

IN DEFENSE OF MANDATORY BINDING ARBITRATION (IF IMPOSED ON THE COMPANY)

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I. INTRODUCTION

I have spent much of my academic career battling mandatory arbitration.¹ As a junior law professor, horrified by the Supreme Court's 1995 decision permitting the practice in *Allied-Bruce Terminix Cos. v. Dobson*,² I drafted an article arguing on policy grounds that companies ought not to be able to deprive "little guys" of the opportunity to litigate their disputes.³ In subsequent articles I continued to attack the phenomenon of mandatory arbitration from a variety of policy, statutory, and constitutional perspectives.⁴ In addition to

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¹ Some, like Professor Stephen Ware, do not like the phrase "mandatory arbitration." However, I believe this phrase perfectly describes companies' practice of requiring their consumers and employees to submit future and yet unknown disputes to binding arbitration, rather than to litigation. See Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 43-44 (2003).

² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding that Alabama's statute prohibiting mandatory pre-dispute arbitration clauses was preempted by the Federal Arbitration Act). I was shocked that a termite extermination company could use an adhesive small print contract to deprive its customers of all opportunity to litigate a breach of contract claim against the company.

³ Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) [hereinafter Sternlight, *Panacea or Corporate Tool?*]. "Little guys" was the phrasing I used to describe consumers, lower-level employees, and perhaps certain franchisees and small businesses that could not be expected to knowingly and voluntarily negotiate arbitration clauses in advance. *Id.* at 637-39.

⁴ See, e.g., Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004) (presenting economic arguments as to why mandatory arbitration clauses eliminating class actions are more likely to be abusive than economically efficient); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003) (presenting state constitutional jury trial arguments that can be used to attack mandatory arbitration clauses); Jean R. Sternlight, *Is the U.S. Out on a Limb?: Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002) (pointing out that the allowance of privately imposed mandatory binding arbitration is unique to the United States); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the*

writing about mandatory arbitration, I have also given numerous talks on the subject and participated in many panel discussions and debates on the pros and cons of the practice. After a while, the participants' punches and counter-punches become predictable.

Attack: Critics like me attack mandatory arbitration as coerced and unfair, often citing anecdotes showing the practice in its worst light.

Defense: In response, defenders typically argue that while consumers/employees may not like the sound or feel or actuality of mandatory arbitration, such arbitration is nonetheless better for both them and society than is the alternative of litigation.⁵ Specifically, defenders often assert that arbitration is quicker and cheaper than litigation and overall just as fair or fairer.⁶ Or, defenders assert that the money companies save through imposing mandatory arbitration is passed on to consumers/employees, who thereby benefit overall.⁷

Attack: In response, critics like me state that if arbitration is so quick, cheap, and fair, there is no need to impose it on a mandatory basis. Let disputants select this wonderful dispute resolution process voluntarily, we say.⁸

Defense: And then the defenders have responded that it is not practical to make arbitration available only on a voluntary post-dispute basis because disputants have a different set of incentives post-dispute. It is said that consumers and employees (or their lawyers?) would not want to arbitrate the good big \$ cases, and companies would not want to arbitrate the weak low \$ cases so in the

Seventh Amendment Right to a Jury Trial, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (presenting Seventh Amendment arguments that might be used to attack mandatory binding arbitration provisions); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91 (1998) (examining and critiquing federal courts' use of anti-suit injunctions to support the enforcement of arbitration clauses); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) [hereinafter Sternlight, *Rethinking*] (exploring the extent to which Due Process and jury trial arguments might be used to attack mandatory arbitration provisions).

⁵ Note that some also defend private mandatory arbitration on the theory that mandatory arbitration really is voluntary and that enforcing such adhesive contracts promotes freedom of contract. See Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO POL'Y ANALYSIS, at 1, 10 (April 18, 2002), available at <http://www.cato.org/pubs/pas/pa433.pdf>. I find this line of argument unpersuasive.

⁶ See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001); see also Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 63-64 (1998) (arguing, in the employment context, that arbitration may serve employees' interests better than does litigation).

⁷ See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 261 (2006).

⁸ E.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1267-68 (2001); Sternlight, *Panacea or Corporate Tool?*, *supra* note 3, at 701-02.

end, nothing would be arbitrated. Thus, say the advocates, better to allow companies to compel consumers/employees to arbitrate all cases, pre-dispute.⁹

In the past, my own typical response at this point in the argument has essentially been a combination of “no it ain’t” and “that’s not fair.” Specifically, I have questioned the premise that voluntary post-dispute arbitration will not work, assuming that the proposed arbitration is fair.¹⁰ I have also urged that even if privately mandating arbitration is the only way to ensure that disputes are arbitrated rather than litigated, that does not justify the imposition of mandatory arbitration on “little guys.”¹¹ Thus, I have supported and continue vigorously to endorse measures that would preclude companies from using adhesive contracts to require their consumers and employees to resolve disputes through binding arbitration rather than in court. One such measure is the Arbitration Fairness Act of 2007, recently introduced in both the House of Representatives and Senate.¹²

Here I discuss an alternative response: make arbitration mandatory for the company, but not the “little guy.” That is, assuming only for the sake of argument, that defenders of mandatory arbitration are correct that companies and “little guys” won’t agree to arbitration post-dispute, in the same cases, and further assuming only for the sake of argument that arbitration is socially more desirable than litigation in many cases, perhaps we should impose arbitration on companies in certain cases, rather than on consumers and employees? As I will explain *infra*,¹³ I believe it is more justifiable from a policy standpoint to impose arbitration only on companies, rather than on “little guys” alone or on both companies and “little guys.”

To try to minimize confusion, I will now offer two new terms to this discussion. I will use the phrase “private mandatory arbitration” to describe the kind of privately imposed arbitration that currently exists in the United States. I will use the phrase “governmental mandatory arbitration” to describe the new form of mandatory arbitration that I am discussing in this Article. Also, note that I will only be discussing the possibility of requiring arbitration in lieu of a lawsuit to resolve a civil dispute, and not, for example, the imposition of so-called “interest arbitration” in which arbitrators dictate contract terms to which labor and management could not voluntarily agree.¹⁴

The remainder of this Article will explore three aspects of this deliberately radical proposal for governmental mandatory arbitration: (1) What is my idea?;

⁹ *E.g.*, Estreicher, *supra* note 6, at 567-68 (describing voluntary pre-dispute arbitration as “chimerical”).

¹⁰ Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1656-58 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*].

¹¹ Sternlight, *Panacea or Corporate Tool?*, *supra* note 3, at 696-97.

¹² Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007). This bill would amend the Federal Arbitration Act to include a provision stating: “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of . . . an employment, consumer, or franchise dispute” S. 1782 § 4; H.R. 3010 § 4.

¹³ See *infra* text accompanying notes 35-38.

¹⁴ For a discussion of interest arbitration, see, for example, Brian J. Malloy, *Binding Interest Arbitration in the Public Sector: A “New” Proposal for California and Beyond*, 55 HASTINGS L.J. 245 (2003).

(2) Is such a proposal desirable from a policy perspective?; and (3) Is such a proposal feasible from a legal perspective, given existing constitutional and other constraints?

II. WHAT WOULD IT MEAN TO IMPOSE MANDATORY ARBITRATION ON THE COMPANY?

At minimum the idea of mandating arbitration on the company is delicious from a rhetorical perspective. Having battled with certain able foes over the years, regarding the fairness and legal legitimacy of private mandatory arbitration, I frankly look forward to the possibility of turning the tables. For example, I imagine that Alan Kaplinsky, a banking lawyer who has vigorously defended the imposition of binding arbitration on consumers,¹⁵ will be far less enthralled at the prospect of the government forcing binding arbitration on his own clients, banks, and credit card issuers.¹⁶

The gist of my idea is that “little guys” (consumers and certain lower level employees) would be provided, by statute, with an opportunity to take their disputes to binding arbitration rather than litigation. If the “little guys” chose arbitration over litigation, post-dispute, companies would have to agree to such arbitration, and the results of the arbitration would then be binding on both “little guy” and company.¹⁷ If on the other hand the “little guys” preferred to litigate their disputes, they would reserve that right.

I will now try to spell out this very basic idea in a bit more detail. In essence, my idea is that Congress would choose certain categories of disputes to be eligible for this governmental mandatory arbitration program. For exam-

¹⁵ See, e.g., Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator?: Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May-June 1998, at 24, 24, 26-28.

¹⁶ I am certain that Professor Stephen Ware, who views what I call “private mandatory arbitration” as a legitimate product of free contracting, see Stephen J. Ware, *supra* note 7, at 253, will not be enthusiastic about the legislative imposition of arbitration on companies. See Stephen J. Ware, *What Makes Securities Arbitration Different from Other Consumer and Employment Arbitration*, 76 U. CIN. L. REV. (forthcoming 2007) (draft on file with author) (“I believe governmental imposition of non-contractual duties to arbitrate is bad policy, regardless of the victim’s status as a worker or a capitalist.”).

¹⁷ An alternative but similar idea would require both company and consumer to arbitrate certain disputes but then make the result of such arbitration binding only if the consumer was satisfied with the result of the arbitration. That is, the consumer but not the company would have the right to designate the arbitration as non-binding, subsequent to the issuance of the award. The Better Business Bureau handles arbitration in this fashion and calls this process “conditionally binding” arbitration. BETTER BUS. BUREAU, RULES OF CONDITIONALLY BINDING ARBITRATION (2003), available at <http://www.dr.bbb.org/ComSenseAlt/CondBidRules.asp>. Similarly, a bill recently introduced in the Senate would require long term insurance plans to develop dispute resolution procedures that would allow enrollees but not insurance issuers to appeal determinations made by non-court third parties as to disputed claims. Long Term Care Insurance Integrity Act of 2007, S. 2268, 110th Cong. (2007). My tentative preference would be to allow consumers to opt in or out of the arbitration prior to the claim having been heard by an arbitrator, rather than afterwards. First, I believe it would be inefficient to require all disputes to be arbitrated in situations where a substantial number of consumers/employees may then opt for a trial de novo. Second, from a fairness perspective, I am more comfortable requiring all disputants to elect a process pre-decision, rather than providing one, but not both disputants with a post-decision veto.

ple, Congress might provide that all “consumer” claims against companies for breach of contract or fraud,¹⁸ or all company claims against consumers be eligible for arbitration, at the consumer’s option.¹⁹ With respect to employees, Congress might decide that all employees earning less than a certain amount be permitted to arbitrate claims against their employer pertaining to unpaid wages or benefits, breach of contract, or discrimination. Congress would decide how to draw these lines based on its sense of the category of claims in which arbitration might be preferable from a societal perspective, but in which the company might nonetheless refuse to arbitrate such claims. As well, Congress would need to consider the constitutional constraints that will be examined below.

With respect to how the arbitration would look, I can imagine four possible variants of this basic proposal.

Option 1: Congress could establish and fund an arbitration process much as it establishes and funds administrative law judges in a variety of areas. In this option, the arbitrators would be government employees, paid a salary by the government, and statutes and rules would define the nature of the arbitration.²⁰ This sort of publicly-funded arbitration is used in a number of other countries.²¹ The advantage of Option 1 is that Congress would have maximum control over the arbitration and be able to ensure that the process is one that Congress approves. One downside of Option 1 is that Congress would then have to appropriate funds to administer and pay for these arbitrations.²² A

¹⁸ Such “consumer” claims might, for example, include claims brought against banks, credit card issuers, phone providers, and homebuilders. Potentially claims in the medical field, for example, by patients against doctors, hospitals, or HMOs, could be eligible for such a program as well.

¹⁹ Note that while the discussion of private mandatory arbitration typically focuses on claims brought by consumers against companies, in reality, much of the private mandatory arbitration taking place today is collections actions brought by companies against their customers. One credit card company, First USA, revealed that in the two years since it implemented its mandatory arbitration clause in early 1998, only four consumers had filed arbitration claims against the company. In contrast, First USA itself filed 51,622 arbitration claims against consumers in the same period. See Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum’s Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1. For a critique of the use of mandatory binding arbitration for collections purposes, see PUB. CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* (2007), available at www.citizen.org/documents/final_wcover.pdf.

²⁰ Such rules would presumably spell out matters including how arbitrators are selected, where the arbitration takes place, whether the arbitration is live or based only on paper evidence, what discovery is permitted, whether representation by attorneys is permitted, whether arbitrations are open to the public, whether arbitration decisions are published, and how arbitral awards might be vacated. The rules could potentially be drafted by an appropriate federal agency, rather than by Congress itself.

²¹ For example, Great Britain currently uses a system of industrial tribunals to resolve employment disputes. While not called “arbitration,” in essence this is the same sort of program discussed here, in that panels include non-lawyers and use less formal procedures than courts. See Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1430-34 (2004). Some commentators have also proposed that Britain add a voluntary “arbitration” scheme, where the arbitrators would be paid by the government. *Id.* at 1444-48.

²² It is unlikely that these expenses would be entirely offset by reductions in the funding needed for federal courts. First, as arbitrations would potentially reduce not only federal but also state court filings, offering federally-funded arbitrations might reduce state judicial costs

second downside of Option 1 is that it would be difficult either to specify a set of rules that would work for all disputes or to allow for enough flexibility to make such accommodations.

Option 2: Congress could design an arbitration process that companies would be required to offer to certain consumers, employees, or other “little guys.” In this variation, Congress would need to spell out, in some detail, various features of the arbitration.²³ An advantage of Option 2 is that Congress would not need to commit to funding the arbitration process. A second advantage is that while Congress would need to spell out certain mandatory features of the arbitration, it could leave other design aspects to the disputants. However, one disadvantage of Option 2, from disputants’ perspective, is that individuals and companies would be paying for the arbitration rather than receiving this service free of charge from the government. A second potential disadvantage is that as Congress would not be spelling out all the details of the process, companies might devise a process that would not be desirable to “little guys.”²⁴

Option 3: Rather than designing an arbitration process Congress could, instead, provide some basic constraints and allow companies to devise an arbitration scheme so long as it fell within constraints. This approach would be somewhat similar to the current adoption of “due process protocols” by a number of private providers.²⁵ Such protocols spell out certain fair features of arbitration but, outside those limits, allow companies to design the arbitration as they wish.²⁶ An advantage of Option 3 is that it would preserve maximum flexibility to companies that might therefore devise the most appropriate form of arbitration for the dispute at hand. But, as with Option 2, there is a risk that companies would try, within the limits, to design a process that would be either undesirable or unfair to the “little guy.”

Option 4: Under this approach Congress would not impose any constraints but would instead allow the company complete flexibility to design the proposed arbitration process. The company could then offer the process to the consumer/employee who could either accept or reject the process. However, while offering the advantage of minimal governmental intrusion and lower regulatory costs, this approach seems flawed in that a company that did not want to arbitrate a particular dispute could just provide an obviously skewed or costly process.

but not necessarily federal judicial costs. Second, if disputants view arbitration as cheaper and quicker than litigation, offering arbitration may allow some claims to be brought that otherwise would have been ignored or settled. This may be a good result, from a justice perspective, but still means that Congress might incur additional costs.

²³ Such features might include not only the features mentioned *supra* note 20, but also who would pay how much for the arbitration.

²⁴ For example, the company might devise a process that would be expensive. Although Congress could always craft legislation to restrict companies from imposing any particular unfair term, it may be that companies will always be one jump ahead of Congress in coming up with unfair terms.

²⁵ See generally Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004).

²⁶ *Id.* at 395-96.

III. POLICY IMPLICATIONS OF IMPOSING MANDATING ARBITRATION ON THE COMPANY

Why might a staunch opponent of mandatory binding arbitration potentially seek to impose binding arbitration of certain disputes on companies? Or, why might what is bad for the goose be good for the gander? And, if it is justifiable to impose arbitration on companies, why is it not equally justifiable to impose arbitration on “little guys”?

First, as the defenders of private mandatory binding arbitration have argued for years, I do recognize that American-style litigation is neither feasible nor desirable for all claims. At least as structured in the United States, litigation is often so expensive and time consuming that many potential claimants are foreclosed from seeking relief for alleged legal violations.²⁷ Defendants, as well, are harmed by a system that costs them substantial time and money, even when they are ultimately found not liable.

Second, I also agree with defenders of traditional binding arbitration that arbitration can *potentially* be a better venue, from either or both disputants’ perspective, for resolving certain kinds of claims. One particularly appealing aspect of arbitration is that its procedures can be custom-tailored to the dispute at hand.²⁸ Such customization can potentially be beneficial to the “little guy,” as well as to the larger company.²⁹ Unfortunately, empirical evidence on how mandatory private arbitration works out in practice is quite scant and is likely to continue to be limited.³⁰ For business reasons, to protect disputant confidentiality, or perhaps even to cover up questionable practices, arbitration providers have for the most part not been willing to open their files to researchers. Moreover, those few studies that have been done leave many open questions.³¹ Yet,

²⁷ See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2005). As Samuel Estreicher has explained, our “cadillac” version of litigation, with opportunities for substantial discovery, in-person hearings, and appeals, may make sense for large dollar disputes, but not for smaller value disagreements. Estreicher, *supra* note 6, at 563-64. Of course, disputes that don’t involve large sums of money can also be important.

²⁸ For example, evidentiary rules can be loosened or not; discovery can be extensive or not; and hearings can be in-person or based solely on a paper record. While it has recently been suggested that litigation, too, can be customized, see Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007), it is easier and more accepted to customize arbitration than litigation.

²⁹ For example, consumers and employees may benefit from having their disputes heard by a neutral with particular subject matter expertise, by a neutral, who focuses more on fairness than just law, in a process that can offer more privacy than the public court, and in a process that can offer increased speed and decreased cost.

³⁰ For an example of an article summarizing some of the empirical studies in the employment context, see Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105 (2003).

³¹ For example, studies of “win rates” often do not discuss how much is won. Moreover, studies of final results in arbitration do not reflect critically important prior events such as the extent to which private mandatory arbitration discourages “little guys” from bringing claims and the impact private mandatory arbitration has upon settlement and summary judgment. For a discussion of empirical studies and my frustrations therewith, see Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1658-61. See also David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A*

I am certainly ready to believe that in particular situations arbitration can be better for consumers, employees, and other “little guys” than litigation. We know, at least anecdotally, that consumers and employees do sometimes elect to proceed voluntarily through arbitration.

Third, I also agree with some commentators’ point that although arbitration may sometimes be better for both parties, if analyzed pre-dispute, that post dispute one or both parties may elect litigation. This could happen because arbitration may be attractive as a general matter but not for a particular dispute that may arise. Also, it may be true that arbitration is actually better for both disputants, post-dispute, but that one or both nonetheless fails to see such benefits and thus selects litigation.³²

Fourth, I also recognize that one must separately analyze whether a particular dispute resolution process is better than alternatives for the disputants, and whether it is better than alternatives for society-at-large. Thus, even if two fully informed disputants might, in a given dispute, prefer to litigate, it is conceivable that an arbitral or other resolution might better serve the needs of the society-at-large.³³

Lest any may think I have entirely lost my bearings, of course I am not claiming that binding arbitration is *necessarily* better for “little guys” than is litigation. My own belief remains that denying “little guys” their litigation option and forcing them into arbitration, designed by the company, can often be harmful to the “little guys.” When the company has the opportunity to design arbitration in any way it wants (subject only to occasional expensive court challenge) the company has the incentive to skew the arbitration process in its favor.³⁴

Nor do I believe that any potential benefits to society justify companies in imposing mandatory arbitration on their customers, employees, or other “little guys.” Private companies are not the appropriate entity to determine whether individual “little guys” should be disadvantaged, purportedly in the interest of the greater good. Further, in many instances the “little guys” may have constitutional or statutory rights to litigate that should not be eliminated through privately imposed arbitration.

New Path for Empirical Research, 57 STAN. L. REV. 1557, 1564-66 (2005) (recognizing difficulties in empirically comparing arbitration and litigation).

³² That is, as economists would put it, there can be an information failure. See, e.g., Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83 (2005) (presenting “barriers” to resolution that may explain why disputants elect traditional litigation over mediation or arbitration, even when such alternatives to litigation would be more rational choice). Also, to the extent that disputants are represented by attorneys, it is possible that a particular form of dispute resolution (litigation) might be better for the attorney, but not the client, and, thus, selected against the client’s best interest. This would be an example of an “agency” problem. See KENNETH ARROW ET AL., BARRIERS TO CONFLICT RESOLUTION (1995); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69-91 (2000).

³³ See generally Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2694-95 (1995).

³⁴ Such skewing may be used to prevent or deter “little guys” from filing any claims at all, and also to decrease their odds of prevailing, or winning much, in the event that they do bring claims.

Yet, I find myself wondering whether notwithstanding these concerns mandatory arbitration might be fair and appropriate if imposed by the government on the company. Why the distinction between private and governmental imposition of mandatory arbitration? First, I am far less worried that companies will be taken advantage of, through governmental mandatory arbitration, than that “little guys” might be disadvantaged in private mandatory arbitration.³⁵ If arbitration is governmentally imposed, the government will presumably also design the arbitration itself, adopt rules on the design of the arbitration, or provide the company with the opportunity to design the process. Under any of these variations, the company will receive far greater protections from a potentially unfair process than “little guys” currently receive when the process is designed and run by the companies. Second, from a democratic standpoint I am more comfortable with dispute resolution procedures imposed by an elected Congress than by a single powerful company on its far less powerful customers or employees.³⁶ Presumably Congress would only adopt a governmental mandatory arbitration program if it truly thought such a program would be fair and just for the disputants and for society as a whole. We cannot be sure that privately imposed mandatory arbitration would be fair and just for all.

If Congress is to impose arbitration, why not impose it even-handedly, rather than provide “little guys” with an opt out? For me, the opt out is a critical feature of the plan because it ensures that any arbitration scheme that is created will be fair for the “little guys.” If Congress or companies design an unfair program, the “little guys” will consistently opt out of such a program. Thus, even if companies are given a fair bit of discretion to design the arbitration program, the “free market” of the opt out will limit companies’ ability to design a program that benefits themselves at “little guys’” expense. Companies do not need such an opt out because they will likely play a greater role in designing the program³⁷ and because in general they are more knowledgeable and sophisticated and more capable of representing their interests in any dispute resolution process.

IV. CONSTITUTIONALITY OF IMPOSING MANDATORY ARBITRATION ON COMPANIES

Assuming for the moment that imposing mandatory arbitration on companies is desirable, is it constitutional? Some may assume not, but as one who has fought an uphill battle to convince others that privately imposed arbitration is unconstitutional, I am not sure the answer is so clear. Below I will discuss

³⁵ Whereas in private arbitration companies can design arbitration to give themselves an advantage over “little guys,” governmental mandatory arbitration would either be designed by the government or designed by the companies themselves. Even assuming the process were to be designed by the government, rather than the company, I am confident that companies have sufficient legislative clout to ensure that the process would not be rigged against them.

³⁶ Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1673-75.

³⁷ Under Option 1, *see supra* text accompanying notes 20-22, this point would not apply, as Congress would do all the design work. However, I believe that it is not likely Congress would take on the burden and expense of fully designing and funding an arbitration process.

constitutional attacks that might be made under Article III,³⁸ the Seventh Amendment,³⁹ and the Due Process Clause of the U.S. Constitution⁴⁰ if Congress sought to impose mandatory arbitration on companies.⁴¹ I do not claim that these attacks are the only viable arguments, but they do seem to me the most plausible. Potentially challenges might also be made under the Equal Protection Clause⁴² or under the Appointments Clause, but such challenges will not be discussed in depth in this Article.⁴³

A. *Article III*

If Congress were to impose mandatory arbitration on companies, it is likely some would contend that such a statute deprived them of the right to bring or defend such claims in federal court, in front of an Article III judge. While the question of the extent to which Congress can mandate non-judicial fora has arisen repeatedly, in our heavily administrative state, the line of cases defining the rules in this area remains muddled.⁴⁴ In general the Supreme

³⁸ See *infra* Part IV.A.

³⁹ See *infra* Part IV.B.

⁴⁰ See *infra* Part IV.C.

⁴¹ I will not attempt to address what state constitutional provisions might impede states from imposing mandatory arbitration on companies, though presumably the analysis is fairly similar. For a now somewhat outdated discussion of whether states constitutionally may impose binding arbitration to deal with medical malpractice claims, see Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 796-99 (1977) (concluding that some state-imposed mandatory arbitration schemes in the medical malpractice arena have survived and may in the future survive constitutional attack).

⁴² If companies were to contend that mandating companies but not individuals to participate in binding arbitration violates Equal Protection, I believe a court would reject the challenge on the ground that distinguishing between companies and “little guys” passes muster under a rational basis analysis. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

⁴³ The Appointments Clause, U.S. CONST. art. II, § 2, provides that “Officers of the United States” must be appointed by the President “with Advice and Consent of the Senate,” but that “inferior Officers” may be appointed by agency heads. It has been argued in several cases that NAFTA arbitration violates the “appointments clause,” but to date no reported decision has made a ruling on the merits on this issue. See, e.g., *Coalition for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (per curiam) (dismissing complaint for lack of jurisdiction). I doubt the Court would find arbitrators required advice and consent of the Senate, particularly if they were appointed on a short-term rather than a continuing basis. See 31 Op. Off. Legal Counsel, slip op. at 1, 34 (Apr. 16, 2007), available at <http://www.usdoj.gov/olc/2007/appointmentsclausev10.pdf> (stating that only positions which are both “invested by legal authority with a portion of the sovereign powers of the federal Government” and “continuing” are subject to the appointments clause, and opining that “the federal Government’s participation in binding arbitration ordinarily does not raise an Appointments Clause problem”).

⁴⁴ See e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916 (1988); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 647 (2004) (“Scholars have searched, with mixed success, for an organizing and limiting principle in the

Court has proved willing to permit uses of “legislative courts,”⁴⁵ government agencies, and “adjuncts”⁴⁶ in lieu of Article III courts, in some circumstances, for example because “public rights” are at stake,⁴⁷ because there is sufficient review by Article III courts,⁴⁸ or based on historical exceptions.⁴⁹

Clearly, statutorily imposed arbitration can be consistent with Article III. The Supreme Court so held in *Thomas v. Union Carbide Agricultural Products Co.*,⁵⁰ in 1985. In that case, a set of companies challenged a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)⁵¹ that required pesticide manufacturers to arbitrate disputes regarding who should pay for certain research.⁵² They contended that “Article III bars Congress from requiring arbitration of disputes among registrants concerning compensation under FIFRA without also affording substantial review by tenured judges of the arbitrator’s decisions.”⁵³ In upholding the constitutional validity of the FIFRA mandatory arbitration scheme, the Court stated:

somewhat muddled jurisprudence that governs the relationship between Article III courts and Article I tribunals.”); Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1043 (1999) (“[T]he Court’s Article III jurisprudence is incomplete, inconsistent, and, at times, nearly incomprehensible.”).

⁴⁵ E.g., Fallon, *supra* note 44, at 921-22 (discussing the Supreme Court’s approval of uses of territorial courts, courts martial, court of claims, federal tax court, customs court, etc.); Sward, *supra* note 44, at 1040. Note that Professor Sward uses the term “legislative court” much more broadly than does Professor Fallon, and includes administrative agencies and adjuncts in her definition of legislative courts. *Id.* at 1043.

⁴⁶ Fallon, *supra* note 44, at 923-25, explains that “adjuncts” are entities, including administrative agencies, that make certain determinations but leave the essential attributes of the decision with the courts.

⁴⁷ Professor Fallon states that the first justification, historically, for allowing disputes to be resolved administratively was the public rights doctrine. He notes that in its first session the first Congress provided that certain disputes, including those involving veterans’ benefits and custom duties, were sent to executive officers in the Treasury Department. *Id.* at 919. The rationale, as Professor Fallon admits “[c]rudely stated,” was that “some disputes about the proper application of law to fact—mostly, although not invariably, associated with the doctrine of sovereign immunity—do not require judicial resolution . . .” *Id.*

⁴⁸ See, e.g., *Crowell v. Benson*, 285 U.S. 22, 51-52 (1932) (permitting federal administrative agency to make factual determinations and issue an initial legal decision, so long as final decision remained in a federal court’s hands); see also Sward, *supra* note 44, at 1044-45 (providing examples of adjuncts, such as magistrate judges, who operate under supervision of federal district court judges).

⁴⁹ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-76 (1982) (plurality opinion) (identifying a series of “historical exceptions” to literal interpretations of Article III, including territorial courts, military tribunals, and non-article III adjudication of public rights cases).

⁵⁰ *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

⁵¹ Federal Insecticide, Fungicide, and Rodenticide Act, ch. 125, 61 Stat. 163 (1947) (current version at 7 U.S.C. §§ 136-136y (2000)).

⁵² According to the pesticide registration portion of FIFRA, manufacturers were required to submit research data to the Environmental Protection Agency regarding the nature of their product. The Act included provisions requiring data sharing among manufacturers and also mandated that later applicants compensate earlier submitters for a portion of their costs. If the compensation could not be negotiated, the statute provided that such disputes be resolved through binding arbitration. The arbitrators’ decisions were to be final and conclusive and could be reviewed only in a narrow set of circumstances including allegations of fraud, misrepresentation, or other misconduct. *Thomas*, 473 U.S. at 571-74.

⁵³ *Id.* at 582.

[We have] long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts. Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.⁵⁴

The *Thomas* Court's explanation for why the FIFRA arbitration scheme passed muster is rather complex. The Court explicitly rejected using any sort of bright-line test, such as between public and private rights, instead asserting "[t]he enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."⁵⁵ Describing its own holding, the *Thomas* Court, approving the FIFRA mandatory arbitration, stated:

Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.⁵⁶

In a subsequent decision, *Commodity Futures Trading Commission v. Schor*,⁵⁷ the Court made clear that its reasoning in *Thomas* was no fluke. The *Schor* Court held that Article III was not violated by providing a government agency, the Commodity Futures Trading Commission ("CFTC"), jurisdiction to decide a state law cause of action brought by a commodities broker as a counterclaim to the customer's fraud claim.⁵⁸ Once again the Court espoused a balancing methodology.⁵⁹ In short, as one commentator put it, "congressional

⁵⁴ *Id.* at 583 (citations omitted) (citing cases approving decision making by government agencies, administrators, and non-Article III courts).

⁵⁵ *Id.* at 587 (referring to *Crowell v. Benson*, 285 U.S. 22 (1932)); *see also id.* at 583-87 (rejecting "absolutist" constructions of Article III and asserting that the bright-line test espoused by some in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), did not command a majority of the court). The *Thomas* Court construed *Northern Pipeline* narrowly, stating:

The Court's holding in that case establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Id. at 584. *Crowell*, cited favorably by *Thomas*, is a case in which the Court upheld agency adjudication of federal workers' compensation claims under the Longshoremen's and Harbor Workers' Compensation Act, even though the disputes were between two private parties. The Court emphasized that the agency would have to enforce its orders in an Article III court where there would be de novo review. *Crowell*, 285 U.S. 22.

⁵⁶ *Thomas*, 473 U.S. at 593-94.

⁵⁷ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

⁵⁸ One aspect of *Schor* may be distinguishable in future cases. In considering whether the grant of agency jurisdiction violated a disputant's personal rights, in contrast to more systemic concerns, Justice O'Connor emphasized that Mr. Schor "indisputably waived any right he may have possessed" to have the claim heard by an Article III court. *Id.* at 849. To the extent that companies challenging governmental arbitration could not be found to have waived their rights, they might succeed where Mr. Schor failed.

⁵⁹ In particular, the Court enunciated that Article III decisions should take into account a series of factors including the following:

interests in providing for administrative adjudication must be weighed against 'the purposes underlying the requirements of Article III.'"⁶⁰

In light of *Thomas* and *Schor*, and given the great similarities between governmental mandatory arbitration and agency decisions, it seems that Article III will not pose an insurmountable burden to legislatively mandating use of binding arbitration for certain disputes. Of course there are limits. Congress surely could not legitimately require that *all* private disputes, such as torts and breaches of contract, be resolved through binding arbitration rather than in court.⁶¹ However, if Congress were to require that certain statutory consumer protection claims be resolved through binding arbitration rather than in court, I suspect that such a statute could pass muster. Or, if Congress were to specify that particular statutory employment claims, such as those regarding fair labor standards or discrimination, be resolved through arbitration, I don't think Article III would stand in the way. In reviewing a challenge to such statutes, the Court would likely be persuaded that such statutes imposed a public regulatory scheme and that the enforcement scheme devised was appropriate to resolve such claims. As Justice O'Connor stated on behalf of the majority in *Thomas*, the use of innovative alternative dispute resolution mechanisms such as arbitration and negotiation can be very beneficial.⁶²

Moreover, even if some members of the Court might balk at resolving such statutory claims through arbitration, rather than in court, they might be convinced to accept the use of arbitration if at least some form of appeal to a court from the arbitration were available. A number of the Court's decisions have accepted the use of non-Article III courts so long as determinations might be reviewed in court.⁶³ Based on the Court's jurisprudence it seems like any

the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, . . . the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. at 851.

⁶⁰ Fallon, *supra* note 44, at 931 (quoting *Schor*, 478 U.S. at 847). Waiver analysis also played a substantial role in the *Schor* decision, as the Court emphasized that any individual interests the customer had in retaining the right to an Article III forum had been waived. *Schor*, 478 U.S. at 848-50.

⁶¹ Such decisions as *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73-74 (1982), make clear that the Court remains highly protective of non-statutory private claims. Indeed, in *Schor* the Court implied it would find an Article III violation if "Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities," even if "the parties had the election to proceed in their forum of choice . . ." *Schor*, 478 U.S. at 855.

⁶² *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593-94 (1985).

⁶³ See, e.g., *Crowell v. Benson*, 285 U.S. 22, 64 (1932) (emphasizing availability of judicial review as critical to constitutionality of agency decisions). *But see N. Pipeline*, 458 U.S. at 86-87 & n.39 (finding grant of jurisdiction to bankruptcy judges violated Article III, even though bankruptcy judges' decisions could be appealed, and stating that "[o]ur precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level"). See also Pfander, *supra* note 44, at 647-48 (discussing appellate review justification for use of non-Article III courts, but stating that "the appellate review theory does not fit

necessary appellate review would not need to be very thorough to pass muster under Article III. In *Thomas*, although the Court noted the availability of appellate review,⁶⁴ the review that was available was extremely limited and only permitted arbitrators' decisions to be overturned for fraud, misrepresentation, or other misconduct by a party or arbitrator.⁶⁵ At minimum, Congress could easily make such limited review a part of any legislatively imposed arbitration.

B. Seventh Amendment Jury Trial Right

The Seventh Amendment to the U.S. Constitution guarantees that disputants in certain types of situations cannot be denied their right to a civil jury trial, absent their consent.⁶⁶ This guarantee limits the government's right to mandate binding arbitration statutorily but does not entirely foreclose that option.

Because the Seventh Amendment only affords a jury right to claims brought in federal court, at "common law," for amounts in excess of \$20,⁶⁷ at minimum it is clear that federal legislation would not violate the Seventh Amendment if it prescribed arbitration only for claims not brought "at common law."⁶⁸ Over the years the Supreme Court has wrestled to define which claims are and are not "at common law" such that the jury trial right must be preserved. It has explained that the definition has both historical and functional dimensions, but that the latter are more important.⁶⁹ Specifically, when a statute provides remedies such as punitive or compensatory damages, that were typically available at common law, disputants are entitled to a jury trial.⁷⁰ Thus, at minimum Congress could mandate that equitable claims be resolved through arbitration without impinging on the Seventh Amendment.

particularly well with many of the accepted features of the Court's Article I and Article III jurisprudence").

⁶⁴ *Thomas*, 473 U.S. at 584.

⁶⁵ *Id.* at 574 n.1.

⁶⁶ It states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

⁶⁷ *Id.*

⁶⁸ It is also true that the Seventh Amendment would not prevent Congress from mandating binding arbitration for claims that otherwise would have been brought in state court, or for claims brought for \$20 or less. However, as the possibility of supplemental jurisdiction makes it virtually impossible to predict where claims will be brought, and as it seems equally impossible to predict which claims will have little or no dollar amount, these limits will not help much with the crafting of federally mandated arbitration.

⁶⁹ *See, e.g.,* *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990). Note that even though an entire claim is subject to jury trial, the Court has also held that portions of the claim may be appropriate for resolution exclusively by a court. *E.g., Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377, 384 (1996) (holding that whereas patent infringement actions must be tried to a jury, the construction of a patent is "a question of law, to be determined by the court").

⁷⁰ *See, e.g., Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97-98 (1991).

A relatively recent line of precedent opens up a much more promising way to impose binding arbitration statutorily without violating the Seventh Amendment.⁷¹ In 1977, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,⁷² the Court began to blend its analyses under Article III and the Seventh Amendment, holding that by sending certain matters to non-Article III courts, Congress could also elude the strictures of the Seventh Amendment.⁷³ The *Atlas Roofing* Court found that requiring certain OSHA claims to be heard by an administrative agency did not unconstitutionally deprive the company of its right to a jury trial because the rights at issue were “public” rather than “private.”⁷⁴ Clearly, much will turn on the definitions of “public” and “private” rights. However, as discussed below, it is conceivable that the Court’s use of non-Article III fora to loosen the Seventh Amendment restriction may even reach into areas beyond “public rights.” While the scope of this new way around the Seventh Amendment is both confusing and unclear,⁷⁵ at minimum the viability of mandatory statutory arbitration has become more plausible.

Atlas Roofing itself defined the term “public rights” in a fairly narrow way that might not offer Congress much opportunity to mandate arbitration without offending the Seventh Amendment.⁷⁶ However, subsequent decisions have

⁷¹ Note that I am not endorsing the Court’s recent blending of Article III and Seventh Amendment analysis, but only attempting to discern how this jurisprudence would apply to mandatory statutory arbitration.

⁷² *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442 (1977).

⁷³ A number of respected critics have attacked the Court’s blending of the Article III and Seventh Amendment analyses. See, e.g., Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408-09 (1995) (calling the Court’s approach “indefensible as a matter of Seventh Amendment construction,” “inconsistent with the principles of judicial review embodied in *Marbury v. Madison*,” and “in violation of the fundamental precepts of constitutional democracy”); Sward, *supra* note 44, at 1043 (urging that while the Court’s blended analysis is flawed both because the Article III jurisprudence itself is “nearly incomprehensible” and because the Court has failed adequately to consider the separate history, policy, and language of the Seventh Amendment, it may nonetheless be pragmatic to retain the status quo).

⁷⁴ *Atlas Roofing*, 430 U.S. at 450.

⁷⁵ See, e.g., Redish & La Fave, *supra* note 73, at 409-10 (“Purely as a practical matter, it is clear that when the dust settles, in most cases Congress possesses ultimate authority to deny the jury trial right by transferring adjudication to a non-Article III forum. The Court, however, has achieved this end by resorting to convoluted, unpredictable, and virtually Byzantine doctrinal contortions that will require, in future cases, a great deal of judicial time and effort in order to resolve the Seventh Amendment issue.”); Sward, *supra* note 44, at 1089-90; see also Redish & La Fave, *supra* note 73, at 428-29 (“[T]he public rights doctrine, at least when applied in the Seventh Amendment context, is fundamentally incoherent.”).

⁷⁶ *Atlas Roofing* stated:

At least in cases in which “public rights” are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Atlas Roofing, 430 U.S. at 450. The Court relied on a similar narrow definition in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (allowing Congress to vest federal adjudicatory power in non-Article III bodies for claims of “public right,” specifically “matters arising between the Government and persons subject to its

apparently broadened the term, as we have already seen in the Article III portion of this Article.⁷⁷ Specifically, *Thomas v. Union Carbide Agricultural Products Co.*,⁷⁸ in text quoted earlier, rejected an Article III attack on required FIFRA arbitration of a dispute between two companies, stating that Congress may use its Article I powers to create a “seemingly ‘private’ right” that is nonetheless so closely intertwined with a “public regulatory scheme” as to permit resolution by an administrative agency with limited judicial involvement.⁷⁹ Even more powerfully, in *Commodity Futures Trading Commission v. Schor*⁸⁰ the Court, in permitting mandatory agency adjudication of a breach of contract claim brought by a broker against its client, explained that the dividing line between claims of public and private right is largely “pragmatic.”⁸¹

While *Granfinanciera, S.A. v. Nordberg*⁸² did find a Seventh Amendment violation, holding that where a bankruptcy trustee sued a party in bankruptcy court with respect to a “private right” the respondent was entitled to a jury trial,⁸³ even that decision draws the public/private distinction in a way that may leave Congress some broad powers to impose mandatory arbitration.⁸⁴ Specifically, rejecting the narrow *Atlas Roofing* definition of “public rights” as limited only to claims brought by the government,⁸⁵ *Granfinanciera*, in multiple parts of the opinion, stated that “public rights” claims are also those where the federal government, acting for a valid legislative purpose, has created a seemingly private right that is closely integrated into a public regulatory scheme.⁸⁶

authority in connection with the performance of the constitutional functions of the executive or legislative departments’” (quoting *Cromwell v. Benson*, 285 U.S. 22, 50 (1932)).

⁷⁷ See *supra* notes 55-60 and accompanying text.

⁷⁸ *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

⁷⁹ *Id.* at 593-94.

⁸⁰ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

⁸¹ “[T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers” is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication.

Id. at 853-54 (quoting *Thomas*, 473 U.S. at 589 (internal citation omitted)). Commentator Ellen Sward tries to make sense of this expansion of the public rights doctrine, creating a new category of “quasi-public” rights whereby “Congress creates a new regulatory right but allows private parties to enforce that right against other private parties” Sward, *supra* note 44, at 1077.

⁸² *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

⁸³ *Id.* at 51-52. The Court found that a person who had not submitted a claim against a bankruptcy estate had a Seventh Amendment right to a jury trial when sued by the bankruptcy trustee to recover an allegedly fraudulent conveyance. *Id.* at 36.

⁸⁴ For a similar analysis see *Redish & La Fave*, *supra* note 73, at 426 (“It is . . . by no means clear, on the basis of *Granfinanciera*, that ultimately Congress is truly restricted in its power to remove a jury trial from a non-Article III proceeding, even in the case of a private right adjudication.”).

⁸⁵ *Granfinanciera*, 492 U.S. at 53 (“Our case law makes plain, however, that the class of ‘public rights’ whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*’s discussion suggests.”).

⁸⁶ *Id.* at 54, 55 n.10. The Court goes on to find the fraudulent conveyance claim to be “private” in this sense, explaining:

Moreover, at one point the *Granfinanciera* opinion can be read to imply that even if Congress were to impinge on a traditionally *private* right, such interference with Seventh Amendment rights might sometimes be acceptable for pragmatic reasons.⁸⁷ Writing for the Court, Justice Brennan explained that the Court owes Congress deference in circumstances in which it has given careful consideration to the constitutionality of a legislative provision.⁸⁸ The Court explained that sometimes jury trials may be problematic, in that they seriously interfere with a chosen statutory scheme.⁸⁹

Given this body of case law, it seems clear that Congress may mandate the use of binding arbitration in some circumstances without violating the Seventh Amendment. Indeed, in 1980 Congress passed the Multiemployer Pension Plan Amendments Act of 1980 ("MPAA"),⁹⁰ which required employers to arbitrate disputes over liability for withdrawal from multiemployer pension plans.⁹¹ Numerous federal appellate courts have held, citing *Atlas Roofing*, that the MPAA does not violate the Seventh Amendment because "Congress may

The decisive point is that in neither the 1978 Act nor the 1984 Amendments did Congress "creat[e] a new cause of action, and remedies therefor, unknown to the common law" . . . Congress cannot eliminate a party's Seventh Amendment right . . . merely by relabeling the cause of action . . . and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Id. at 60-61 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977)).

⁸⁷ Other commentators have reached this same conclusion, while also noting that the *Granfinanciera* analysis is confusing. See Redish & La Fave, *supra* note 73, at 427 ("Justice Brennan's words create a reasonable inference that *had* Congress made careful consideration of the Seventh Amendment right before directing that jury trials not be used in the adjudication of fraudulent conveyance actions, or *had* the Court been convinced that jury trials were, in fact, 'incompatible' with the legislative scheme, Congress's decision to abandon the jury trial right would have been constitutionally acceptable."); see also Sward, *supra* note 44, at 1095 n.298, 1096 (observing that the *Granfinanciera* Court "was never very clear about the reasons for its decision" and that *Granfinanciera* "muddies both the Article III and the Seventh Amendment waters to a considerable degree").

⁸⁸ *Granfinanciera*, 492 U.S. at 61.

⁸⁹ *Id.* However in *Granfinanciera*, finding both that Congress had not focused on the possible unconstitutionality of the bankruptcy provision and that permitting a jury trial would not be incompatible with the chosen bankruptcy process, the Court found further justification (beyond the private rights analysis) for mandating use of a jury. *Id.* at 61-62.

⁹⁰ Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208.

⁹¹ Under the Act, if an employer withdrew from multiemployer pension plans, the plan would determine how much if any money that employer owed to fund its portion of "unfunded vested benefits." 29 U.S.C. § 1381(a)-(b) (1982) (imposing liability); § 1393(c) (defining "unfunded vested benefits"). If the employer was dissatisfied with the plan's ruling it could arbitrate in front of a panel that would reverse the plan's ruling only upon a finding that the plan's ruling was unreasonable or erroneous by a preponderance of the evidence. § 1401(a)(3)(A). The arbitration ruling itself could be challenged in federal court, by either party, under a quite limited standard of review. § 1401(c). For general discussion of the Acts and challenges to the arbitration provision, see John R. Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISP. RESOL. 1, 24-43. Professor Allison discusses courts' appellate review of MPAA arbitral decisions at pages 28-29.

assign to a nonjudicial forum the authority to initially adjudicate claims derived from 'statutory public rights' which it has created."⁹²

If the MPAA passes Seventh Amendment muster, in what other contexts might Congress legitimately mandate binding arbitration?⁹³ Might Congress require that certain consumer protection claims, such as those brought under the Magnuson-Moss Act,⁹⁴ be resolved through an administrative scheme of binding arbitration rather than in court? While companies would no doubt argue that such claims were private in nature, and closely analogous to breach of contract or fraud claims brought at common law, I think it is conceivable that courts would find Congress had created a new statutory right with its own statutory enforcement scheme.⁹⁵

Or, might Congress revise civil rights legislation to provide that all claims for employment discrimination must be heard by arbitrators, rather than in court?⁹⁶ In this author's opinion at least some courts would find that because claims for employment discrimination did not exist at common law, and because Congress had set up an entirely non-court enforcement process, the Seventh Amendment argument would fail.⁹⁷ Defenders of such a statute would

⁹² Peick v. Pension Benefit Guar. Corp., 724 F.2d 1247, 1277 (7th Cir. 1983); see also Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc., 749 F.2d 1396, 1404 (9th Cir. 1984); Wash. Star Co. v. Int'l Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1511 (D.C. Cir. 1984); Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843, 855 (2d Cir. 1984).

⁹³ One student commentator has argued that the *Atlas Roofing* Seventh Amendment argument can even be used to justify companies' contractual imposition of mandatory arbitration. Andrew M. Kepper, Note, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine to Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345 (2006). He urges that contractually imposed arbitration clauses are "closely integrated into a federal regulatory scheme,"—the FAA—and thus justified despite the Seventh Amendment under an *Atlas Roofing* analysis. *Id.* at 1358-59. While I am not convinced that the FAA qualifies as a federal regulatory scheme, I do believe that elements of Kepper's analysis support the arguments spelled out here.

⁹⁴ 15 U.S.C. §§ 2301-2312 (2000).

⁹⁵ The Magnuson-Moss Act is mentioned by name only because it is a well-known piece of consumer legislation. This argument could potentially be applied to any existing or future piece of consumer-protection legislation in which Congress chose to allow consumers to bring claims through an arbitration process, rather than in court.

⁹⁶ For many years prior to passage of the Civil Rights Act of 1990, Title VII only allowed for a bench trial, and not a jury trial. The Supreme Court never ruled on the question of whether, under the Seventh Amendment, Title VII plaintiffs must be afforded a jury trial. See *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (raising but not resolving question of whether the Seventh Amendment mandated jury trial for claims brought under Title VII). However, even were it unconstitutional to deprive litigants in court of their right to jury trial, courts might plausibly find that an entirely non-court enforcement mechanism, such as mandatory arbitration, would justify elimination of the jury trial. For a parallel analysis see *Textile Workers*, 725 F.2d at 855 (contrasting MPAA, in which Congress established a detailed non-court procedure for resolving pension liability, to the Civil Rights Act of 1968, which provided housing discrimination claims should be brought in court).

⁹⁷ Persons seeking a jury trial under such a hypothetical federal statute would no doubt cite *Curtis*, 415 U.S. 189, in which the Court held that the Seventh Amendment mandated a jury trial for federal court private damage suits alleging housing discrimination. However, that decision might be distinguished in many ways, including that the new statute would have created an entirely non-court enforcement mechanism.

likely cite *NLRB v. Jones & Laughlin Steel Corp.*,⁹⁸ in which the Court approved use of an administrative non-jury process to resolve union members' unfair labor practice claims.⁹⁹ In deciding *Curtis v. Loether*,¹⁰⁰ in which it mandated use of a jury trial to resolve damages claims brought in court for acts of housing discrimination, the Court distinguished *NLRB v. Jones & Laughlin Steel*. It explained: "*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme."¹⁰¹ Because, in my hypotheticals, Congress would be setting up a new enforcement procedure, outside the courts, I believe there is a good likelihood that courts would find such governmental mandatory arbitration permissible under the Seventh Amendment.

C. Due Process

In order to prevail on a Due Process argument, companies would need to show that the state had deprived them of "life, liberty, or property, without due process of law."¹⁰² With respect to private mandatory arbitration, such an argument has typically floundered on the "state action" requirement. Despite the efforts of this author and others,¹⁰³ courts have typically found that no state action exists.¹⁰⁴ Here however, since the arbitration I discuss in this Article would be statutorily imposed, it seems clear that state action would exist.

Assuming that state action exists, one must also ask whether the imposition of arbitration as a substitute for litigation would potentially infringe on a protected interest in life, liberty, or property. Given that the Court, in *Logan v. Zimmerman Brush Co.*,¹⁰⁵ has stated that "a cause of action is a species of

⁹⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁹⁹ In rejecting the Seventh Amendment attack, the Court also stated:

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Id. at 48-49.

¹⁰⁰ *Curtis*, 415 U.S. 189.

¹⁰¹ *Id.* at 194 (footnote omitted).

¹⁰² U.S. CONST. amends. V & XIV, § 1. If the legislation mandating arbitration was federal, the relevant Due Process Clause would be that contained in the Fifth Amendment, and, if the legislation mandating arbitration was contained in a state statute, the court would properly look to the Fourteenth Amendment. Both clauses prohibit the taking of life, liberty, or property without due process of law.

¹⁰³ See, e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 631-41 (1997) (arguing that privately imposed arbitration is sufficiently entangled with public courts to give rise to state action); Sternlight, *Rethinking*, *supra* note 4, at 40-47 (arguing that privately imposed arbitration may give rise to state action, particularly where courts employ a jurisprudence that favors arbitration over litigation). But see Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 2-3 (arguing that privately imposed mandatory arbitration does not give rise to state action).

¹⁰⁴ See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200-03 (9th Cir. 1998).

¹⁰⁵ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that court's dismissal of complainant's employment discrimination complaint as untimely violated the Due Process

property protected by the Fourteenth Amendment's Due Process Clause,"¹⁰⁶ the only real question seems to be whether the particular form of binding arbitration that is imposed is sufficient to protect the property right disputants hold in their cause of action.¹⁰⁷ That is, "what process is due"?¹⁰⁸ Does the mandated arbitration provide sufficient process to comport with the Constitution?

The Supreme Court has repeatedly held that Due Process is a flexible concept,¹⁰⁹ and that the Due Process Clause does not mandate a particular or even an adversarial process. For example, in *Walters v. National Association of Radiation Survivors*,¹¹⁰ the Court examined a statutorily created administrative process that applied to veterans seeking benefits for a service-related disability. The veterans argued that they needed attorney representation to have a decent shot at retaining or obtaining benefits, and that the antiquated \$10 restriction on total payments to claimant attorneys therefore deprived the veterans of the rights to Due Process.¹¹¹ However, the Court rejected the claim, reasoning that the government had deliberately established an informal non-adversarial process for submitting disability claims and that such a process was sufficient to pass constitutional muster.¹¹² Indeed, the Court opined that allowing veterans more access to attorney representation might ultimately harm veterans' interests:

It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply

Clause, where complainant had met deadlines and untimeliness of hearing was attributable to actions of government agency).

¹⁰⁶ *Id.* at 428.

¹⁰⁷ The Court often refers to the "familiar two-part inquiry" to determine whether a person was deprived of a protected right and, if so, what process was due. *E.g., id.* at 428.

¹⁰⁸ *Id.* at 433.

¹⁰⁹ *E.g., Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985) ("Our decisions establish that 'due process' is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur."); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))). See generally Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

¹¹⁰ *Walters*, 473 U.S. 305.

¹¹¹ *Id.* at 308.

¹¹² The Court stated:

As might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country. It is commenced by the submission of a claim form to the local veterans agency . . . Upon application a claim generally is first reviewed by a three-person "rating board" of the VA regional office—consisting of a medical specialist, a legal specialist, and an "occupational specialist." . . . Proceedings in front of the rating board "are ex parte in nature"; no Government official appears in opposition. . . . The board is required by regulation "to assist a claimant in developing the facts pertinent to his claim" . . .

Id. at 309-10 (citation omitted).

because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.¹¹³

The well-known case of *Mathews v. Eldridge*¹¹⁴ provides further support for the idea that the Due Process Clause does not mandate particular court-like procedures. In that decision, reviewing the termination of governmental disability benefits, the Court held that Due Process did not require a pre-termination hearing. In so holding the Court explained that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.”¹¹⁵

Similarly, while the Court clearly has a great deal of faith in the procedural benefits of adjudicative systems,¹¹⁶ in many situations it has found that disputes can be heard by persons other than judges¹¹⁷ and that not all typical courtroom protections must be afforded in all contexts. For example, the Court has accepted as consistent with Due Process an inquiry by a staff physician to determine whether parents should be able to commit a child to a state mental health facility;¹¹⁸ a determination by a staff member that a patient is competent before she is allowed to voluntarily commit herself to a state mental health facility;¹¹⁹ a mere post-deprivation hearing before a Social Security Administration administrative law judge to determine whether social security disability or welfare benefits had appropriately been terminated;¹²⁰ an informal hearing by school officials to determine whether a student’s suspension would be justi-

¹¹³ *Id.* at 326.

¹¹⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹¹⁵ *Id.* at 348.

¹¹⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970), is perhaps the best example of the Court’s occasional enthusiasm for adversarial processes. In that case the Court held that welfare benefits could not constitutionally be terminated unless the recipient were provided with notice and a pre-termination hearing. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.8, at 630 (7th ed. 2004) (“The Court has demonstrated a consistent belief that the adversary process is best designed to safeguard individual rights against arbitrary action by the government.”). Some have questioned whether the Court is correct to focus so heavily on adversary procedures. E.g., Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974) (urging that expert decision making with managerial oversight may prove better than adversarial procedures in protecting individual rights); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5 (1996) (“[T]he adversary system may no longer be the best method for our legal system to deal with all of the matters that come within its purview.”).

¹¹⁷ Indeed Professor Judith Resnik has pointed out that the vast majority of adjudicatory decisions made in this country are now being issued by agency personnel or administrative law judges, rather than traditional courtroom or Article III judges. Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 799 (2004) (roughly estimating that whereas federal Article III judges, magistrates, and bankruptcy judges conducted approximately 85,000 trials in 2001, administrative law judges conducted over 700,000 hearings pertaining to social security, immigration, veterans’ benefits, and employment discrimination, in the same time frame).

¹¹⁸ *Parham v. J.R.*, 442 U.S. 584 (1979).

¹¹⁹ *Zinermon v. Burch*, 494 U.S. 113 (1990).

¹²⁰ *Mathews*, 424 U.S. 319.

fied;¹²¹ dismissal of a medical school student without a formal hearing;¹²² and an informal hearing in front of prison personnel or doctors as a means to decide whether prisoners' "good-time credits" should be eliminated,¹²³ whether prisoners should be transferred from a prison to a mental hospital,¹²⁴ or whether prisoners should be administered antipsychotic drugs.¹²⁵

One of the most relevant Due Process precedents, albeit seventy-five years old, is *Hardware Dealers Mutual Fire Insurance Co. v. Glidden*.¹²⁶ In that case the Court was asked to consider a Minnesota statutory scheme requiring all state fire insurance policies to provide for compulsory binding arbitration regarding the amount of losses. The statute had been challenged on Due Process and Equal Protection grounds by an insurance company that preferred to litigate.¹²⁷ The Court unanimously found that there was no Due Process or Equal Protection violation in requiring a company to arbitrate rather than litigate the issue of its customer's scope of loss. The Court explained:

The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.¹²⁸

In *Glidden*, the Court found the mandatory arbitration acceptable in that it was rational for a state to require that the single issue of the amount of loss be arbitrated, rather than litigated, in that expert knowledge and speed would be particularly important to such a dispute. The Court found that the Fourteenth Amendment requires an alternative to litigation to be "substantial and efficient,"¹²⁹ and analogized the required arbitration to non-judicial decisions already held acceptable with respect to workers' compensation, condemnation appraisals, and decisions by boards and commissions.¹³⁰ While *Glidden* certainly could be distinguished from my proposal, in that for example the arbitration analyzed in that case was limited to valuations and not legal coverage

¹²¹ *Goss v. Lopez*, 419 U.S. 565 (1975).

¹²² *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

¹²³ *Wolff v. McDonnell*, 418 U.S. 539 (1974).

¹²⁴ *Vitek v. Jones*, 445 U.S. 480 (1980).

¹²⁵ *Washington v. Harper*, 494 U.S. 210 (1990).

¹²⁶ *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931).

¹²⁷ When the dispute arose between the company and its insured, following a fire loss, the insured appointed an arbitrator and demanded that the company participate in arbitration. The company refused to participate, and so the insured, in accordance with the policy, had an umpire appointed who together with the previously selected arbitrator went on to make an award. *Id.* at 155-56. When the insured then brought a lawsuit to recover the amount of the award the company asserted in defense that the Minnesota statute requiring use of arbitration for such claims violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 156.

¹²⁸ *Id.* at 158 (citation omitted).

¹²⁹ *Id.* at 159.

¹³⁰ *Id.* at 159-60 (citing, e.g., *Dohany v. Rogers*, 281 U.S. 362 (1930) (condemnation appraisals); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930) (boards and commissions); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917) (workers' compensation)).

issues, my instinct is that few if any courts would find that the imposition of “fair,” “substantial,” and “efficient” binding arbitration in lieu of litigation violates the Due Process Clause.

In addition to the Supreme Court precedents, discussed above, it is informative to examine lower courts’ analysis of Due Process attacks on mandatory arbitration. A number of lower federal and state courts have approved the use of mandatory arbitration in a variety of contexts.¹³¹ One interesting line of cases finds Congress did not violate the Due Process Clause by requiring disputes over pension plan withdrawal liability to be resolved through arbitration.¹³²

On the other hand, it is also true that some lower courts have flatly held that statutorily imposed binding arbitration necessarily violates the Due Process Clause.¹³³ Some of these decisions cite an older Supreme Court decision, *Charles Wolff Packing Co. v. Court of Industrial Relations*.¹³⁴ In that 1925 case the Court voided, under the Due Process Clause, a Kansas statute that required labor disputes in certain areas to be taken to what the Court variously called “industrial courts” or “arbitration.”¹³⁵ However, while the decision has never been directly overruled it appears no longer to be good law in that it relies on an outmoded interpretation of doctrines involving freedom of con-

¹³¹ See, e.g., *Guralnick v. Supreme Court*, 747 F. Supp. 1109 (D.N.J. 1990), *aff’d*, 961 F.2d 209 (3d Cir. 1992) (holding that mandatory arbitration of attorney/client fee disputes, at the client’s option, was permissible under the Due Process Clause, even without opportunity for appeal to court, in that the attorneys had adequate opportunity for a notice and a hearing before the arbitrators); *Bd. of Educ. v. Harrell*, 882 P.2d 511 (N.M. 1994) (holding that Due Process Clause permits mandatory arbitration of discharge claim brought by school employee, even though arbitrator need not be lawyer nor judge nor apply rules of procedure nor evidence, but also holding that Due Process mandated opportunity for more substantial appellate review of arbitrator’s decision than had been afforded by statute).

¹³² See, e.g., *Wash. Star Co. v. Int’l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984) (holding Multiemployer Pension Plan Amendments Act of 1980 (“MPAA”) did not violate due process right to impartial adjudication); *Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1404 (9th Cir. 1984) (same); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984) (same); see also *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1277 (7th Cir. 1983) (holding that MPAA did not unconstitutionally deny right of access to court in that it allowed for minimal judicial review of any arbitration award).

¹³³ See, e.g., *Henderson v. Ugalde*, 147 P.2d 490 (Ariz. 1944) (finding that courts declare coercive arbitration agreements unconstitutional); *St. Louis I.M. & S. Ry. Co. v. Williams*, 49 Ark. 492 (1887) (noting that legislatures lack power to substitute boards of arbitration for the courts); *Healy v. Onstott*, 237 Cal. Rptr. 540 (Ct. App. 1987) (finding that coercive arbitration is unconstitutional if the parties cannot appeal the arbitrator’s decision); *People ex rel. Baldwin v. Haws*, 37 Barb. 440 (N.Y. App. Div. 1862) (stating in dictum that parties may not be compelled to arbitrate).

¹³⁴ *Charles Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925); see, e.g., *Henderson*, 147 P.2d 490 (finding that courts declare coercive arbitration agreements unconstitutional); *Williams*, 49 Ark. 492 (noting that legislatures lack power to substitute boards of arbitration for the courts); *Healy*, 237 Cal. Rptr. 540 (finding that coercive arbitration is unconstitutional if the parties cannot appeal the arbitrator’s decision); *Baldwin*, 37 Barb. 440 (stating in dictum that parties may not be compelled to arbitrate).

¹³⁵ *Charles Wolff Packing Co.*, 267 U.S. at 561, 569.

tract.¹³⁶ Some lower courts have taken a more nuanced position, holding that statutory imposition of binding arbitration can be acceptable with respect to certain kinds of disputes, but not others.¹³⁷

So, what is the bottom line in terms of a Due Process challenge to a statutorily imposed arbitration program? Given the cases discussed above I am reasonably confident that at least so long as the imposed arbitration allowed for adequate notice, a sufficiently neutral arbitrator, opportunities to obtain some kind of discovery, and perhaps limited appeal, it would pass Due Process muster in many courts.¹³⁸

V. CONCLUSION

When I first started thinking about this project, I viewed it mostly as a lark. I initially assumed it would be largely or entirely infeasible to impose arbitration on companies, but nonetheless thought that explicating the arguments would be fun and possibly useful, for rhetorical purposes.

Having now done the research and more thoroughly thought through the possibilities of legislative mandatory arbitration, I have come to believe it may actually be possible for Congress to impose arbitration on companies, at least in certain limited situations. So I must now face head-on the question of whether I actually want to become an advocate of governmental mandatory arbitration. As I remain somewhat conflicted, I will lay out my thought processes.

The major argument I see in favor of advocating for governmental mandatory binding arbitration, with an opt out for “little guys,” is that I do believe it could help create a fairer, more just dispute resolution process than currently exists in this country. Offering the option of an arbitration process that could be cheaper and quicker than litigation might help provide greater access. Because the program would be purely voluntary, at the option of the “little guys,” it could only improve and not worsen their chances of obtaining procedural and substantive justice.

A second factor in my considerations is that I believe, as a matter of real-politik, that the chances of Congress adopting the sort of mandatory arbitration discussed here are slim. Even assuming a Democratic resurgence in 2008, cor-

¹³⁶ See generally NOWAK & ROTUNDA, *supra* note 116, §§ 11.3-11.4, at 442-58 (discussing demise of substantive due process doctrines based on such cases as *Lochner v. New York*, 198 U.S. 45 (1905), and their replacement with an attitude of great latitude towards social and economic legislation).

¹³⁷ See, e.g., *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 18 Cal. Rptr. 2d 626, 633-36 (Ct. App. 1993) (recognizing that mandatory governmental arbitration can be appropriate when limited to contractual disputes with government agencies, disputes involving certain highly regulated industries, or to situations where the rights to be arbitrated have been created by federal statute, but asserting that mandating arbitration of rent control disputes is unconstitutional because statute does not allow for substantial judicial review of arbitrators' decisions).

¹³⁸ See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 534-40 (1989) (asserting that statutorily mandated arbitration, if properly designed, can satisfy the requirements of Due Process); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1050-86 (2000) (spelling out Due Process requirements that would apply to private arbitration).

porate lobbyists' control over Congress will likely remain strong. A bill that clearly favors employees and consumers over corporate entities has a low likelihood of success, in my cynical view.

Finally, and most important, I fear that by advocating mandatory statutory binding arbitration, I would undermine the idea that arbitration is desirable only if it is voluntary. I and many other opponents of private mandatory arbitration have frequently asserted that binding arbitration is a fine and indeed desirable dispute resolution technique, but only so long as it is voluntary.¹³⁹ In truth, as discussed earlier, I do feel that a legitimate distinction can be made between Congress mandating the use of binding arbitration by companies and private companies mandating the use of binding arbitration by their customers.¹⁴⁰ That is, whereas I staunchly oppose companies' private imposition of arbitration on their employees and customers, I see no inherent reason why Congress ought not to mandate the use of arbitration, just as it currently mandates the use of a broad array of litigation and administrative processes.¹⁴¹ Nonetheless, were I now to switch to a more nuanced position, that it is legitimate to mandate arbitration for "big guys" but not "little guys," I fear that I would undercut the rhetorical strength of this position. I also fear that I might undercut support for bills, such as the Arbitration Fairness Act of 2007,¹⁴² that would explicitly proscribe companies from imposing arbitration on their customers and employees.

Thus, because the chances of passing legislation of the sort discussed herein are weak, and because advocating such legislation could potentially backfire rhetorically and be used to support the private mandatory arbitration I despise, I will at this point refrain from taking the ultimate step of advocating governmental mandatory arbitration. I will, however, take every chance I get to turn the rhetorical tables on advocates of private mandatory arbitration. If they truly think mandatory arbitration is necessary, to improve access to justice, it should be mandatory arbitration imposed on the company, and not on the "little guy."

¹³⁹ Professor Richard Reuben urges that the democratic pedigree of arbitration hinges on whether the process is agreed to voluntarily. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 *LAW & CONTEMP. PROBS.* 279, 282 (2004) (urging that while "[a]s a dispute-resolution process, arbitration is generally undemocratic, . . . it acquires democratic legitimacy when parties actually agree to arbitrate their disputes because it furthers the unifying democratic value of personal autonomy"); see also Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, *DISP. RES. MAG.*, Spring 2001, at 18 (arguing, more generally, that arbitration is a good process, but only if it is voluntary).

¹⁴⁰ See *supra* text accompanying notes 34-37.

¹⁴¹ For further amplification of my views, see Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1670-72.

¹⁴² See *supra* note 12.