focus on (and increase the caseload for) other problems. Although that question is a fascinating one, we leave its empirical exploration for another day, focusing here instead on total civil caseloads in a state.

Finally, if some states do compete for arbitration laws, what drives the state to enact pro-arbitration laws? Do states with pro-arbitration laws adopt those laws as part of a menu of laws all designed to facilitate local trade? Or do pro-arbitration laws instead tend to reflect a state's effort to enable sophisticated parties to mitigate the potential costs of anti-market rules more generally? To answer this question we study the relationship between pro-arbitration laws and freedom of contract laws generally in a state. The relationship between these laws could have implications for the desirability of interpreting the FAA to limit state efforts to put in place their own arbitration laws. If the interaction between the state's laws reflects the state's attempt to fine-tune the operation of the local economic environment, then perhaps a more permissive stance toward state experimentation is warranted. If not, then the policy choice becomes a more straightforward inquiry into the desirability of pro-market measures.

Our analysis gives rise to the following predictions, which are summarized in Table 1. First, we hypothesize that states will increase their arbitration caseload, all else equal, when (1) they adopt a UPL rule easing restrictions on foreign attorney appearance sited in the state; (2) they design other features

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of their legal regime signaling favorable treatment toward arbitration; (3) features of their court system make it a less efficient alternative to arbitration. Second, state efforts to attract a higher arbitration caseload may increase (or decrease) their overall litigation caseload. An increase would occur if the creation of an arbitration-friendly legal environment saps cases from other states; a decrease would occur if the creation of an arbitration-friendly legal environment does not draw cases from other states but, instead, simply reallocates the existing supply of disputes within a state from courts to arbitration. Third, state efforts to liberalize their UPL rules regarding arbitration may be positively (or negatively) correlated with broader efforts to liberalize their freedom of contract regime and, more generally, facilitate local trade. A positive correlation would be seen if liberalized UPL rules represented merely one component of a larger effort to make the state more appealing to the business community in the law market; a negative correlation would be seen if political compromise among interest groups required liberalized UPL rules to be counter-balanced by the tightening of other rules designed to protect local interests from competition.

Table 1 – Predicted Relationships

Dependent Variable (Arbitration caseload)

Independent Variables

Liberalized UPL statutes
Pro-arbitration legal regime
Business court alternative
Freedom of contract norm

Predicted sign

positive
positive
positive or negative
positive or negative

Dependent Variable (Liberalized UPL statute)

Independent Variable

Pro-arbitration legal regime

Predicted sign

positive or negative

Dependent variable (Freedom of contract norm)

Independent Variable

Pro-arbitration legal regime

Predicted sign

positive or negative

Dependent variable (State court caseload)

Independent Variable

Arbitration caseload

Predicted sign

positive or negative

B. Data

Testing our hypotheses requires data on five matters – lawyer licensing rules, the content of state arbitration laws, the locus of arbitration choices, state litigation dockets and freedom of contract regimes.

1. Licensing Rules

We did not locate prior scholarship synthesizing state rules governing the ability of foreign attorney to appear in arbitration. So we developed a new database by canvassing UPL statutes, rules of professional conduct, ethics advisory opinions and judicial decisions in all fifty states plus the District of Columbia. These jurisdictions broke down into four categories.

First, some states have adopted an exceptionally permissive stance toward out-of-state attorney participation in local arbitration proceedings.⁹⁷ For example, New York has made the determination that representing a client in arbitration does not constitute the practice of law.⁹⁸ As a result, lawyers licensed in other states and nonlawyers can both compete with local lawyers for arbitration business. A

⁹⁷ What could drive the relevant interest groups toward this result? As noted in Part II, a local attorney support for relaxed UPL rules could turn on whether predicted losses due to increased competition are offset by predicted gains associated with attracting arbitration to the state. Local litigators specializing in court resolution of disputes might be harmed with a potential move from courts to arbitration, but even if this loss could be established, local litigator interests in the UPL rules for arbitration are uncertain. In particular, relaxed UPL rules for arbitration might be favored by local litigators seeking to ward off other arbitration friendly laws. The idea is that the push for other arbitration friendly laws is dampened if the rents for obtaining those laws are dissipated in a competition for the arbitration business that results. If, however, the relaxed UPL rules serve as complements to other arbitration friendly laws, then local litigators might oppose them but transactional lawyers might favor them because the relaxed UPL rules help enable private parties to decouple the applicable law and forum. Local arbitration associations might also benefit from this rule to the extent that it enables greater importation of arbitration to the state. Thus, the interests of lawyers and arbitration associations turns on whether relaxed UPL rules work to chill other arbitration friendly rules and on whether an increase in arbitration business as well as increased competition for that business creates net gains to local interests.

⁹⁸ Williamson, 537 F. Supp. at 616; Committee of the Association of the Bar of the City of New York Report (1991); Prudential Equity Group, LLC v. Ajamie, 538 F. Supp. 2d 605, 607-08 (S.D.N.Y. 2008).

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few other states in this category have at least determined that an out-of-state attorney representing a client in a local arbitration does not represent UPL, sometimes with the caveat that the attorney must not represent that she is licensed to practice within the state.⁹⁹

Second, at the other extreme, some states characterize the representation of clients in arbitration as part of the practice of law and also require at least that the attorney of record for a party to arbitration be a locally licensed lawyer.¹⁰⁰ Under this stricter rule, in place in states like Connecticut,¹⁰¹ the UPL rules for arbitration and litigation are equivalent, and local litigators are better able to protect their local court practices. However, the incentives of local attorneys that specialize in arbitration can be mixed. On the one hand, for arbitrations that occur in state, the UPL restrictions protect local practice. On the other hand, the restriction can limit the attractiveness of the state for arbitration overall, in which case local practice might be threatened. Local transactional attorneys might also be harmed with this rule, but the costs to them can be mitigated so long as the contract can designate arbitration-friendly venues elsewhere. Here too, the influence of the rule on in-state arbitrations and the overall interests of local lawyers is unclear. (As noted earlier, some jurisdictions differentiate between domestic and international arbitration by retaining some regulations on unlicensed attorney appearance in domestic arbitrations but completely exempt international arbitrations. We return to this distinction later in the section.)

A third approach is contained in ABA Model Rule 5.5.¹⁰² That rule, published in 2002,¹⁰³ permits an out-of-state attorney to provide legal services related to arbitration so long as (a) the attorney has

⁹⁹ New Jersey: Report issued by the Commission on the Unauthorized Practice of Law (1995), plus modified version of Model Rule; Virginia: Committee on Legal Ethics and Unauthorized Practice of Law (but perhaps tightened with its subsequent version of the Model Rule); Cf. Colorado Rule of Civil Procedure, Rule 220 (2003) (out-of-state attorney can practice law in state so long as he has no need to appear in court).

¹⁰⁰ See, e.g. Encinas v. Magnum, 54 P.3d 828, 828 (Ariz. App. 2002) (subsequently relaxed); Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct., 949 P.2d 1 (Cal. 1998) (subsequently relaxed).

¹⁰¹ Connecticut Rules of Professional Conduct R. 5.5 (2012).

¹⁰² Model Rules of Professional Conduct R. 5.5 (2011).

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not been disbarred or suspended from practice in any jurisdiction in which she is admitted; (b) the legal services are provided on a temporary basis; (c) the legal services provided are reasonably related to the attorney's practice in the jurisdiction in which he is admitted; and (d) the legal services provided are not those for which *pro hac vice* admission is required.¹⁰⁴ Model Rule 5.5 takes a middle-of-the road approach in that it largely seeks to exempt ADR, including arbitration, from unauthorized practice by enabling lawyers licensed to practice in other US states to represent clients in local litigation under some circumstances. The Model Rule does not enable foreign lawyers or nonlawyers to compete for in-state arbitration business. Moreover, lawyers from other states must demonstrate some connection between their home state practice and the in-state arbitration. The Model Rule has not been uniformly adopted, and where it has been cited as persuasive authority, its standard is so vague that it is difficult to clearly discern the contours of the Rule,¹⁰⁵ let alone its overall effect on in-state arbitration and local attorney welfare.¹⁰⁶

Finally, a few states have not taken any position on the matter, whether in UPL statutes, bar rules or ethics opinions. We treat this group as the reference category (0) for purposes of our coding.¹⁰⁷

The following table summarizes our classification of states based on our research into their views on whether the participation of an unlicensed attorney in arbitration constituted the unauthorized practice of law:

¹⁰³ See Arthur Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729, 729 (2010).

¹⁰⁴ Model Rules of Professional Conduct Rule 5.5(c)(3) (2009).

¹⁰⁵ See generally D. Ryan Nayar, *Unauthorized Practice of Law in Private Arbitral Proceedings: A Jurisdictional Survey*, 6 J. AM. ARB. 1 (2007).

¹⁰⁶ Examples of States that have adopted some version of the Model Rule include Arkansas (2005); Delaware (2003); Indiana (2005); Iowa (2005); Louisiana (2005); Maine (2009); Maryland (2005); Michigan (2011); and Minnesota (2005).

¹⁰⁷ To reflect the expected sign, we code those states with especially restrictive UPL rules like Connecticut (-1), those states with the MPC (1), and those states with more relaxed rules than the MPC (2).

Table 2 – State approaches to whether foreign attorney appearance in an arbitration constitutes the unauthorized practice of law. (2011)

States that do not treat arbitration as the practice of law	States following Model Rule 5.5	States Not taking a position on the issue	States treating arbitration as the practice of law and punishing foreign attorney appearance
District of Columbia Florida New York	Alaska Arizona Arkansas California Colorado Delaware Georgia Illinois Indiana Iowa Louisiana Maine Maryland Massachusetts Michigan Minnesota Montana Nebraska New Hampshire New Jersey New Mexico North Carolina Ohio Oregon Pennsylvania Rhode Island South Carolina Tennessee Utah Vermont Virginia Washington Wisconsin	Alabama Hawaii	Connecticut Idaho Kansas Kentucky Mississippi Nevada North Dakota Texas West Virginia Wyoming

Sources: State Laws, Model Rule 5.5 adoption tables, State Bar Ethics Opinion Letters

It is worthwhile noting that although the states appear to vary significantly in the precise rules that they adopt to govern out-of-state attorney participation in local arbitrations, the general trend for

states that have altered their positions over time is toward a loosening of the practice restrictions.¹⁰⁸

This general trend indicates that at least the perception of enhanced jurisdictional competition has forced a relaxation of the ethics rules. Moreover, it indicates that relaxed UPL rules may increase rather than decrease overall demand for lawyer services.

In the course of our research, we also noted that some states treated international arbitrations differently than domestic arbitrations. For example, California treats the appearance of an unlicensed attorney as falling completely outside the rules governing the unauthorized practice of law but imposes slightly greater restrictions governing an unlicensed attorney's appearance in a domestic arbitration.¹⁰⁹ One might hypothesize that these rules reflect an uneasy compromise between a small, well-organized international arbitration bar eager to attract business to the state and a separate coalition of lawyers who regularly appear in the trial courts eager to protect their rents. In a separate regression, we code these states as equivalent to those with the most liberal UPL rules (like New York).

2. Arbitration Fora

Determining party preferences for arbitral forums required us to obtain evidence from actual arbitration clauses. We approached the project aware of certain methodological difficulties. First, to the extent we are measuring the relationship between lawyer licensing laws and private contracting practices, there will obviously be a lag time between the implementation of any change to the lawyer licensing rules and any resulting change in arbitration clauses.¹¹⁰ Second, arbitrations (and the clauses giving rise to them) may be subject to the same confidentiality restrictions that plague many empirical

¹⁰⁸ See note *supra*.

¹⁰⁹ Other states falling into this category include Connecticut, Georgia and Virginia.

¹¹⁰ After all, many, probably most, parties to existing contracts will not bother to rewrite those contracts solely in light of a change or clarification in UPL rules as applied to arbitration. New contracts, and contracts rewritten for other reasons could reflect a choice from the change, but they will take a while to appear in large enough numbers to influence statistical results.

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studies of contracts.¹¹¹ Consequently, it can be enormously difficult to gather good data on parties' contracting practices when drafting arbitration clauses.

Nonetheless, available data create some opportunity to measure party choices about where to arbitrate. Previous literature, publicly available databases and our contacts with arbitration associations supplied several options. As we investigated the options, we unfortunately had to rule out one relatively comprehensive (and surprisingly under-utilized database) of consumer arbitrations. The database comes from various state laws requiring arbitration associations to report details on consumer arbitrations in the state.¹¹² Some states such as California and Maryland required arbitration associations to gather and report various data such as the identity of the party, the amount in controversy, the locus of the arbitration, the date of the arbitration, and the disposition of the arbitration.¹¹³ The problem with this database was that the arbitrations were subject to the Consumer Due Process Protocol which requires that the arbitration take place in a location that is reasonably convenient to the consumer.¹¹⁴ As a result of the Protocol, arbitration venue collected from these arbitrated cases would reflect the Protocol, not party preference.

Other databases involved disputes not subject to such regulatory constraints. Chris Drahozal has constructed a multi-year database of arbitration agreements in franchise contracts, but the sample size limited its usefulness in comparing competition across jurisdictions in the United States.¹¹⁵ A database of arbitration agreements in CEO employment contracts developed by Randall Thomas, Erin O'Hara, and Ken Martin overcame this problem, but its results antedated many of the current reforms in

¹¹¹ See, e.g. Born, *supra* note __ at 791-812.

¹¹² See California Code of Civil Procedure §1281.96; Maryland Commercial Law §§14-3901 *et seq.*

¹¹³ See American Arbitration Association, Consumer Arbitration Statistics (2011).

¹¹⁴ *Supra* note 68.

¹¹⁵ Christopher R. Drahozal, *Arbitration Clauses in Franchise Agreements; Common (and Uncommon) Terms*, 22-FALL FRANCHISE L.J. 81 (2002); Drahozal & Wittrock, *supra* note 57.

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this area of the law and, therefore, provided a poor proxy for whether state changes in UPL laws had an effect on arbitral caseloads.¹¹⁶

Ultimately, we obtained a new and previously unavailable database of arbitrations filed with the American Arbitration Association between the years 2007 and 2011.¹¹⁷ The genesis of this database stemmed from an insight about the above-described database that the AAA and other arbitral organizations had prepared on their consumer caseload. In the course of separating out data on their consumer cases (where the choice of arbitral forum was subject to the protocols), presumably the associations also generated data on what cases fell *outside* their reporting requirements. Put another way, we asked the AAA to tell us what was left on the cutting room floor after they separated out the arbitration subject to their reporting requirements under state consumer laws. Consequently, we were able to obtain from the AAA data for all construction and commercial cases filed between 2007 and 2011 broken down by locale.¹¹⁸

While we believe this new dataset will provide significant opportunities to advance empirical scholarship about arbitration, both in connection with UPL laws and other contexts, we should be very clear about several limitations. First, it bears emphasis that the data only cover a single arbitration association, the American Arbitration Association, and do not cover other arbitrations taking place under the auspices of other institutions or on an *ad hoc* basis.¹¹⁹ Second, our data only cover a portion

¹¹⁶ Randall Thomas, Erin O'Hara & Kenneth Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959 (2010).

¹¹⁷ Here we, must again extend special thanks to the American Arbitration Association, especially Ryan Boyle, for supplying the previously unavailable caseload data used to undertake our analysis.

¹¹⁸ The data do not enable us to identify precisely what fraction of these cases are commercial cases and what fraction are construction cases. We acknowledge that the difference might influence the choice of forum, particularly where the nature of the construction dispute favors the situs selection (such as the decision to site the construction arbitration in the site of the construction project).

¹¹⁹ Nonetheless, we think this limitation is not fatal to the explanatory value of our dataset. The American Arbitration Association maintains the largest docket of any arbitral association in the United States, see Brief of the American Arbitration Association as *Amicus Curiae* in support of Neither Party in *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp.* (No. 08-1198) at 1-2 and numerous scholars have relied on AAA data to undertake generalized empirical

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of the AAA's docket –namely commercial and construction cases and, consequently, does not include other types of cases that the AAA may classify differently. Third, even within these two categories of cases, the data are not entirely complete. We only utilize those cases in which the AAA has identified an arbitral forum. According to the AAA, sometimes parties do not identify the forum upon filing the request for arbitration (whether due to pleading error or an omission in the arbitration clause).¹²⁰ in the event those disputes settle prior to a hearing, they fall outside the data reported here. Fourth, and perhaps most importantly, our dataset is based on the reports about the jurisdiction specified *at the time the arbitration was commenced, not at the time the parties entered into the agreement*. This raises the distinct possibility that at least some of the disputes logged for a given year will involve older arbitration agreements. Put more specifically, a dispute logged in 2011 may be based on an arbitration clause contained in a contract formed in 1995. To the extent the arbitral forum specified in the agreement changed its UPL laws *after* 1995, that decision almost certainly could not influence the parties' choice.¹²¹ To minimize (though certainly not eliminate this risk of overinclusivity) we focused, at least initially, on the latest year for which complete data were available, namely 2011.

3. Arbitration Friendly Statutes

research about arbitration. See, e.g. Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995); William Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J. Oct.-Dec., 1995; Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP.. POL'Y J. 189 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); Lisa B. Bingham, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in New York University 53rd Annual Conference on Labor. (2003); Theodore Eisenberg and Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58-JAN DISP. RES. J. 44 (2003-2004); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003); Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association: A Preliminary Report* (Mar. 2009); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIR. LEG. STUD. 1 (2011).

¹²⁰ See Email from Ryan Boyle to Peter B. Rutledge (Sept. 2012) (copy on file with authors).

¹²¹ In theory, of course, the parties would be free to amend their arbitration agreement even after forming the contract. In practice, though, our anecdotal experience suggests this is more the exception than the norm.

Prior work has offered several possible measures of a state's legal architecture governing arbitration. A 2006 report prepared by John Townshend for the U.S Chamber's Institute of Legal Reform that canvassed state court views governing the enforcement of arbitration agreements.¹²² We rejected it due to its limited focus on arbitration agreements.¹²³ A 2011 summary by LEXIS/NEXIS summarized state laws regulating arbitration.¹²⁴ We rejected it due to its lack of comparative metrics. An ABA survey examined the law governing arbitrations relating to medical and attorney fee claims. We rejected it due to its subject-specific nature and the atypical features of these disputes.¹²⁵

We ultimately settled on two possible measures of the friendliness of a state's legal environment toward arbitration. First, we considered a report of the Uniform Law Commission on the adoption of the Revised Uniform Arbitration Act.¹²⁶ Like most uniform laws, the Revised Uniform Arbitration Act was designed by the Uniform Law Commission (formerly the National Conference on Commissioners of Uniform State Laws). It was designed to replace the original Uniform Arbitration Act drafted in 1955.¹²⁷ Whereas 49 states adopted the original Uniform Arbitration Act, only fourteen have adopted the revised act.¹²⁸ Thus, adoption of the act serves as a potential differentiating feature in signaling a state's receptivity to arbitration. The following table indicates the adoption patterns for the Revised Uniform Arbitration Act:

Table 3 - States Adopting the Revised Uniform Arbitration Act
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¹²² John Townshend, Report to the U.S. Chamber Institute for Legal Reform, *State Court Enforcement of Arbitration Agreements* (2006).

¹²³ The focus on arbitration agreements contained two downsides. First, federal law largely governs the enforceability of arbitration agreements, including in state court proceedings. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Second, an exclusive focus on arbitration agreements prevented consideration of other features of state law, such as the law governing vacatur of awards, which is more readily applicable in state court proceedings.

¹²⁴ LEXIS/NEXIS, *50 State Comparison of State Laws Regulating Arbitration* (Mar. 2011).

¹²⁵ American Med. Ass'n, Advocacy Resource Center, *State Laws Governing Liability Reform* (2012); American Bar Ass'n, *Fee Arbitration Survey* (2008).

¹²⁶ See Uniform Law Commission, Revised Uniform Arbitration Act, Status Map, available at <http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20%282000%29> (hereinafter „status map“).

¹²⁷ See Uniform Arbitration Act (1955).

¹²⁸ See Status Map, *supra* n. 125.

<u>(as of 2011)</u>
Arizona Arkansas Colorado Minnesota Nevada New Jersey New Mexico North Carolina North Dakota Oklahoma Oregon Utah Washington Washington, D.C.

Source: Uniform Law Commission, RUAA Adoption Tables

Using the act as a proxy of for the state's receptivity to arbitration offers several advantages. For one thing, several of the act's features were designed to make available various procedural devices that had become increasingly important in arbitration such as provisional remedies and consolidation (devices that the original uniform act had ignored).¹²⁹ For another thing, the revised uniform act was designed to reflect Supreme Court case law over the intervening four and a half decades since the UAA's adoption to ensure that the Federal Arbitration Act did not preempt state law.¹³⁰ Third, lawyers both designed the revised act and, in their respective states, lobbied for its passage. Thus, RUAA provides an example of extensive attorney involvement in law reform. Moreover, it also can provide some evidence of variance in attorney and other interests across the states. Finally, because the revised uniform act has been available for adoption for over a dozen years, it allowed us to take into account the "lag time" between a state's adoption of an arbitration friendly law and the actual designation of the state as an arbitral forum in the arbitration clause.

¹²⁹ See Uniform Law Commission, Revised Uniform Arbitration Act, *Why States Should Adopt the RUAA*, available at <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAA>.

¹³⁰ *Id.*

At the same time, RUAA provides at best a very limited measure of a state's arbitration friendliness. For one thing, this measure overlooks some states that may not have adopted RUAA but nonetheless already have some of its features. For example, while New York has not adopted RUAA, its arbitration law contains a provision authorizing its courts to freeze assets in support of arbitration.¹³¹ For another thing, this measure does not capture the possibility that the revised uniform act might, in some respects, be *less* supportive of arbitration than the laws of a given state.¹³² Indeed, Larry Ribstein's work with Bruce Kobayashi has cast doubt on the utility of uniform laws (though their research did not concentrate on the arbitration acts specifically).¹³³ And Alan Schwartz and Bob Scott have shown how most uniform law drafting by private legislatures will take the form of small, technical, and incremental changes, while topics of any significant will be addressed through vague and abstract rules delegating authority to the courts.¹³⁴ Such rules typically fail to serve as strong signals of a state's position on any topic. Third, using a statutory adoption as a measure of a jurisdiction's disposition toward arbitration does not capture the possibility that some or all of a state's "arbitration friendly" rules might develop through judicial decision without a statutory intermediary.¹³⁵ Finally, we recognized that, even since the RUAA's completion in 2000, the Supreme Court has issued a number of decisions bearing on the relationship between federal and state law that might affect a state's incentives to adopt the revised act.

¹³¹ See N.Y. C.P.L.R. §7501 *et seq.*

¹³² For example, some states not adopting the Uniform Arbitration Act authorize their courts to freeze assets located in the state in support of arbitration located in another jurisdiction. See, e.g., N.Y. C.P.L.R. 7502(c). By contrast, the Uniform Arbitration Act does not expressly authorize such preliminary asset freezes.

¹³³ Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Legal Stud. 131 (1996); Bruce H. Kobayashi & Larry E. Ribstein, *The Nonuniformity of Uniform Laws*, 35 J. Corp. L. 327 (2009).

¹³⁴ Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995).

Under the Schwartz and Scott analysis, clear, bright-line rules can be produced in these organizations, but only when the drafting body is dominated by a single interest. Based on accounts from the Reporter of RUAA, we have no reason to believe that RUAA was drafted with only pro-arbitration business interests present at the drafting table. See Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 J. Disp. Res. 28 (2001).

¹³⁵ Given our focus on the political economy of the rule adoption, we believe the focus on positive law, as opposed to judicial decision, is more apt. Debates over bar admission rules or amendments to state statutory law are much more conducive to the sort of strategic activity by the bar (or constituencies thereof) than actual cases resulting in judicial decisions.

As an alternative measure, we considered specific features of a state's arbitration law that might signal the state's receptivity to arbitration. After canvassing several alternatives, we opted to consider whether the state had adopted an international arbitration law. Such laws may seem rather peculiar because federal law governs much of the field. Nonetheless, state law can periodically fill in the gaps in federal law.¹³⁶ Moreover, much like the RUAA, state adoption of an international arbitration law can signal the pro-activeness of a state bar eager to attract arbitral business to the state. The following table identifies states adopting some international arbitration law:

Table 4- <u>States Adopting International Arbitration Laws (as of 2011)</u>
California
Connecticut
Florida
Georgia
Hawaii
Illinois
Maryland
North Carolina
Oregon
Texas

Source: UNCITRAL Model Law Adoption Tables,¹³⁷ Scholarship on state international arbitration laws

¹³⁶ See Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 Cardozo J. Conflict Res. 509 (2009).

¹³⁷ The UNCITRAL Model Law, not unlike the Uniform Arbitration Act, is a uniform law, designed specifically for international arbitration by the United Nations Commission on International Trade Law. Over forty nations have adopted it, though not the United States, which continues to lack a fully reticulated international arbitration statute. This lacuna in federal law has created an opportunity for some states, such as those listed, to adopt their own international laws, partly in conjunction with an effort to attract international arbitration business to the state. See Daniel A. Zeft, Note, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. Int'l L. & Comm. Reg. 705, 709 & n. 11 (1997). Some state international arbitration laws, such as North Carolina's, specifically declare that they are designed to attract business to the state. See, e.g., N.C. Gen. Stat. § 1-567.30 ("It is the policy of the State of North Carolina to promote and facilitate international trade and commerce, and to provide a forum for the resolution of disputes that may arise from participation therein. Pursuant to this policy, the purpose of this Article is to encourage the use of arbitration as a means of resolving such disputes, to provide rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for legal proceedings ancillary to such arbitration.").

The consideration of this latter category, state international arbitration statutes, intersected with our earlier discussion about special UPL carve-out rules for international arbitration. Anecdotal evidence from jurisdictions such as Georgia suggested that elements of the state bar often lobby for adoption of an international arbitration carve-out from the UPL rules contemporaneously with efforts to push for enactment of a state international arbitration law. The combined effort is designed to send a strong signal to the business community that the state offers a hospitable setting for an international arbitration (and thereby produces a potential source of fees for attorney in that state interested in international arbitration). Thus, to test the linkage between these two phenomena, we also coded for whether the state had adopted a UPL carve-out for international arbitration.

4. State Court Systems

As noted in the preceding section, one question that interested us in this paper was the relationship between arbitration and litigation caseloads within a given jurisdiction. Changes in a state's arbitration legal architecture might have one of two effects. Under an "intra-jurisdictional competition" model, arbitrators and judges in a state compete for the same quantum of cases: consequently, efforts to induce more arbitration would lead to a concomitant reduction in litigation caseloads. Alternatively, under an "inter-jurisdictional competition" model, states compete with each other for dispute resolution business. Consequently, efforts to induce more arbitration in one jurisdiction might not lead to a reduction in litigation in that jurisdiction but, instead, a reduction in arbitration (or litigation) in other states. Thus, we gathered data on state court civil caseloads over the time period corresponding to our data on arbitration caseloads (2007-2011). Data over the relevant time period were not available for all states, so we limited our sample to three states for which complete data were available (New Jersey, Michigan, and Virginia).

Beyond sheer numbers, it was important to consider whether the type of dispute resolution service offered by states might affect the desirability to arbitrate. To measure this relationship between arbitral caseloads and the dispute resolution mechanisms offered by the state, we considered whether the state had created a business court. As mentioned in Part II, over the last two decades, several states have developed such courts which offer an amalgam of judicial expertise and other procedural conventions making them more palatable as a dispute resolution forum for business interests. Given the public statements of judges claiming that the business courts have been designed to compete with arbitration, one would expect the existence of business courts in the state to have a negative effect on arbitral caseloads.¹³⁸ The next table lists states that have created business courts:

¹³⁸We thank participants in a September 2012 conference at George Mason University Law School for their suggestions on this point.

Table 5 - States With Business Courts¹³⁹

Alabama
Colorado
Delaware
Florida
Georgia
Illinois
Maine
Massachusetts
Nevada
New Hampshire
New Jersey
New York
North Carolina
Ohio
Oregon
Pennsylvania
South Carolina

5. Freedom of Contract Norms

Finally, in Part II, we hypothesized that the adoption of relaxed UPL requirements might signal a more general receptivity to enforcing private party choice about legal matters generally, including contractual freedom. As a measure, we employed the 2012 Harris Ranking of state liability systems developed for the U.S. Chamber's Institute of Legal Reform.¹⁴⁰ This annual report scores each state based on various measures of its litigation environment, including its treatment of contract litigation.

¹³⁹ We include in this list states that do not have statewide business courts but, instead business courts within particular counties (such as Georgia). Our rationale for their inclusion is that the mere availability of the business court accomplishes the objective of keeping disputes within the judicial system (in lieu of alternative dispute resolution) and that parties generally can harness the benefits of these courts through carefully crafted forum selection clauses. **This rationale holds up so long as states do not impose venue rules restricting the ability of parties to opt into district-specific business courts. We are unaware of any such venue rules.**

¹⁴⁰ Harris Interactive, Report Prepared for the U.S. Chamber Institute for Legal Reform 2012 State Liability Systems Survey: Ranking the States (Sept. 2012). We thank Henry Butler for this recommendation.

Some research has suggested it is an especially good predictor of the legal costs faced by businesses and, thus, is at least a reasonable measure of how businesses perceive the legal climate in a state.¹⁴¹

Our reliance on the Harris Ranking is imperfect at best. For one thing, the ranking captures much more than simply assessments of a state's contractual norms. It also captures ideas pertaining to the tort regime in the state and business perceptions about the specter of tort liability. Second, the methodology used to create the ranking has been subject to criticism.¹⁴² Specifically, the study relies heavily on the opinions of corporate counsel who may base their perceptions on differing experiences, information and biases. Nonetheless we believe the perceptions captured by the study (and the score assigned based in part on those perceptions) does teach something about how business perceives the state and the extent to which the state may attract business. Thus, we would expect the adoption of liberalized UPL rules governing arbitration to be positively correlated with a high score on the chamber scale.

¹⁴¹ Paul Hinton *et al.*, *Determinants of State Tort Costs: The Predictive Power of the Harris State Liability Ranking Study*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154124.

¹⁴² Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470872.

Table 6 summarizes statistics for each of the variables considered in our analysis:

Variable	Variable Definition	Mean	Median	Standard Deviation	Minimum	Maximum
UPL	Liberality of state's rules governing appearance of foreign attorney in arbitration	.59	.5	.8984	-1	2
RUAA	Dummy variable equaling 1 if state has adopted RUAA	.28	.5	.4507	0	1
Intl arb	Dummy variable equaling 1 if state has adopted international arbitration statute	.18	.5	.3850	0	1
State caseload	State Civil Caseload/1000	+	+	+	+	+
Bus Ct	Dummy variable equaling -1 if state has adopted business court	-.33	-.5	.4761	-1	0
Harris Rank	Harris Ranking of State Business Environments	62.21	63.8	7.5441	44.8	75.8

+ As noted above, in contrast to other independent variables, we could not obtain civil caseload data for all 51 jurisdictions in 2011. Instead, we constructed a set of panel data for 2007-2011 for the three states for which such data were available. Results of the panel data appear in Table 11, *infra*.

C. Regression Models

We report the results of our regressions in a series of tables organized around the hypotheses and predictions described in the preceding paragraph.

1. Arbitration Caseload

Table 7 reports the results of a regression using our database of AAA cases and various factors that might influence the decision where to site an arbitration, including its UPL rules, its legal regime, and whether the state has a business court:

Table 7 – Ordinary Least Squares Model of AAA Arbitration Caseloads (2011)

	(1)	(2)
UPL	.2314 (.1477)	.2921 (.1351)*
Harris	-.0255 (-.0173))	-.0271 (.0169)
RUAA	-.4516 (.2786)	-.3583 (.2373)
Intl Arb	.9626 (.3430)*	.8709 (.3399)*
Bus Ct	-.1076 (.2794)	-.0976 (.2965)
Coding for Int'l UPL Carveout?	No	Yes

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Note: N=51. The dependent variable is the normalized AAA caseload for 2011, and the linear regression is estimated using OLS. The value in the parentheses below each coefficient is the standard error. An asterisk marks estimates that are statistically significant at the .05 level.

The results here provide insight into the determinants of arbitration venue. Both the business courts and the state's legal environment appear to show a negative correlation with arbitration venue. This correlation could provide some indication that arbitration is a substitute for business courts and for a general pro-business environment in a state; however, neither coefficient is statistically significant at the five-percent level. The coefficient on the variable for UPL statutes is consistent with our prediction, but here too our test for statistical significance failed, at least when considering whether out-of-state attorneys are permitted to represent clients in domestic arbitrations (column 1). Our indicators for pro-arbitration statutes, RUAA and the passage of an international arbitration statute, produced results with inconsistent signs, and the coefficient for our RUAA variable is negative, which is inconsistent with our predictions. This is, however, not altogether unsurprising. As we described above, prior scholarship has cast doubt on the clarity and boldness of uniform law proposals.¹⁴³ Moreover, as we indicated earlier in this section, adoption of both the RUAA and international arbitration statutes are, at best, imperfect proxies for a state's predisposition toward arbitration, at best sending a signaling effect of the state bar's receptivity to this form of dispute resolution.

Interestingly, however, the coefficient for our international arbitration statute variable is both positive and significant. Moreover, when we recoded the UPL variable to reflect whether out-of-state attorneys could represent clients in international as opposed to domestic arbitrations (column 2), then the coefficient for UPL statute is statistically significant at the five percent level. Although we cannot form strong conclusions from the data, these results suggest that the choice of arbitration forum are affected by whether the states have made efforts to attract international arbitrations to the state. The

¹⁴³ See Kobayashi and Ribstein, *supra* at note [x].

results are particularly significant given that likely the vast majority of cases in our AAA dataset involve domestic rather than international arbitrations.

2. UPL Statutes

Table 8 reports the results of a regression using our database of UPL rules regarding domestic arbitrations and various measures of whether the state has adopted one or more arbitration friendly laws such as the RUAA or an international arbitration law:

Table 8 – Ordinary Least Squares Model of Domestic UPL Statutes

	(1)
RUAA	.0635
	(.2867)
Intl Arb	.2256
	(.3356)

Note: N=51. The dependent variable is the UPL variable (scale from -1 to 2), and the linear regression is estimated using OLS. The value in the parentheses below each coefficient is the standard error. An asterisk marks estimates that are statistically significant at the .05 level.

The regression suggests a positive correlation with both independent variables. Neither coefficient is statistically significant at the five-percent level. This is, however, not altogether unsurprising. As we described above, some prior scholarship has cast doubt on the efficacy of adopting uniform laws.¹⁴⁴ Moreover, as we indicated earlier in this section, adoption of both the RUAA and international arbitration statutes are, at best, imperfect proxies for a state's predisposition toward arbitration, at best sending a signaling effect of the state bar's receptivity to this form of dispute resolution.

¹⁴⁴ See Kobayashi and Ribstein, *supra* note 27.

In light of our findings regarding the significance of state efforts to exempt international arbitrations from otherwise governing UPL rules, we also ran a regression to glean the relationship between a state's passage of international arbitration statutes and its relaxation of the UPL rules for international arbitrations.¹⁴⁵ Here we hypothesized that states attempting to attract international arbitrations to the state with an international arbitration statute would be more likely to also exempt international arbitrations from the UPL rules. Table 9 reports our result:

Table 9 – States adopting international arbitration statutes (2011)

UPL Carve Out	.3837
	(.1393)*

Note: N=51. The dependent variable is whether the state has carved out international arbitration from the state's UPL rules, and the linear regression is estimated using OLS. The value in the parentheses below each coefficient is the standard error. An asterisk marks estimates that are statistically significant at the .05 level.

This coefficient has the predicted sign. The relationship is highly statistically significant, at both the 5% and the 1% level. Thus, we can reject the null hypothesis and state there is a strong correlation between these two elements of a state's law governing arbitration. Put another way, enactment of these two sets of legal reforms is no accident. Rather, they tell a more general, theoretically interesting story about the political economy of how small well-organized interest groups within a state's bar set about to influence the content of substantive laws. That effort seeks to signal the state's openness to arbitration through a carefully crafted package of reforms designed to create a legal environment hospitable to siting disputes in that state.

¹⁴⁵ For this regression, we coded as (1) states that either exempt all arbitration from UPL rules (like New York) or states that exempt only international arbitration (like California). All other states were coded as zero.

3. Freedom of Contract Norms

Table 10 presents results from regressions assessing the correlation between freedom of contract norms and the extent to which states have adopted laws favorable to arbitration. Consistent with our practice elsewhere in the paper, we used two different measures of a state's arbitration regime- whether it had adopted the RUAA and whether it had adopted an international arbitration statute.

Table 10 – Ordinary Least Squares Model of Freedom of Contract Norms

	(1)
RUAA	1.1209 (2.3543)
Intl Arb	-4.4388 (2.7560)

Note: N=51. The dependent variable is the Harris Rank score (scale ranges from 0 to 100), and the linear regression is estimated using OLS. The value in the parentheses below each coefficient is the standard error. An asterisk marks estimates that are statistically significant at the .05 level.

The regression suggests a positive correlation with adoption of the RUAA but a negative one with the adoption of an international arbitration statute. Neither coefficient is statistically significant at the five-percent level. This gels with our findings in the earlier regression. Either the adoption of statutes like the RUAA and international arbitration laws do meaningfully influence other related segments of the law market, or it is necessary to identify more robust measures of the relative “pro arbitration” legal regime in a state.

4. State Court Caseload

As noted above, we also were interested in the relationship between arbitration caseloads and state court caseloads. We were unable to collect 2011 civil caseloads for the fifty-one jurisdictions in

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our model. Instead, we developed a set of panel data for the period 2007-2011 (the years for which we had AAA caseload statistics) for three states where we also could obtain civil caseload data. We also coded our other independent variables (RUAA, UPL, Int'l Arb, Bus Ct and Harris) for each state and for each year. This enabled us to capture changes in the jurisdiction over time. For example, some states adopted slightly more restrictive UPL rules in 2009, causing us to code UPL for the state "2" in 2007 and 2008 and then "1" in 2009 and subsequent years. Likewise, the Harris score for the states changed each year, and we coded the ranking for each year in a separate cell.

Table 11 reports the results of a regression using these panel data:

Table 11 – Fixed effects model of AAA caseloads (2007-2011) for

	Michigan, Virginia and New Jersey
	(1)
State caseload	2.6844 (7.3786)
UPL	-26.1363 (37.3246)
Harris	-13.7321 (10.9899)
RUAA	100.6873 (133.7476)
Intl Arb	-146.959 (515.2259)
Bus Ct	0 (0)

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Note: N =15. The dependent variable is the AAA commercial and construction caseload for 2007-2011 in Michigan, New Jersey and Virginia. The value in the parentheses below each coefficient is the standard error. An asterisk marks estimates that are statistically significant at the .05 level.

Contrary to our regression on the 2011 data, the coefficients on most variables are not consistent with our predictions. None of these coefficients is statistically significant at the five-percent level. The results here are essentially random. Consequently, we cannot offer any confident conclusions about the relationship between a state's judicial caseload and its arbitration caseload. The two phenomena appear to to operate independently of each other.

IV. Implications

Our project was inspired by Larry Ribstein's focus on the relationship between lawyers and law production, and by a desire to apply his insights to arbitration, a subject matter that interested Ribstein for other reasons. Our conceptual framework and empirical observations suggest several policy implications and reveal multiple avenues for future research.

We have introduced two new datasets into the literature – a new five-year set of AAA caseload data and a comprehensive survey of state rules governing whether (and under what circumstances) appearance in arbitration constitutes the unauthorized practice of law. These datasets can provide fertile ground for future studies, but our use of some existent datasets has left us with imperfect measures of the phenomenon we sought to study. Thus, our conclusions can be at best tentative and some of our implications remain somewhat speculative. We nevertheless proceed to offer the following observations about the significance of our findings.

First, our findings indicate that direct interstate competition for private dispute resolution is quite weak. Despite interest group and public official claims, so far the passage of RUAA, the presence

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of business courts, the environment of a state's courts and legal system, the local state court caseloads, and the treatment of domestic arbitration under state UPL rules all seem to have negligible effect on a state's ability to attract arbitrations to the state (Table 7). Based on admittedly early evidence regarding the UPL rules for domestic arbitration, interest groups seeking to attract dispute resolution to the state so far appear to have reaped little benefit from successful UPL reforms. Similarly, the passage of RUAA has proved entirely unsuccessful in attracting arbitration business to the state.

Our findings also indicate that virtually no state has engaged in coordinated efforts to attract domestic interstate arbitration business. For example, state changes in a state's general arbitration laws seem uncorrelated with state changes to the UPL rules applied to domestic arbitrations (Table 8). And these laws seem uncorrelated with the general freedom of contract norms in the state, at least as measured by the Harris Ranking (Table 10). We cannot offer firm conclusions here, but our results lend support to the idea that despite some interest group rhetoric, the states are investing little, if anything, to compete to attract domestic arbitration business.

Our findings also lend support to the notion that the choice of arbitration situs turns entirely on factors relevant to an arbitration rather than on assessments of the functioning of the chosen state. Specifically, situs choice does not depend on the general business friendliness of a state or the backlog or other local court system problems. The finding is surprising because parties contemplating arbitration might well forecast the need for courts to enforce arbitration agreements and awards and/or to provide preliminary relief, and one might therefore expect them to worry about the functioning of courts and other law makers at the situs. Although it is quite possible that the choice to arbitrate is influenced by general disenchantment with laws and courts, the decision about where to locate the

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arbitration is unaffected by these conditions at the situs. Effectively, then, parties appear to view arbitration as an entirely private matter.¹⁴⁶

Second, although interstate competition for domestic arbitration does not appear to be operating with any significant force, interstate competition for international arbitration does appear to be present with significant effects. This conclusion, although tentative, is based on three findings. First, AAA arbitration location was significantly influenced by the state's enactment of an international arbitration statute. Second, arbitration venue was also significantly influenced by a state rule exempting international arbitrations from the state's generally applicable UPL rules for litigation. These two results are especially powerful given that our AAA dataset is comprised of mostly domestic cases. Given that fact, either the effect on international arbitration is particularly strong and/or state efforts regarding international arbitration is somehow a more effective signal of a state's arbitration friendliness than is state efforts regarding domestic arbitration. Third, there is a strong correlation between a state's adoption of an international arbitration statute and its UPL rule exemption for international arbitration. This result suggests that, unlike domestic arbitration regulations, state international arbitration reforms tend to be coordinated in an effort to attract such arbitrations to the state.

In *The Law Market*, O'Hara and Ribstein posited that international competitive forces often forced the state and federal governments to relax laws that provided benefits to interstate and even purely domestic private commercial interests. Regarding arbitration, however, it appears that state competitive efforts are working at the international effort but not the interstate effort. True, the AAA data suggests that states that compete for international arbitration business may also, by reputational

¹⁴⁶ These findings lend some indirect credence to the idea that, in most instances, parties voluntarily comply with arbitral agreements and arbitral awards (to the extent they do not otherwise settle the case). See Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration*, 19 Am. Rev. Int'l Arb. 319. 344 (2008). That is, once they have undertaken a commitment to arbitrate (for whatever reason), parties generally (though certainly with important exceptions) have little interest in returning to court.

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signaling, benefit from enhanced interstate and intrastate arbitration business. However, neither the international arbitration statute nor the UPL exemption for international arbitrations is providing benefits to the private parties choosing that arbitration venue. The results suggest that future jurisdictional competition scholarship pay more attention to whether governments can effectively discriminate between international, interstate, and locally immobile parties and assets.

As a policy matter, the results might also suggest that the Federal Arbitration Act hinders effective jurisdictional competition for desirable arbitration laws, and, if so, the Supreme Court's efforts to promote arbitration with strong preemption doctrine could at some point prove counterproductive. The Court's strong pro-arbitration stance has been justified by a need to preserve international commercial opportunities for American parties.¹⁴⁷ The Court's preemptive stance presumably does help to promote international commerce by ensuring international parties that their arbitration agreement won't be undone by hostile state policies. Indeed, the focus of the Court's cases has been on interpreting the FAA broadly to ensure that the parties' wishes are respected and that state laws do not work to hinder the streamlined and efficient functioning of arbitration.¹⁴⁸ However, the Court's strong preemptive stance could be chilling state efforts to set an agenda to provide laws friendly to domestic arbitration

Our assertion here is speculative and, therefore, tentative. In fact, the Court has not adopted a policy of striking down state laws that are friendly to arbitration. In addition, the Court has upheld a

¹⁴⁷ See, e.g., *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto-Culver, Co.*, 417 U.S. 506, 516-17 (1974).

¹⁴⁸ See *Nitro-Lift Technologies, L.L.C. v. Howard*, 2012 WL 5895658 (Nov. 26, 2012) (state court erred in striking down contractual provision under state public policy because the job of determining the validity of a contractual agreement belongs to the arbitrator); *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (state law that prohibits enforcement of arbitration clauses in nursing home contracts as applied to personal injury and wrongful death claims preempted); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempted California law designed to preserve class proceedings in contracts of adhesion, even if the contract contained an arbitration clause); *Preston v. Ferrer*, 552 U.S. 346 (2008) (state administrative proceeding that either prevents or delays arbitration interferes with FAA goals); *Doctor's Assocs. V. Casarotto*, 517 U.S. 681 (1996) (FAA preempts state statute which conditions enforceability of arbitration clause on compliance with notice requirements);

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California law that permits a court to stay arbitration pending related litigation involving third parties not bound by an arbitration agreement when the parties contracted to have their arbitration proceed according to California arbitration law.¹⁴⁹ This position could have the effect of encouraging states to compete for domestic arbitrations with innovative bundles of law. In fact, however, the states appear not to have chosen this course, which raises the possibility that states choose not to compete for domestic arbitration business because states deem such efforts unavailing; after all, the Supreme Court has been very active in taking cases and quite expansive in its determinations regarding congressional intent. In addition, all of the Supreme Court's preemption cases treat provisions of chapter 1 of the FAA, which deals with domestic arbitration rather than chapters 2 and 3, which address international arbitrations.¹⁵⁰ This lopsided treatment could suggest to the states that they have more room to distinguish themselves as competitors for international arbitration business.

In a world where Congress is actively reforming federal arbitration laws in order to compete for international arbitrations, the harm to tying the states' hands may be quite small. Jurisdictional competition among nations pressures could cause the federal government to promote the creation of efficient laws even if the states remain silent. Yet Congress has hardly been a seedbed of reform in this area. Instead, Congress has barely amended the domestic portion of the FAA since 1925, and there is consequently plenty of room, at least in theory, for state laws to operate to provide models of arbitration law modernization. With Congress so inactive, the federalization of arbitration law could prove to be inefficient in the ways that Ribstein and Kobayashi predicted in their work on uniformity.¹⁵¹

¹⁴⁹ *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. University*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987) (state law forcing wage collection actions into court despite arbitration clauses preempted); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (state law forcing actions under franchise investment law into court despite arbitration clauses preempted).

¹⁵⁰ See cases cited *supra* n. [148](#) ~~145~~.

¹⁵¹ See Ribstein & Kobayashi, *An Economic Analysis of Uniform State Laws*, *supra* note 27, at 140-41 (discussing difficulty of responding to innovation and other changed conditions without diverse legal options).

With respect to international arbitrations, Congress has been even less helpful in producing effective laws. Rather than passing a statute giving specific substance to the New York Convention (such as by adopting the UNCITRAL Model Arbitration Law, as some countries have done or adopting a specific international arbitration law like France),¹⁵² for the most part Congress simply enacted very simple implementing legislation. That implementing legislation merely governs matters such as the definition of a “non-domestic” dispute, the scope of a federal court’s subject-matter jurisdiction, and a district court’s power to compel arbitration. Unlike the UNCITRAL Model Law or other international arbitration laws, it leaves wholly unaddressed a host of issues such as the scope of an arbitrator’s jurisdiction, the power of the arbitrator (or court) to order interim measures, discovery, evidence, and the standards governing the vacatur of international awards rendered in the United States.¹⁵³ State competition for international laws might well prove helpful in setting precedents for efficient implementations of the Convention, especially if party preferences for arbitration situs are respected.

Conclusion (Thoughts on whether we should break out this paragraph and, if so, what we should entitle it?)

Larry Ribstein was a scholar of the first order. Every one of his research projects, while answering some questions, invariably raised others that had to be relegated to future research. Our project similarly raises questions that must be left to future research, and those questions could be more reliably answered by developing better metrics of a state’s freedom of contract norms and the arbitration-friendly nature of state laws as well as a study of actual contract clauses and better

¹⁵² See W.W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 Vand. J. Transnat’l L. 1241 (2003) (calling for the adoption of an international arbitration law for the United States).

¹⁵³ Of course, as to some of these issues, the residual application clauses of Chapters 2 and 3 incorporate the provisions (and judicial interpretations) of Chapter 1 governing domestic (and non-Convention) arbitrations to the extent those rules are not inconsistent with the treaties and their implementing legislation. See 9 U.S.C. §§208, 307. These unusual provisions both reflect lack of deep thinking about the wisdom of extending legal rules governing domestic arbitration to international ones (especially on matters such as award vacatur) and risk substantial confusion (and uncertainty) over whether a particular rule is “inconsistent” with a treaty or the implementing legislation.

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measures of the relationship between arbitral and court caseloads. While we unfortunately no longer can profit from Larry's insights into new work, we offer a conceptual framework as well as tentative policy-relevant empirical results in the hope that we can stimulate further study in an area that was central to Larry's intellectual life.