

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

1991

A Better Approach to Arbitrability

Jeffrey W. Stempel

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Civil Procedure Commons](#), [Contracts Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Litigation Commons](#)

Recommended Citation

Stempel, Jeffrey W., "A Better Approach to Arbitrability" (1991). *Scholarly Works*. 193.
<https://scholars.law.unlv.edu/facpub/193>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

A BETTER APPROACH TO ARBITRABILITY

JEFFREY W. STEMPEL*

“If the only tool you have is a hammer, you tend to see every problem as a nail.”¹

Abraham Maslow

I.	INTRODUCTION	1379
II.	A BRIEF LOOK AT THE FEDERAL ARBITRATION ACT	1380
III.	CONTRACT REVOCATION DEFENSES IN ARBITRATION DISPUTES	1383
	A. <i>The General Rule of Rigid Formalism</i>	1383
	1. Background	1383
	2. <i>The Prima Paint Problem</i>	1390
	B. <i>The Sporadic and Erroneous Use of the Public Policy Exception</i>	1392
	C. <i>Judicial Use of Contract Revocation Defenses in Arbitrability Disputes</i>	1397
	1. Fraud Defenses in the Wake of <i>Prima Paint</i>	1397
	a. <i>Moseley: The Arbitration Clause as Central to Fraud</i>	1397
	b. <i>Fraud Particular to the Arbitration Clause</i>	1398
	c. <i>Getting Around Prima Paint: Fraud in the Factum as Distinguished from Fraud in the Inducement</i>	1399
	2. <i>Illegality</i>	1402

* Associate Professor of Law, Brooklyn Law School. B.A. 1977, University of Minnesota; J.D. 1981, Yale Law School. Special thanks to Dan Chow, Bailey Kuklin, and Ann McGinley for comments on an earlier draft of this article and to David Herr, Roberta Karmel, Gary Minda, Norman Poser, and David Trager for ideas and support. Mark Kornfeld, Nancy London, and Irene Skidan provided valuable research assistance while June Parris, Rose Patti, and Regina Esquilin bore the clerical burden of this piece. This project was supported by a Brooklyn Law School summer research stipend.

1. Generally attributed to Abraham Maslow. See, e.g., *Thoughts on the Business Life*, FORBES, Feb. 14, 1983, at 196; San Francisco Chronicle, Jan. 1, 1991 (Letters Column), at A16, col. 3. I originally saw the quote attributed to Maslow on a calendar. The quote is also frequently credited to Mark Twain. See, e.g., *Rights Movement in Struggle for an Image as Well as a Bill*, N.Y. Times, April 3, 1991, at 1, col. 5, for my purposes, who said it is less important than the statement.

3.	Impossibility and Frustration	1402
4.	Waiver and Laches	1403
5.	Coercion and Duress	1404
6.	Failure of Consideration	1405
7.	Unconscionability, Adhesion, and Unfairness	1406
	a. The "Seriously Inconvenient" Forum... ..	1406
	i. Commercial Cases	1406
	ii. The Inconvenient Forum as a Form of Substantive Unconscionability ...	1408
	iii. Inconvenient Forums as Unconscionable in Consumer Cases	1410
	iv. Unconscionability in Commercial Cases	1412
	b. Contracts of Adhesion: Unconscionability's Cousin	1413
8.	Traces of Contract Doctrine in Public Policy Exception Cases	1414
	a. Securities Law	1414
	b. The Underlying Parallel of the FELA Cases	1418
	c. Adhesion Fails Again in Antitrust Claims	1420
	d. The Civil Rights and Employment Exception Cases.....	1421
IV.	A BETTER APPROACH TO ARBITRABILITY: FEDERAL COMMON-LAW DOCTRINE OPERATING EVENHANDEDLY WITHIN THE STATUTORY FRAMEWORK	1426
	A. <i>The Approach</i>	1426
	B. <i>The Roots of the Approach</i>	1428
	C. <i>Application of the Approach</i>	1433
	1. Blameless Ignorance	1435
	2. Dirty-Dealing.....	1437
	3. Inescapable Adhesion.....	1438
	4. Substantive Unconscionability.....	1442
	5. Defective Agency	1443
	D. <i>Likely Results Following the Approach</i>	1447
	E. <i>The Imperative of a Federal Common Law of Arbitration Contracts</i>	1452
	F. <i>The Prima Paint Precedent</i>	1456

V. CONCLUSION..... 1459

I. INTRODUCTION

The United States Arbitration Act (the "Act") states that arbitration agreements contained in contracts involving interstate commerce are specifically enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."² Despite this seemingly clear statutory directive, courts have failed to provide coherent and fair enforcement of arbitration agreements. The process seems starkly polarized: either an arbitration clause is routinely enforced despite available contract revocation defenses; or the matter is termed exempt from arbitration under a public policy exception despite the clearly valid arbitration agreement. Both of these courses are too extreme and fail to appreciate the individual circumstances of the contestants. Although the current judicial regime for construing arbitrability may reduce the courts' administrative burden of individual factfinding and decisionmaking, it does so at too high a cost in fairness, logic, and faithfulness to the text and intent of the Arbitration Act.

This Article suggests that courts more frequently apply notions of contractual consent and fairness to decide arbitrability questions, eschewing both rigid formalism and unfettered public policy exceptions. The current false dichotomy creates inconsistencies that greatly aid some classes of litigants while ignoring others. Despite the obvious importance of preventing arbitration contracts from becoming oppressive, courts have failed to develop a doctrine of arbitration contract defenses.³ When courts refuse to enforce an arbitration agreement, they apply the unnecessarily blunt hammer of public policy all too often, wrongly viewing it as the only tool available for policing the Act. Simultaneously, courts have overlooked the language of the Act that holds the most promise for preventing unfairness and vindicating congressional and contractual authority. Rather than hammering out ad hoc exceptions according to the nature of the dispute, courts should employ the

2. 9 U.S.C. § 2 (1988). Pub. L. No. 68-401, 43 Stat. 883 (1925) (effective Jan. 1, 1926) (codified at 9 U.S.C. §§ 1-15 (1988)).

3. See *infra* text accompanying notes 237-45; Comment, *Just Saying No: Avoiding Predispute Agreements to Arbitrate in Securities Cases*, 1990 J. DISPUTE RES. 117, 120 (courts have given "no explicit guidance" regarding arbitration contract avoidance).

more varied tools of common-law contract expertise to examine the quality of consent in arbitration agreements.

This Article proposes that courts recognize and develop five defenses to arbitrability unrelated to the nature of the claims in dispute. Part I of this Article briefly reviews the Act. Part II discusses the judicial use of the contract revocation defenses provided by the Act and the judiciary's occasional resort to public policy exceptions. Part III proposes a principled doctrine of arbitration contract rescission as a better approach to arbitrability.

II. A BRIEF LOOK AT THE FEDERAL ARBITRATION ACT

Historically, Anglo-American courts refused to enforce arbitration agreements, jealously guarding their dispute resolution monopoly.⁴ During the early twentieth century, merchants and attorneys began seeking legislation requiring courts to defer to arbitration.⁵ The United States Arbitration Act took effect January 1, 1926⁶ and has remained essentially unchanged.⁷ It was written with the implicit assumption that it would be invoked by commercial actors having relatively equal bargaining power and emotive appeal to a jury.⁸ The Act says nothing to direct the court's inquiry concerning the quality of either party's assent to the arbitration clause other than requiring a written arbitration agreement and referring to grounds for revocation

4. See *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990).

5. Note, *Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445 (1937) (business support was part of movement leading to enactment of the Arbitration Act); see *Joint Hearings, House and Senate Judiciary Committees, on S. 10005 and H.R. 14* (hereinafter *Joint Hearings*) at 21-24 (listing 67 business organizations supporting proposed Act and letters of endorsement from various groups); *id.* at 10 (statement of American Bar Association representative W.H.H. Piatt).

6. Pub. L. No. 68-401, 43 Stat. 883 (1925); 9 U.S.C. § 14 (1988). Section 1 of Pub. L. No. 282, 61 Stat. 669 (1947) codified and enacted into positive law title 9 of the U.S. Code. Prior to that, the text of title 9 containing the Act had been legally viewed as "merely prima facie evidence of the law." S. REP. NO. 664, 80th Cong., 1st Sess. 1 (1947).

7. See Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. CHI. L. REV. 1373, 1373 n.2 (1987).

8. See *Joint Hearings*, *supra* note 5. In 1925, many of the common forms of arbitration found today did not exist or were used only infrequently. Modern examples of arbitration are: between securities customers and broker-dealers; between individual employees and their employers; between employer and employee as part of a collective bargaining agreement; or among insureds involved in an automobile accident in a no-fault insurance state.

available at common-law.⁹

Section 1 of the Act broadly defines key terms used subsequently in the Act.¹⁰ Section 2 provides that written agreements to arbitrate, whether part of an initial contract in commerce or in a maritime transaction or a separate agreement pertaining to such a contract, “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹ The Act supplies the substantive rules for deciding whether to uphold an arbitration agreement, stay judicial proceedings, compel arbitration, confirm the award, vacate the award, or alter the award.¹² Although there is some possibility of exception, the prevailing view is that even strong state statutory policies do not override the Act.¹³ Although the Act is considered substantive law, it imposes many procedural requirements upon the parties seeking to promote or attack arbitration.¹⁴

The Act also promotes arbitration by providing that litigation may be stayed by the court until completion of the arbitration. The court must first be “satisfied that the issue involved

9. See 9 U.S.C. § 2 (1988). The Act also seems to presume that parties to an arbitration proceeding would have little to say after the award and thus provides arbitration losers only a few narrow grounds for vacating an award or preventing entry of judgment upon the award. See *id.* §§ 9-11.

10. *Id.* § 1. However, § 1 qualifies its expansive definitions of coverage by providing that the Act does not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Id.*

11. *Id.* § 2; see H.R. REP. NO. 96, 68th Cong., 1st Sess. (1924); S. REP. NO. 536, 68th Cong., 1st Sess. (1924). See generally *Joint Hearings*, *supra* note 5 (arbitration agreements are to be treated as are other contracts).

12. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). However, there must be an independent basis for federal jurisdiction before federal courts will hear claims made pursuant to the Act. *Moses H. Cone*, 460 U.S. at 25 n.32.

13. See *Perry v. Thomas*, 482 U.S. 483, 491 (1987). But see *Atwood*, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61 (1985) (suggesting that some state laws consistent with the federal Act or relating to the parties' rights separate from arbitration are not foreclosed by view of federal preemption expressed in *Moses H. Cone* and *Southland Corp. v. Keating*). If the parties have stipulated in the contract to apply state substantive law to their dispute, this private choice of law is binding even where the state law selected conflicts with the Act. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989).

14. See, e.g., 9 U.S.C. § 13 (1988) (requiring specific documentation of award before court will act); *id.* § 12 (requiring specific service requirements for motions related to arbitration award and setting time limits); *id.* § 7 (provisions regarding witnesses, fees, and compelled attendance); *id.* § 6 (providing that Arbitration Act requests are treated as civil motions); *id.* § 4 (setting notice, hearing location, and jury trial requirements). These requirements look procedural but apply as substantive law in both state and federal court.

. . . is referable to arbitration.”¹⁵ Section 4 authorizes federal courts to compel arbitration if a party refuses to honor an arbitration agreement.¹⁶ The Act states that any contractually specified method of arbitration shall be followed¹⁷ and provides subpoena power to the arbitrator.¹⁸ Sections 9, 10, and 11 deal with the confirmation, vacation, or modification of arbitration awards.¹⁹ The court must grant an order confirming the award unless the court finds the case to meet one of several narrow grounds.²⁰ The courts have generally accorded these exceptions confined scope due to the limited enumerated grounds, the language of the section, and the Act’s goal of encouraging arbitration.²¹

15. *Id.* § 3.

16. *Id.* § 4. If the existence or scope of the arbitration agreement or adherence to it is in dispute, the judge is to “proceed summarily to the trial” of that issue, holding a bench trial in admiralty matters or where the defendant fails to demand a jury trial. *Id.*

17. *Id.* § 5.

18. *Id.* § 7. If a party disobeys the arbitration subpoena, the federal court can not only enforce the order but also hold the offender in contempt. *See Bayside Enters., Inc. v. Hanson*, 675 F. Supp. 1375 (D. Me. 1987).

19. 9 U.S.C. §§ 9-11.

20. *Id.* § 10(a)-(d). The grounds for vacating or modifying an arbitration award are:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

21. *See, e.g., Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983) (taking a narrow view of what constitutes bias sufficient to overturn award). However, courts have occasionally invoked § 10(d) to strike down awards viewed as resulting from ultra vires or “imperfect” execution of power by the arbitrators. *See, e.g., Milwaukee Typographical Union v. Newspapers, Inc.*, 639 F.2d 386 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981); *Raytheon Co. v. Computer Distributions, Inc.*, 632 F. Supp. 553 (D. Mass. 1986). In particular, some courts have been willing to strike down awards where the arbitration result evidences “manifest disregard of law.” For this ground to apply, the arbitrators must have done more than merely commit legal error, but rather, must have either blatantly disregarded the law or made an intolerably egregious error. *See, e.g., Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990); *Sheet Metal Workers Int’l Ass’n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742 (9th Cir. 1985).

III. CONTRACT REVOCATION DEFENSES IN ARBITRATION DISPUTES

A. *The General Rule of Rigid Formalism*

1. Background

For the most part, courts enforce written arbitration clauses regardless of circumstances surrounding the signing. Courts tend to follow a formal logic akin to the objective theory of contract, a view of contracting law that has lacked widespread support since World War II.²² Under this view, contracting parties are assumed to appreciate the full ramifications of contract language even when they are unsophisticated regarding technical meaning and applications. Signature is regarded as virtually conclusive evidence of consent. Only the most compelling evidence of active fraud or duress will overcome this presumption.²³

The district court's opinion in *McMahon v. Shearson/American Express, Inc.*²⁴ reflects the typical view. The trial court found securities investors' arguments that the arbitration clause was unfairly placed in the customer agreement "wholly unconvincing."²⁵ To the court, it was "well settled that one who signs a contract, in the absence of fraud or misconduct by another contracting party, is conclusively presumed to know its contents and to assent to them."²⁶ Other courts adjudicating arbitration disputes have generally clung to this classical objective theory of contract assent despite the doctrine's erosion in other areas of contract law.²⁷ In the typical arbitration case, the court, with little discussion of the record, characterizes attacks on the arbitration clause, particularly claims of fraudulent inducement, as weak or fabricated.²⁸

22. See *infra* text accompanying notes 248-49 (discussing classic objective theory of contract law and its virtual replacement by more flexible, neoclassical theory).

23. See *infra* text accompanying notes 130-36 (discussing high threshold that must be met to prove duress or coercion).

24. 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part and rev'd in part*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987). *McMahon* subsequently became a key Supreme Court precedent regarding the relationship of the Act and the Securities Acts. See *infra* text accompanying notes 179-201 (discussing arbitration and securities cases).

25. 618 F. Supp. at 386.

26. *Id.*; accord *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 446 n.3 (S.D.N.Y. 1985); *Fustok v. Conticommodity Servs., Inc.*, 577 F. Supp. 852, 856 (S.D.N.Y. 1984).

27. See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976).

28. See, e.g., *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961) (court found

In one arbitration case,²⁹ the court took this view despite the apparent romantic involvement of the plaintiff, a rich widow, with the defendant broker, who allegedly reduced her \$1 million account to \$90,000 over five years through unauthorized speculation and churning. According to the plaintiff, she was induced to sign the arbitration clause without reading it based on the broker's representation that it was just a formality. Notwithstanding the obvious questions surrounding this investment soap opera, the court enforced the agreement, staying plaintiff's lawsuit.³⁰

The courts' affinity for contract formalism has dominated disputes between brokers and investors as well as conflicts between brokerage houses and their employees. As in *McMahon*, investor claims of fraud, misrepresentation, duress, coercion, adhesion, or unconscionability are generally dismissed with dispatch by the courts.³¹ Similarly, employee efforts to litigate with brokerage house employers rather than arbitrate have generally failed.³² Courts have been similarly enthusiastic about enforcing arbitration clauses where the aggrieved party is both

that the record "demonstrates beyond cavil that the alleged fraud [defense to arbitrability] is a mere afterthought, wholly without substance, advanced for purposes of delay"; *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973) (finding the resisting party to be a sophisticated contractor and rejecting a defense of misrepresentation); *Lewis v. Prudential-Bache Sec., Inc.*, 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986) (rejecting defense of fraud despite intertwining of alleged fraudulent conduct and arbitration clause).

29. *Ross v. Mathis*, 624 F. Supp. 110 (N.D. Ga. 1985).

30. *Id.* The affair between widow Ross and broker Mathis was of sufficient seriousness that she relocated from Birmingham to Atlanta in order to live with him. *Id.* at 112. Notwithstanding the potential contracting abuses inherent in the case, the pro-arbitration result may have been dictated by *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which held that allegations of fraudulent inducement are first to be decided by the arbitrator unless directed solely toward the arbitration clause. However, although the *Ross v. Mathis* opinion is unclear on this point, the arbitration clause signed by Ross and the signing transaction may have been sufficiently separate from entry into the brokerage agreement that *Prima Paint* did not compel the court to avoid deciding the lack of informed consent defenses raised by plaintiff. In addition, *Prima Paint* is flawed and demands revision. See *infra* note 265 and text accompanying notes 336-45.

31. See, e.g., *Adrian v. Smith Barney, Harris Upham & Co.*, 841 F.2d 1059 (11th Cir. 1988); *Reed v. Bear, Stearns & Co.*, 698 F. Supp. 835 (D. Kan. 1988); *Dougherty v. Mieczkowski*, 661 F. Supp. 267 (D. Del. 1987); *City of Whitefish v. Hansen*, 237 Mont. 105, 771 P.2d 976 (1989).

32. See, e.g., *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984); *O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982); *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433 (6th Cir. 1975).

employee and investor.³³ Judicial formalism seems particularly misplaced in both these instances.

Although many investors in securities are sophisticated, many are not. Case reports reveal a surprising number of workers and pensioners placing virtually their entire savings into brokerage accounts and giving allegedly unscrupulous brokers almost total discretion over account trading.³⁴ Investors may have wealth but lack understanding of the nature of the securities markets, the distinctions between arbitration and litigation, or the consequences of signing boilerplate agreements.³⁵ Although in most cases a nonformalistic approach to contracts requires that parties be held to their signed, written agreements, the case for enforcement declines considerably if signature is acquired through misinformation or if the clause is hidden in a dense pack of form contract language. One would think these issues would concern the courts, but case reports reflect little attention to either the contracting environment or contract revocation defenses.³⁶

Arbitration agreements between employers and employees

33. See, e.g., *Muh v. Newburger, Loeb & Co.*, 540 F.2d 970 (9th Cir. 1976).

34. See, e.g., *Dougherty*, 661 F. Supp. at 271 (one investor placed life savings in discretionary account; another investor, an 81-year-old widow, placed substantial assets in an account); *Cady v. A.G. Edwards & Sons, Inc.*, 648 F. Supp. 621 (D. Utah 1986); *Leone v. Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985) (plaintiff, a teletype operator supporting elderly father, placed her combined life savings of \$413,000 in two accounts with broker who churned the account through discretionary unsuitable securities, reducing the account balance to \$240,000 within six months). When the defendant broker in *Leone* changed employers, he somehow convinced Ms. Leone to move her account and sign similar agreements. The account was closed with \$60,000 remaining. For powerful anecdotal evidence of investors claiming lack of sophistication and catastrophic results from investing in a discretionary account, see Henriques, *When Naivete Meets Wall Street*, N.Y. Times, Dec. 3, 1989, § 3, at 1, col. 3; Glaberson, *When the Investor Has a Gripe*, N.Y. Times, Mar. 29, 1987, § 3, at 1, col. 4; see also Labaton, *Brokerage Case Goes On and On*, N.Y. Times, Feb. 19, 1990, § 4, at 2, col. 1 (discussing continuing saga of protracted *McMahon v. Shearson/American Express* arbitration).

35. See, e.g., *Dougherty v. Mieczkowski*, 661 F. Supp. 267 (D. Del. 1987) (large sums invested by several investors who appear not to have appreciated the consequences of signature or a broker's trades); *Ross v. Mathis*, 624 F. Supp. 110 (N.D. Ga. 1985) (wealthy widow placed complete discretion in her broker-paramour) (discussed *supra* text accompanying notes 29-30).

36. See, e.g., *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230-31 (1987) (finding plaintiff's claim of lack of consent to arbitration clause "grounds for revoking the contract under ordinary principles of contract law" but failing to discuss such principles and focusing solely on whether Securities Exchange Act of 1934 created an exception to arbitrability); *Wilko v. Swan*, 346 U.S. 427 (1953) (finding an exception to arbitrability for 1933 Securities Act claims, but addressing contract questions only in general terms), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

raise additional concerns of coercion or duress. An employee's predispute agreement to arbitrate, especially when made a precondition of employment by the employer at the behest of an organization such as the New York Stock Exchange (NYSE), seems devoid of meaningful consent.³⁷ Typically, the broker signs a broadly worded arbitration clause that commits almost all disputes with the employer to arbitration, including claims of defamation³⁸ as well as those regarding compensation and benefits.³⁹ Despite the obvious disparity of bargaining power and the potential of such agreements to privatize whole classes of disputes, courts generally have failed to address the consensual quality of arbitration agreements.

In a recent stockbroker employment arbitration case, the Supreme Court and California courts combined to continue the formalist trend. In *Perry v. Thomas*,⁴⁰ a former stockbroker sued his employer for past commissions. The brokerage house moved to compel arbitration pursuant to the standard NYSE Rule 347 arbitration clause. The Supreme Court rejected the employee's argument that the California Labor Code guaranteed him a judicial forum, finding the California statute preempted by the Arbitration Act.⁴¹ The Court specifically declined to address the employee's claim of contract unconscionability, leaving this issue for the state courts on remand.⁴² The California appellate court rejected plaintiff's adhesion-unconscionability argument, finding it sufficiently specific to arbitration agreements that it was preempted by federal law, which did not recognize the defenses in the brokerage employee context.⁴³

Although most employment arbitration clauses and cases

37. NYSE Rule 347 requires that all disputes between member firms and registered representatives be arbitrated.

38. See, e.g., *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984). But see *Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78, 82 (2d Cir. 1983) (straining to construe "any controversy arising out of employment" language in arbitration clause as not covering a defamation claim based on negative evaluation given to prospective future employer), *overruled*, *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1052-53 (1989).

39. See, e.g., *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310 (7th Cir. 1981); *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433 (6th Cir. 1975); *Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561 (S.D.N.Y. 1978).

40. 482 U.S. 483 (1987).

41. *Id.* at 489-91. The complex issues of federal preemption, state contract law, and federal common law of contract are addressed *infra* text accompanying notes 313-35.

42. 482 U.S. at 492 n.9.

43. *Thomas v. Perry*, 200 Cal. App. 3d 510, 512, 246 Cal. Rptr. 156, 158-59 (1988)

appear to involve brokerage house employees by virtue of NYSE Rule 347, employers also may insist on arbitration agreements for employees who work under contract.⁴⁴ For example, professional athletes⁴⁵ and executives⁴⁶ are often asked to sign arbitration agreements as a condition of working. For unionized workers such as laborers, truckers, and public employees, arbitration is usually mandated by the collective bargaining agreement.⁴⁷ These organized employees generally can be presumed to have more leverage than individuals. Further, the arbitration mechanism has become a centerpiece of labor law. However, for individual employees, consent to arbitration may be more formal than real for all but the most financially secure and sought-after workers. As one contracts scholar has noted, “[f]or many Americans, particularly those who are not union members, civil servants or possessors of some highly desired talent, employment does not fit well into a mold shaped by the rules of contract.”⁴⁸ Berthold Brecht put it more bluntly: people want to eat first and consider legal and philosophical implications later.⁴⁹ The average worker in need of a job is unlikely at the outset to balk at an arbitration clause.

Notwithstanding this reality of economic life, courts fre-

(citing *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988)); see *supra* text accompanying note 27.

44. The law generally treats employees working without a contract as “at-will” employees who can be fired by the employer without notice and without cause so long as the employer’s reason for discharge does not violate a sufficiently well-defined public policy of the jurisdiction. See generally Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

45. See, e.g., *Boston Celtics Ltd. Partnership v. Shaw*, 908 F.2d 1041 (1st Cir. 1990); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972).

46. See, e.g., *Nicholson v. CPC Int’l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters Int’l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989).

47. See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (police officer); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (trucker); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (manufacturing worker); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988) (landscaper).

48. Linzer, *supra* note 44, at 374. Professor Linzer was referring to less formalist neoclassical contract doctrine rather than more formalist classical objective theory of contract. The latter provides even less willingness to consider an employee’s challenge to contract clauses. Even where the employee is highly desired, the arbitration clause may be virtually impossible to refuse if he or she wants to work. For example, basketball stars are highly desired but NBA teams insist on arbitration clauses in their contracts. See *id.* at 374-90 (criticizing formalist views of employer-employee relations).

49. See 2 Brecht, *Dreigroschenoper* [The Three-Penny Opera] in GESAMMELTE WERKE: STUCKE [Collected Works] 457 (1967) (“Erst kommt das Fressen, dann kommt die Moral” [first the meal, then the sermon]).

quently show no great concern over the quality of consent attending arbitration agreements. For example, the court in *Gilmer v. Interstate/Johnson Lane Corp.*⁵⁰ rejected (correctly in my view)⁵¹ plaintiff's claim of an Age Discrimination in Employment Act (ADEA) exception to arbitrability, but gave no serious consideration to whether the employee's signing of the arbitration contract stemmed from meaningful consent. Even in cases sensitive to contracting realities, courts have refrained from addressing contract revocation defenses in any depth.⁵²

The courts' formalism is also applied with vigor in many forum selection clause disputes analogous to arbitration. The Supreme Court has termed arbitration clauses a specialized type of forum selection clause.⁵³ This pushes courts near a line of precedents notable for almost antediluvian contract formalism. For example, in *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*,⁵⁴ the court held that passengers on the ill-fated ocean liner *Achille Lauro*, which was hijacked by terrorists, had to bring any claims against the shipowner in Naples, Italy because of a preprinted forum selection clause contained on the ticket handed them shortly before boarding. Although *Hodes* reached an outrageous result, it represents a significant line of cases treating boilerplate ticket or receipt language as an enforceable contract.⁵⁵ Most courts, however, have viewed ticket and receipt language as lacking contractual force, at least when the provi-

50. 895 F.2d 195 (4th Cir.), *aff'd* U.S.L.W. (May 13, 1991).

51. See Stempel, *supra* note 4, at 328-29.

52. See, e.g., *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (finding ADEA exception to arbitrability). The *Nicholson* court noted the importance of a job and the weak leverage held by a job-seeker or senior employee hoping to retain work, but stopped short of exploring the implications or deciding the case on contract consent grounds. *Id.* at 230-31. The court noted that "[a]lthough this [situation] may not constitute the type of duress which renders a contract voidable, we cannot close our eyes to the realities of the workplace." *Id.* at 229. Other courts finding an ADEA exception to arbitrability seem influenced by sympathy for the worker in a harsh contracting environment but, like the *Nicholson* court, fail to develop this sentiment. See, e.g., *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D. N.J. 1987).

53. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-19 (1974).

54. 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989).

55. See, e.g., *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968) (enforcing forum selection clauses contained in passenger tickets). *But see Chasser v. Achille Lauro Lines*, 844 F.2d 50 (2d Cir. 1988) (refusing to hear interlocutory appeal of district court decision refusing to require Achille Lauro passenger to bring suit in Naples pursuant to forum selection clause on ticket), *aff'd*, 490 U.S. 495 (1989).

sion at issue involves a waiver of substantive rights.⁵⁶ The Supreme Court's forum selection decisions display a largely formalist tone with some concern for the substantive fairness of such provisions.⁵⁷

Some of the judicial neglect of contract revocation defenses probably results from counsel's failing to develop a record and aggressively argue contract revocation defenses.⁵⁸ Case reports

56. See E. FARNSWORTH, *CONTRACTS* §§ 3.7, 4.26 at 296-97 (1982). "It is especially unlikely that terms on packaging, on an invoice, or in instructions received after a contract has been made, will be held to be effective." *Id.* at 296 n.16; see, e.g., *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953) (refusing to enforce a confession of judgment clause buried in a home repair form contract); *Kushner v. McGinnis*, 289 Mass. 326, 194 N.E. 106 (1935) (amusement park ticket language does not create enforceable contract); *Healy v. New York, Cent. & Hudson River R.R.*, 153 A.D. 516, 519-20, 138 N.Y.S. 287, 290 (1912), *aff'd mem.*, 210 N.Y. 646, 105 N.E. 1086 (1914) (claim check language does not create enforceable contract). Proponents of the position of the *Hodes* court might argue, of course, that the ocean liner ticket's boiler plate does not come too late since the customers used the ticket to board the ship. I find such arguments hair-splitting at best. After having purchased the ticket, planned the trip, arranged time off from work, alerted the post office, newspapers and neighbors to their absence, the customers of the *ACHILLE LAURO* were unlikely to turn back from their ill-fated trip when handed a ticket containing an inconvenient forum selection clause. As this article was going to press, the Supreme Court, by a 7-2 vote, largely adopted what Prof. Farnsworth and I had regarded as the poorer line of cases. See *Carnival Cruise Lines, Inc. v. Shute*, 59 U.S.L.W. 4323 (April 17, 1991). Although the result in *Shute* (suprise litigation in Florida) is not as outrageous as that of *Hodes* (suprise litigation in Italy), the Court's formalism is disappointing. Although *Shute* is confined to admiralty law, it suggests that the Court's view of federal common law on contract law remains unresponsive to this Article's proposed approach to arbitrability.

57. See, e.g., *THE BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (enforcing forum selection clause in international ship towing contract used for disabled ship in need of prompt towing); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (enforcing appointed agent for service-of-process clause contained in farm equipment lease).

Notwithstanding the hysteria of Justice Black's dissent, in which he accuses the majority of enabling slick city businesses to exploit poor country farmers, *Szukhent* differs significantly from *Hodes* in that the Szukhents at least had the opportunity to read and reflect upon the contract before signing and obtaining the farm equipment. 375 U.S. at 328-29 (Black, J., dissenting). The *Hodes* couple received the ocean liner ticket virtually at the pier.

Enforcement of the forum choice clause in *THE BREMEN* seems particularly apt. The case involved a contract between Zapata and Unterweser, the owner of the tugboat *THE BREMEN*, to tow Zapata's oil drilling rig from Louisiana to Italy. The contract, signed after Zapata received several bids, was drafted by Unterweser and reviewed by Zapata, which made several changes but did not change the forum selection clause. Neither Unterweser nor Zapata was a powerless commercial novice and the Court had little trouble concluding that there was no contract defense available to enable Zapata to avoid the forum choice clause. 407 U.S. at 12-13 n.14. In addition, *THE BREMEN* provided that seriously inconvenient forum selection clauses might be unconscionable and unenforceable, an approach used somewhat in lower courts. See *infra* text accompanying notes 142-75 (discussing the "seriously inconvenient forum" defense to arbitration).

58. For example, the former stockbroker plaintiff of *Thomas v. Perry*, 200 Cal. App.

teem with general language in which courts state that arbitration clauses may be set aside on standard common-law contract grounds.⁵⁹ But courts so seldom find these grounds or give them serious discussion that one must inevitably conclude that courts generally treat the arbitration text as the irrefutable embodiment of agreement.

2. The *Prima Paint* Problem

Much of the atrophy of contract revocation defenses results from *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁶⁰ In *Prima Paint*, the plaintiff sought to avoid arbitration by arguing that a consulting agreement it signed (and which contained an arbitration clause) was induced by fraud, specifically representations of financial strength by Flood & Conklin, which went into bankruptcy a week after the agreement was signed. The Supreme Court held that the issue of fraud was simply a controversy arising out of the agreement, an arbitrable issue under the broadly worded arbitration clause contained in the contract.⁶¹ Consequently, the Court held that “‘the making of the agreement for arbitration’” was “‘not in issue,’” and federal courts were, under these circumstances, required to compel arbitration under the Act.⁶² *Prima Paint* was a breakthrough for supporters of arbitration in that it prevented parties from avoiding arbitration by asserting a contract rescission defense based on nonarbitration provisions of the contract.⁶³ To be heard by courts after *Prima Paint*, a contract revocation defense must specifically

3d 510, 246 Cal. Rptr. 156 (1988), argued that the arbitration agreement required of broker employees was unconscionable because the arbitrator is selected by the employer and because arbitration provides less discovery than litigation. Similarly, the plaintiff alluded to the adhesive nature of the agreement. If the case report is accurate, however, plaintiff's counsel did not develop these arguments in sufficient detail to warrant setting aside the contract. Reduced discovery in arbitration is not in itself unconscionable. However, if the employer deceived the employee about forum differences, a defense of misrepresentation or lack of sufficient consent may apply. See *infra* text accompanying notes 266-75 (discussing the blameless ignorance and dirty-dealing defenses). Similarly, the mere adhesive quality of an arbitration clause does not invalidate the clause. However, if the weaker party must adhere in order to obtain food, clothing, shelter or employment, perhaps the defense has merit. See *infra* text accompanying notes 280-91 (discussing the inescapable adhesion defense).

59. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 11, 19 (1984).

60. 388 U.S. 395 (1967).

61. *Id.* at 399, 402-04.

62. *Id.* at 403 (quoting § 4 of the Arbitration Act).

63. See *Furnish, Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CAL. L. REV. 317 (1979).

address the arbitration clause rather than the entire contract, which at least in the first instance, made the vast bulk of fraud, misrepresentation, illegality, and other traditional rescission defenses the province of the arbitrator.⁶⁴

Prima Paint tended to discourage the limited body of developing law concerning avoidance of arbitration on the basis of contract revocation arguments. Prior to *Prima Paint*, courts had occasionally refused to separate arbitration clauses from their underlying contracts and had required judicial resolution of defenses seeking to abrogate the entire contract before submitting to arbitration less sweeping defenses of contract interpretation.⁶⁵ Even in jurisdictions that adopted the severability analysis of *Prima Paint* prior to the Court's ruling,⁶⁶ arbitration clauses that spoke of contract interpretation or performance rather than all disputes arising under the contract received judicial consideration of fraud or other revocation defenses.⁶⁷

After *Prima Paint*, litigants opposing arbitration were logi-

64. Of course, given the limited scope of review provided in the Act, the arbitrator was likely to have the last word as well as the first word on the issue. See 9 U.S.C. §§ 9-13 (1988). To the extent that arbitrators, like courts prior to passage of the Act, tend to jealously guard and assert their own jurisdiction, this has the effect of submerging contract formation and consent issues, insulating them from serious judicial consideration either before or after the arbitration.

65. See, e.g., *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963); *Eastern Marine Corp. v. Fukaya Trading Co.*, 364 F.2d 80 (5th Cir.), cert. denied sub nom. *Publishers' Ass'n of New York City v. NLRB*, 385 U.S. 971 (1966). *Moseley* is frequently characterized as a precursor to *Prima Paint* and cited for the proposition that only contract revocation defenses directed at the arbitration clause are cognizable under the Act. See, e.g., *Leone v. Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985). It seems apparent, however, that the *Moseley* Court, although superficially adopting a separability analysis, was applying a less rigorous notion of separability than that at work in *Prima Paint*. See *infra* text accompanying notes 96-100.

66. See, e.g., *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), cert. dismissed, 364 U.S. 801 (1960). *Robert Lawrence* is the leading case taking this approach prior to *Prima Paint* and is cited extensively by the Supreme Court in *Prima Paint*.

67. See, e.g., *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961) (where clause restricts arbitration to disputes and controversies relating to the interpretation of contract and matters of performance rather than standard AAA clause of all matters "relating to" contract, defense of fraud in the inducement is not included in arbitration clause and is subject to judicial consideration). In *Kinoshita*, however, this analytical parsing proved of no aid to the resisting party. The court, finding that the case "demonstrates beyond cavil that the alleged fraud is a mere afterthought, wholly without substance, advanced for purposes of delay," summarily adjudicated the fraud defense and ordered arbitration. *Id.* at 953.

Presumably, this approach still has force after *Prima Paint* and litigants could still raise revocation claims directed at the entire contract so long as the arbitration clause was sufficiently narrow. As a practical matter, however, this rarely occurs. In most contracts

cally required to target their attacks on only the arbitration clause in order to succeed with a contract revocation defense.⁶⁸ Broader attacks on the contract were sent to arbitration first, where the matter was likely to end through award or settlement without further serious judicial review. Given contracting realities, fraud directed only to inducing an arbitration agreement seems a logical rarity. Nevertheless, a few cases have found a fraud claim to be sufficiently focused on the arbitration provision or the very existence of the contract to support a stay of arbitration until litigation of the fraud claim was completed.⁶⁹ The net effect of *Prima Paint* is to restrict the activities of courts in policing arbitration agreements for consent and fairness.⁷⁰

B. *The Sporadic and Erroneous Use of the Public Policy Exception*

Despite showing little inclination to address contract questions, courts have been willing to adopt public policy exceptions, removing whole categories of claims from the Arbitration Act, for fear of potential contracting abuse. The public policy exception to arbitrability, when invoked, precludes enforcement of claims that the parties had clearly agreed to arbitrate. During the Act's relatively short life of sixty-five years, courts have managed to create exceptions to arbitrability for federal securities,⁷¹ antitrust,⁷² patent,⁷³ title VII,⁷⁴ ERISA,⁷⁵ Fair Labor

providing for arbitration, the arbitration clause is broadly worded, probably at the wish of both parties, to reduce the unpredictability of forum assignment should a dispute arise.

There are a number of reasons why, after a dispute has arisen, one party may prefer litigation to arbitration. See Stempel, *supra* note 4, at 265-69. In the *ex ante* context, however, all parties presumably want the arbitration clause, or at least care so little that the clause is not the subject of extensive negotiation. Whether a prudent commercial actor should hold this *ex ante* view is another question beyond the scope of this Article.

68. See, e.g., *In re AMOCO CADIZ*, 659 F.2d 789 (7th Cir. 1981); *N & D Fashions, Inc. v. DHJ Indus.*, 548 F.2d 722 (8th Cir. 1976); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985).

69. Cases finding fraud claims directed toward the entire contract rather than arbitration specifically are legion. See 9 U.S.C.A. annot. 100 ("Fraud and duress") (1986); see, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985); *Leone v. Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985); *Jarvis v. Dean Witter Reynolds, Inc.*, 614 F. Supp. 1146 (D. Vt. 1985).

70. See, e.g., *Cohen*, 841 F.2d at 287 (acknowledging resisting party's claimed defense of fraud but finding alleged fraudulent conduct going to formation of entire contract rather than arbitration clause, therefore requiring arbitration).

71. See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953) (exempting Securities Act of 1933 (the "1933 Act") claims from arbitration), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), 15 U.S.C. §§ 77a-77aa (1988). Following

Standards Act (FLSA),⁷⁶ section 1983,⁷⁷ ADEA,⁷⁸ FELA,⁷⁹ and bankruptcy claims.⁸⁰ The securities exception has been overruled,⁸¹ the antitrust exception has been effectively buried,⁸² as,

Wilko's lead, many courts decreed a similar exemption for claims arising under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78j (1988). See, e.g., *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 720 F.2d 1446 (5th Cir. 1982); *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981).

72. See *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (holding antitrust claims inappropriate for arbitration because of perceived problems of arbitrator competence, hostility to antitrust claims, inability to deter future violations, and the "public" nature of antitrust litigation). In jurisdictions taking the *American Safety* approach, it appears that courts did not differentiate between claims arising under the Sherman Act, the Clayton Act, or the Robinson-Patman Act, although most cases focused on Sherman and Clayton claims. See, e.g., *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Helpfenbein v. International Indus.*, 438 F.2d 1068 (8th Cir.), cert. denied, 404 U.S. 872 (1971).

73. See, e.g., *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976); *Foster Wheeler Corp. v. Babcock & Wilcox Co.*, 440 F. Supp. 897 (S.D.N.Y. 1977).

74. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding inarbitrable claims arising under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1988)).

75. See, e.g., *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir.), vacated, 110 S. Ct. 225 (1989); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977) (holding inarbitrable claims arising under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988)).

76. See, e.g., *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (holding FLSA claims under 29 U.S.C. §§ 201-19 (1988) not subject to arbitration provision in collective bargaining agreement).

77. See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (holding inarbitrable claims arising under 42 U.S.C. § 1983).

78. See *Nicholson v. CPC Int'l*, 877 F.2d 221 (3d Cir. 1989); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983) (refusing to compel arbitration under employment contract arbitration agreement for claim arising under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988)), aff'd on other grounds, 472 U.S. 400 (1985). But see *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.), cert. granted in part, 111 S. Ct. 41 (1990) (rejecting ADEA exception to arbitrability).

79. See *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987). Strictly speaking, *Buell* may not rest upon a public policy exception to the Arbitration Act. Although the *Buell* Court cited other public policy cases and their rationale with approval, the actual conflict in *Buell* was between plaintiff's asserted right to litigate a tort claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), and the mandatory labor arbitration scheme established in the Railway Labor Act, 45 U.S.C. §§ 151-88 (1988); *Buell*, 480 U.S. at 566.

80. See, e.g., *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55 (3d Cir. 1983), cert. denied, 464 U.S. 1038 (1984); *In re Wm. S. Newman Brewing Co.*, 87 Bankr. 236 (N.D.N.Y. 1988).

81. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953), and finding no bar to application of the Arbitration Act to 1933 Act claims); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (rejecting Arbitration Act exception for claims arising under 1934 Act).

82. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (rejecting rationale of *American Safety* and antitrust exception to arbitrability). But

apparently, the ERISA exception has been;⁸³ and the patent exception was abolished by Congress.⁸⁴ The remaining exceptions seem comfortably entrenched, although the ADEA exception was recently disapproved by the Supreme Court.⁸⁵ In most of the exceptions cases that remain good law, the courts have attempted to characterize the decision as compelled by a statutory conflict.⁸⁶ For reasons detailed elsewhere, the rationale for the policy exceptions is more accurately described as based on either a preference for litigation or an attempt to aid the less powerful contracting party by preventing relegation to a less advantageous forum when circumstances suggest that the party

see *Preston v. Kruezer*, 641 F. Supp. 1163, 1177 (N.D. Ill. 1986) (holding that antitrust exception in wholly domestic lawsuit not foreclosed by *Soler*, which involved an international transaction).

83. The Supreme Court granted defendant's petition for certiorari attacking the ERISA exception in *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir.), and then summarily vacated the holding, 110 S. Ct. 225 (1989), remanding for reconsideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which overturned the exception to arbitration previously read into the 1933 Securities Act. See *Bird*, 110 S. Ct. 225 (1989). Presumably, the Court, over the dissents of Justices Brennan, Marshall, and Stevens, was hinting to the Second Circuit that its reading of ERISA as implicitly barring arbitration was erroneous since the reasoning of *Bird* parallels the reasoning of *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which created the 1933 Act exception and was overruled by *Rodriguez*. Compare *Wilko*, 346 U.S. at 430 n.6, 431 with *Bird*, 871 F.2d at 293, 297 (viewing 1933 Act and ERISA, respectively, as public rights statutes with broad procedural options available to plaintiffs and thus implicitly inconsistent with upholding agreement to resort to private, more narrow dispute resolution alternative of arbitration).

84. See 35 U.S.C. § 294 (1988). A 1982 amendment to the patent laws made patent claims arbitrable in language tracking § 2 of the Arbitration Act, 9 U.S.C. § 2 (1988).

85. *Gilmer v. Interstate/Johnson Lane Corp.*, 59 U.S.L.W. 4407 (May 13, 1990).

86. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (finding statutory framework and language of Title VII incompatible with literal, exceptionless reading of the earlier passed Arbitration Act); *Wilko v. Swan*, 346 U.S. 427 (1953) (majority contends that portion of 1933 Act prohibiting waiver of rights under the 1933 Act precludes enforcement of arbitration contract as this waives wide forum selection otherwise available under the 1933 Act); see also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989) (finding *Wilko* decision "pervaded by what Judge Jerome Frank called 'the old judicial hostility to arbitration'" and "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law," its interpretation of the 1933 waiver provision appears both incorrect and not entitled to stare decisis). Because Congress has acted to eliminate one former public policy exception (patent claims) but failed to legislatively overrule the exceptions for title VII, § 1983 and FLSA claims, the exceptions appear well-entrenched. However, the congressional silence regarding these cases does not, in my view, amount to legislative approval of the exception. Too many reasons could account for congressional inaction in this area. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (Justice Brennan, for the majority, and Justice Scalia, dissenting, debate evidentiary worth of legislative silence as indicating approval of court decisions).

did not adequately consent or consented to a forum so disadvantageous that the court will not enforce the bargain.⁸⁷

The public policy exception to arbitrability is problematic for several reasons. First and perhaps most important, it permits judicial enforcement of arbitration clauses in situations where consent is suspect.⁸⁸ Although employment contracts provide a frequent opportunity for such abuse, the public policy exception has mitigated the danger,⁸⁹ but has done so through overkill, overlooking the Act's own provisions for safeguarding employees.⁹⁰ The courts' disregard of contract defenses opens the possibility of expanded abuses resulting from unconscionable contract terms, often imposed through use of adhesion contracts where one party has no realistic alternative to signing the contract but attempts to litigate a claim falling outside one of the public policy exceptions to arbitrability.

Second, abrogating an arbitration agreement under a public policy exception tends to substitute the judiciary's unconfirmed views about arbitration for the preferences of the parties. This differs from the traditional use of public policy by resort to

87. See Stempel, *supra* note 4, at 350; see also Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 482-83 (1981) (public policy exception to arbitration founded on "an awareness that arbitration is unsatisfactory for resolving certain classes of disputes"; courts have thus invoked exception to hold that "matters involving issues of public policy may not be decided by arbitrators").

Because the posited conflicts between the Arbitration Act and the securities laws, anti-trust laws, title VII, ERISA, ADEA, FLSA, and § 1983 are not inevitable, these cases are better viewed as public policy exception cases and not statutory conflict cases. See Stempel, *supra* note 4, at 283-335.

88. See, e.g., *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310 (7th Cir. 1981); *Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561 (S.D.N.Y. 1978) (all enforcing arbitration clauses required to be signed by stockbrokers as condition of employment with New York Stock Exchange (NYSE) member houses); see also *supra* notes 37-39 and accompanying text.

89. By definition, title VII and ADEA claims arise from an employment relationship. ERISA claims may be brought by an employee. See, e.g., *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977) (holding that stockbroker may be relieved of arbitration clause in making claim under Employee Retirement Income Security Act (ERISA), but need not be); *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir.) (involving an ERISA claim by the trustee of an employee benefits plan), *vacated*, 110 S. Ct. 225 (1989).

90. 9 U.S.C. § 1 exempts from the Act "contracts of employment" for workers "engaged in commerce" but has been given a narrow interpretation by most courts. See, e.g., *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1068-69 (2d Cir. 1972) (holding contract between professional athlete and employer outside exception). The § 1 employment exclusion provides a more principled means for the bench to reach fair and just arbitrability results without disregarding the Act and engaging in ad hoc judicial policymaking.

“public values” when other indicia of statutory meaning are unclear.⁹¹ In effect, the courts’ gut feelings result in court-created exceptions to a clear legislative command (arbitration contracts “shall be specifically enforceable”) without sufficient evidence of any reason to depart from a textual interpretation of the statute. The Act’s legislative history, its purpose, and intervening legal developments all demonstrate a national policy in favor of arbitration.⁹²

There are a host of other problems with the public policy exception. The public policy exception is impossible to square with predominant schools of statutory interpretation.⁹³ It also “favors” some claims by exempting them from arbitration while “disfavoring” others by enforcing their arbitrability without a compelling justification for such haphazard and unequal treatment. In addition, the public policy exception tends to abrogate free contractual choice. Furthermore, when a public policy exception to arbitrability “saves” an individual party from arbitration, it creates a legal rule preventing others from entering enforceable arbitration agreements regarding that claim. For example, after *McDonald v. City of West Branch*,⁹⁴ no combination of equally situated parties could voluntarily act with full information to form an arbitration bargain that would obtain judicial assistance should one party later repudiate the agreement and refuse to arbitrate a claim arising under 42 U.S.C. § 1983.⁹⁵

91. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 108-20 (1975) (statute drafters depend on shared values to communicate to the public and to the courts); Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1008 (1989) (noting use of public values, defined as “legal norms and principles that form fundamental underlying precepts for our polity” to decide cases where text of statute does not require specific outcome).

92. See Stempel, *supra* note 4, at 263-83; see also Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISPUTE RES. 1, 11-13; Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 444-45 (1989) (government mandates arbitration in several situations).

93. See Stempel, *supra* note 4, at 346-50 (categorizing differing approaches to statutory construction as forming six major schools: (1) textual or plain meaning; (2) intentionalist; (3) evolutive; (4) common law approach to statutes as precedential but not binding; (5) free inquiry; and (6) public choice. Of these, only the free inquiry approach can support any of the public policy exceptions refusing to enforce the Arbitration Act other than the bankruptcy exception unless one is persuaded by the strained arguments of *Alexander*, *Barrentine*, and *McDonald* that there is a true statutory conflict justifying a refusal to follow the Act.).

94. 466 U.S. 284 (1984) (holding 42 U.S.C. § 1983 claims not subject to arbitration).

95. By contrast, a ruling that plaintiff McDonald’s § 1983 claim was outside the

C. *Judicial Use of Contract Revocation Defenses in Arbitrability Disputes*

1. *Fraud Defenses in the Wake of Prima Paint*

a. *Moseley: The Arbitration Clause as Central to Fraud*

Despite its history of deterring arbitration revocation defenses based on fraud, *Prima Paint* has not been an insurmountable barrier to avoiding arbitration. For example, in *Moseley v. Electronic & Missile Facilities, Inc.*,⁹⁶ a plumbing and heating subcontractor filed suit in Georgia to collect funds allegedly owed it by the general contractor for a United States government missile site in Georgia. The contractor had previously filed suit in New York seeking an order compelling arbitration in New York pursuant to the contract. The Supreme Court held that the subcontractor articulated a triable issue of fraud regarding the arbitration agreement.⁹⁷ The subcontractor contended

that the subcontracts with him, as well as other subcontractors, were a fraudulent scheme to obtain a great amount of work and material from petitioner and the other subcontractors without making payment therefor and to "browbeat" petitioner and his fellow subcontractors into accepting much less than the value of their claims. One of the means used to effect such scheme was alleged to be the insertion in the subcontracts of an arbitration clause requiring arbitration of disputes in New York.⁹⁸

The Court was sufficiently impressed by this allegation of mega-deceit that it concluded "that, as alleged here, the issue goes to the arbitration clause itself, since it is contended that it was to be used to effect the fraudulent scheme."⁹⁹ By this reasoning, of course, any hoodwinked contracting party with a clever lawyer can initially avoid arbitration by claiming the arbitration clause was designed to further the fraud.¹⁰⁰

scope of the arbitration agreement at issue or that his union had not been empowered to bind him to so broad an arbitration clause (encompassing claims beyond the typical terms and conditions of employment) would control only McDonald's case and lack precedential value, avoiding a per se rule against arbitrability of § 1983 claims.

96. 374 U.S. 167 (1963). Although *Moseley* predates *Prima Paint*, it purports to apply the same approach and its rationale remains available for application in future cases.

97. *Id.* at 171. The district court had refused arbitration while the Fifth Circuit had held for arbitration. See also *Electronic & Missile Facilities, Inc. v. United States*, 306 F.2d 554 (5th Cir. 1962), *rev'd*, 374 U.S. 167 (1963).

98. 374 U.S. at 171.

99. *Id.*

100. For example, the paint manufacturer in *Prima Paint* asserted that the company it contracted with had fraudulently represented that it was solvent and could perform nec-

b. Fraud Particular to the Arbitration Clause

Prima Paint permits judicial disposition of a fraud claim so long as the fraudulent conduct inducing agreement is sufficiently focused on the arbitration clause. This approach has seldom been employed but appears in a few cases.¹⁰¹ For example, in *Gulf Interstate Engineering Co. v. Pecos Pipeline & Producing Co.*,¹⁰² Pecos, the pipeline owner, first contracted with Gulf Interstate to run the pipeline in a 1982 contract with no arbitration provision. In 1983, they entered a second contract containing an arbitration clause. Both contracts were drafted by Gulf. There was evidence that Pecos signed the 1983 contract after being falsely told by Gulf Interstate that the 1983 contract had been reviewed and approved by Pecos' attorney.¹⁰³ The court concluded that although the evidence of fraud was "slight," it was uncontradicted and sufficient to support Pecos' claim of a fraudulently procured and thus revocable arbitration clause.¹⁰⁴

essary obligations under the contract. Had the paintmaker been clever enough (and ethically malleable enough) to allege that the arbitration provision was a significant part of this fraudulent scheme, it would have presumably fallen within the *Moseley* precedent.

The *Moseley* facts fail to articulate a rational reason for the allegation that the arbitration clause was an integral part of the contractor's alleged fraud. Although arbitrating in New York is geographically inconvenient for a Georgia subcontractor, it makes no sense that the contractor, allegedly following a strategy of delay, would seek arbitration, which normally results in binding judgments far faster than litigation. *Moseley* is subjective in tone, heavily infused with extra-record assumptions about the strength of contractors and the weakness of subcontractors, and the supposed insurmountable logistical cost of a Georgia plumber arbitrating in New York. However, some state courts have refused to enforce arbitration agreements on grounds similar to *Moseley's* fulcrum of the fraud approach. See, e.g., *Weinrott v. Carp*, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973).

101. See, e.g., *E.F. Hutton & Co. v. Schank*, 456 F. Supp. 507, 510 (D. Utah 1976) ("an examination of the factual and legal bases of [the defense of fraud] leads this court to conclude that, not only is the making of the customer's agreement at issue, but so is the making of the arbitration agreement itself"); *Canconon v. Smith Barney, Harris Upham & Co.*, 805 F.2d 998 (11th Cir. 1986); *Gulf Interstate Eng'g Co. v. Pecos Pipeline & Producing Co.*, 680 S.W.2d 879 (Tex. App. 1st Dist. 1984). Both *Canconon* and *Pecos Pipeline* involved egregious facts suggesting more than mere problems of assent or expectation. In addition, both cases can be seen as invoking defenses based on fraud in the factum rather than fraud in the inducement.

102. 680 S.W.2d 879 (Tex. App. 1st Dist. 1984).

103. *Id.* at 881-82.

104. *Id.* at 883. The court was unclear about whether Texas or federal law governed the fraud issue because the contract transaction was in interstate commerce but the contract provided it would be "subject to the Texas General Arbitration Act." *Id.* at 880. The court found "that the relevant provision of both the federal and state law are very similar," *id.*, but then failed to state which law it applied and why. The court cited Texas cases on fraud but appeared to be using the 9 U.S.C. § 2 standard of fraud as a ground for revocation under *Prima Paint* rather than the Texas Act, which expressly recognizes unconscionability as a ground for refusing to enforce an arbitration agreement. *Id.* at 881.

However, the fraud allegations in *Pecos Pipeline* could just as easily have been viewed by the court as directed toward the entire second contract rather than only the arbitration clause. It appears, however, that the only difference between the two contracts was the arbitration clause in the second contract. Thus, an attack on the second contract was in effect an attack on the arbitration clause. Although other litigants have raised similar arguments, courts seldom find them sufficiently targeted at the arbitration clause.¹⁰⁵

c. Getting Around *Prima Paint*: Fraud in the Factum as Distinguished from Fraud in the Inducement

In addition to the targeted fraudulent inducement defense, courts have recognized and used, although rarely, a fraud in the factum defense to arbitration. Contract doctrine distinguishes between: (1) fraud in the inducement—fraud in which the consent to the contract is not at issue but where the consent was obtained through fraudulent representations (that is, the financial health of the company, the wisdom of an investment); and (2) fraud in the factum—fraud that makes the consent to the contract ineffective (that is, representing to the party that the document has no legal effect or misstating its legal effect). Although the distinction can be criticized as unrealistically theoretical,¹⁰⁶ it has found some favor in the courts, although “[o]nly rarely, however, is a misrepresentation seen as going to the very nature of the contract itself.”¹⁰⁷ One court outlined the distinc-

Subsequent developments make it appear that state arbitration law would control if adopted through a valid choice of law clause. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468 (1989).

105. *See, e.g., Leone v. Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985) (finding securities investor’s claim of fraudulent inducement into arbitration clause insufficiently focused and also rejecting *Moseley* argument that arbitration clause was integral part of defendant’s fraud); *see also Todd v. Oppenheimer & Co.*, 78 F.R.D. 415 (S.D.N.Y. 1978) (defense of fraud or coercion, even one directed toward arbitration agreement, is not cognizable by court).

106. Everyone would agree that one should not be bound by a contract she did not intend to make. What is less clear is that one should be bound by a contract she intended to sign but only because of fraudulent representations. Despite this apparent unfairness, the distinction can be justified on grounds of freedom of contract and opportunity to assess risk. When one signs a contract, even one induced by fraudulent representations, she is nonetheless able to make some calculation of the risk incurred and can be held accountable until the fraud is proven. When one has not even so much as agreed to the contract or did not intend to create a contract, it is more clearly distasteful to bind her to the contract, even for the initial task of hearing claims.

107. E. FARNSWORTH, *supra* note 56, § 4.10, at 235.

tion as follows:

Under the common law of contracts, there is a distinction between fraud in the inducement and fraud in the "factum," or execution. Fraud in the factum occurs when a party makes a misrepresentation that "is regarded as going to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect." If the misrepresentation is of this type, then "there is no contract at all, or what is sometime[s] anomalously described as a void, as opposed to voidable, contract." If the fraud relates to the inducement to enter the contract, then the agreement is "voidable" at the option of the innocent party. The distinction is that if there is fraud in the inducement, the contract is enforceable against at least one party, while fraud in the factum means that at no time was there a contractual obligation between the parties.¹⁰⁸

In *Cancanon v. Smith Barney, Harris Upham & Co.*,¹⁰⁹ the court stressed this distinction in refusing to order arbitration of a broker-customer dispute. Plaintiffs alleged that they approached a broker to open a money-market account and that the broker took their money and opened a discretionary trading account in equities, either by "furtively obtaining" their signatures or forging them and also falsifying records so that plaintiffs did not receive account statements of the broker's allegedly speculative, unsuitable, and fraudulent trading activity.¹¹⁰ The securities account contract contained an arbitration clause while the standard money-market account did not. *Cancanon* found that the plaintiffs had stated a defense of fraud in the factum rather than fraud in the inducement, removing the case from the *Prima Paint* line of precedents, with the matter instead governed by precedent refusing arbitration where the contract was deemed insufficiently formed and therefore unenforceable.¹¹¹

Similar is *Dougherty v. Mieczkowski*,¹¹² in which plaintiffs,

108. *Dougherty v. Mieczkowski*, 661 F. Supp. 267, 274 (D. Del. 1987) (citations omitted) (respectively quoting E. FARNSWORTH, *supra* note 56, § 4.10, at 235; RESTATEMENT (SECOND) OF CONTRACTS § 163 comment a, § 164 (1981)).

109. 805 F.2d 998 (11th Cir. 1986).

110. *Id.* at 999. By whatever conduct, the broker managed to reduce the value of plaintiffs' account from \$74,657.71 to \$3,126 in one year, incurring more than \$38,000 in commissions. *Id.* One wonders whether the late John Houseman, television spokesman for Smith Barney, envisioned this when he spoke of earning money the old-fashioned way.

111. *Id.* at 1000 ("Where misrepresentation of the character or essential terms of a proposed contract occurs, assent to the contract is impossible.")

112. 661 F. Supp. 267 (D. Del. 1987).

disappointed securities investors, alleged that a renegade broker had forged their signatures on customer agreements providing for arbitration.¹¹³ The court found that the issue of agreement to arbitrate must therefore be tried by the court rather than be submitted to the arbitrator.¹¹⁴ Although *Canconon* and *Mieczkowski*, with their extreme contracting scenarios, provide particularly graphic and compelling cases of contracting misbehavior, other cases have either noted the factum-inducement dichotomy¹¹⁵ or refused to enforce arbitration clauses because the defense challenged the manifestation of assent rather than the circumstances that led to assent.¹¹⁶ *Canconon* and *Mieczkowski* appear to be the only federal cases squarely resting on a fraud in the factum rationale.¹¹⁷ The all-or-nothing importance of the characterization of a defense as sounding in fraudu-

113. *Id.* at 270.

114. *Id.* at 275.

115. *See, e.g.,* *Lummus Co., v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 923 n.8 (1st Cir.) (making distinction but finding instant case to present defense of fraud in the inducement), *cert. denied*, 364 U.S. 911 (1960).

116. *See, e.g.,* *T & R Enters., Inc. v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th Cir. 1980) (absence of signature on written arbitration agreement prevents enforcement of clause); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54-55 (3d Cir. 1980) (question of signer's authority prevents enforcement of arbitration clause until issue resolved by court); *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 462 F.2d 673 (2d Cir. 1972), *cert. denied*, 423 U.S. 1054 (1976); *see also* *Fisser v. International Bank*, 282 F.2d 231 (2d Cir. 1960) (arbitration agreement need not be signed to be enforceable if other evidence sufficiently proves assent).

117. For example, *Par-Knit Mills* can be better explained as a defective agency case while *T & R Enterprises* and *Interocean Shipping* can be described as strictly contract formation cases where allegations of fraud played no part in the decision. *See infra* text accompanying notes 295-301 (discussing defective agency defense).

The bulk of cases where fraud is asserted as an arbitration defense have expressly or implicitly characterized these defenses as going to inducement rather than fraud in the factum. *See, e.g.,* *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286-87 (9th Cir. 1988); *Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 529 (1st Cir. 1985); *Ross v. Mathis*, 624 F. Supp. 110, 114 (N.D. Ga. 1985). *Cohen* seems to be one of those rare cases in which the party seeking to avoid arbitration averred some discussion linked to the impact of the contract on its legal rights. Plaintiffs alleged that they signed the securities account on "the advice of a Wedbush agent that the margin agreement would 'not compromise any of [their] rights.'" 841 F.2d at 286; *see also supra* text accompanying notes 65-66. However, the circuit court found the statement "cannot fairly be characterized as fraud in the inducement as to the arbitration clause. The statement is quite general, relating to the contract as a whole rather than to the arbitration clause in particular." 841 F.2d at 287 (emphasis in original). Although subject to more debate than acknowledged by the Ninth Circuit, *Cohen* illustrates both the more common occurrence of fraudulent inducement claims (or at least judicial preference for the characterization) and judicial reluctance to find satisfied the *Prima Paint* standard of specific attack on an arbitration clause. *See* E. FARNSWORTH, *supra* note 56, § 4.10, at 235 (falsely stating that contract that has no legal effect is fraud in the factum).

lent inducement rather than factum fraud raises the danger of seemingly arbitrary line drawing by the courts.¹¹⁸

2. Illegality

Attempts to interpose contract-based defenses to arbitration agreements other than fraud have fared even less well than fraud claims (both before and after *Prima Paint*). For example, claims that the contract is illegal generally must be first presented to the arbitrators.¹¹⁹ This view posits that arbitrators should be presumed to make the correct decision on the question of legality.¹²⁰ In addition, an egregious arbitrator error concerning contract illegality can be viewed by the court as a "manifest disregard of law,"¹²¹ or an example of arbitrators "so imperfectly executing" their powers as to support vacating the award pursuant to section 10 of the Act.¹²²

3. Impossibility and Frustration

Claims of contract impossibility enjoy a similar lack of success,¹²³ and allegations of frustration of purpose are even more

118. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391 (5th Cir. 1981), in which the court found insufficient a customer's claim that she signed options trading agreements containing arbitration clauses because she was distracted and coerced by "high pressure sales talk." The *Cancannon* court regarded Haydu's defense as one of fraud in the inducement rather than ineffective assent. *Cancannon v. Smith Barney, Harris Upham & Co.*, 805 F.2d 998, 1000 n.5 (11th Cir. 1986). This characterization runs counter to traditional contract concepts as well as common sense. A duress claim, because it alleges coerced assent, must surely be a defense of ineffective assent. What *Cancannon* and *Haydu* must have meant is that Haydu's claims of high pressure, "blue smoke and mirrors" selling, although related to the consent issue, did not meet the legal threshold of a duress defense, a common fate of the defense. See *infra* text accompanying notes 130-36 (discussing duress and coercion defenses). Although the discrepancy between *Cancannon* and *Haydu* can be explained, it nonetheless casts doubt on the inducement-factum fraud distinction as a basis for developing a coherent § 2 contract revocation doctrine in light of the apparently easy malleability and inconsistency of judicial characterization.

119. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960).

120. See, e.g., *Hospital for Joint Diseases & Medical Center v. Davis*, 442 F. Supp. 1030 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1368 (2d Cir. 1978).

121. See, e.g., *Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742 (9th Cir. 1985).

122. See, e.g., *Milwaukee Typographical Union v. Newspapers, Inc.*, 639 F.2d 386 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981); *Raytheon Co. v. Computer Distributions, Inc.*, 632 F. Supp. 553 (D. Mass. 1986).

123. See, e.g., *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir.), *cert. denied*, 484 U.S. 943 (1987). Of course, this case was complicated because the party alleging impossibility was part of the Iranian government, which had made arbitration under the contract impossible as a result of turmoil caused by the Iranian revolution of

unsuccessful. As one court noted, arbitration seeks to determine, "among other things, whether the contract has in fact been frustrated."¹²⁴

4. Waiver and Laches

Defenses asserting forfeiture of the arbitration right through waiver or laches have seen some success,¹²⁵ but the bulk of cases find no waiver.¹²⁶ To waive an arbitration right, the party must normally have engaged in affirmative conduct (usually commencing and prosecuting suit) inconsistent with the arbitration provision while the party asserting the waiver defense must show prejudice from this conduct (often requiring judicial proceedings to progress beyond the initial pleading stage).¹²⁷ For example, many cases have held that conducting discovery in litigation does not itself constitute waiver.¹²⁸

Similarly, defenses based on the triggering point of the right to invoke arbitration have a record of mixed success, with the bulk of cases taking a broad view of triggering language such as "upon inability to agree," "after submission to the architect for decision," and the like. As with questions concerning the scope of an arbitration clause, courts begin with a presumption in favor of arbitrability based on the mere existence of the written arbitration clause and will rely on the presumption so long as the scope of the clause is fairly debatable. Unless "it can be said with positive assurance" that the instant dispute does not fall

1979. The Iranian Oil Company could also clearly have anticipated that arbitration in Iran, as provided in the contract clause (which appeared to have been obtained through something bordering on duress), was clearly foreseeable. *Id.* at 333. In addition, the remedy sought by the Iranian Oil Co.—arbitration in Mississippi—was outside the court's general equitable powers and not authorized by the arbitration clause, which had been drafted by the Iranian Company. *Id.* at 330-31.

124. *Eastern Marine Corp. v. Fukaya Trading Co.*, 364 F.2d 80, 84-85 (5th Cir. 1966), *cert. denied sub nom. Publishers' Ass'n v. NLRB*, 385 U.S. 971 (1967); *accord International Refugee Org. v. Republic S.S. Corp.*, 93 F. Supp. 798 (D. Md. 1950), *appeal dismissed*, 189 F.2d 858 (4th Cir. 1951).

125. *See, e.g., Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. 1974) (finding waiver of arbitration rights through prosecution of lawsuit); *E.C. Ernst, Inc. v. City of Tallahassee*, 527 F. Supp. 1141 (N.D. Fla. 1981).

126. *See* 9 U.S.C.A. § 2 annot. 104-06 (1986); *see also Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 244 (E.D.N.Y. 1973).

127. *See, e.g., Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985); *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638 (7th Cir. 1981).

128. *See, e.g., General Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970); *Drexel Burnham Lambert, Inc. v. Warner*, 665 F. Supp. 1549 (S.D. Fla. 1987).

within the arbitration agreement, arbitration will be compelled or litigation stayed.¹²⁹

5. Coercion and Duress

Contract revocation defenses alleging coercion or duress have not fared any better. In most of these attempts, the party asserting duress is a sophisticated commercial entity of ample resources. Perhaps the leading case is *Hellenic Lines v. Louis Dreyfus Corp.*,¹³⁰ in which the court rejected a claim of duress. A Greek shipper, Hellenic Lines, sought to compel arbitration of its dispute over shipping charges with a grain merchant, Louis Dreyfus, in connection with somewhat involved events related to Dreyfus' attempt to ship grain while simultaneously using the opportunity to collect a past debt owed by Hellenic. Later in the drama, Hellenic gained the upper hand when it tendered an encumbered bill of lading rather than the "clean" bill Dreyfus required to complete the sale.

In order to have Hellenic's claims for detention damages and overtime deleted from the bill of lading, Dreyfus agreed to arbitrate these disputes in New York.¹³¹ A dispute ensued as to the scope of the arbitration, with Dreyfus refusing to arbitrate, claiming the agreement was obtained through duress.¹³² The Second Circuit rejected this argument, finding no duress because Dreyfus was not compelled to assent to arbitration against its will. Although Dreyfus undoubtedly wished to resolve the problem quickly and sell the grain, it was not powerless to resist nor was it stripped of its capacity to exercise reasonable judgment because of threats, fear, or economic necessity.¹³³

129. See, e.g., *Mar-Len, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 636 (5th Cir. 1985); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984).

130. 372 F.2d 753 (2d Cir. 1967).

131. See *id.* at 754-55 for a description of the facts of the cases. The arbitration was to occur before a three-member panel, with each side appointing a partisan arbitrator and the chosen arbitrators choosing a neutral third arbitrator. Dreyfus had an office in New York and did a substantial amount of its business in New York.

132. *Id.* at 755-56.

133. *Id.* at 756-57. The court stated:

It is quite clear that at no time did Dreyfus exhibit the loss of judgment or severe impairment of bargaining power required to establish duress. Dreyfus, whose annual volume at the time was in the vicinity of \$700 to \$800 million, had the problem of satisfying the conditions of a letter of credit in order to obtain payment of \$378,573. The claims raised by Hellenic amounted to slightly over \$21,000. It is difficult to believe that Dreyfus could not have made some arrangement to obtain an amended letter of credit to cover a claim amounting to less than

To make out a duress claim, courts generally require proof by a preponderance of the evidence of: a wrongful act compelling involuntary submission; a wrongful threat or other conduct inducing sufficient fear to preclude application of free will and judgment; or an agreement compelled by economic necessity.¹³⁴ There are few reported arbitration cases discussing the duress defense, probably because duress arguments usually are directed toward the entire contract rather than only the arbitration clause and are thus first referred to arbitrators pursuant to *Prima Paint*.¹³⁵ Consumer cases are more problematic in that one can plausibly posit that a lower level of questionable conduct or threat might, through economic or other pressure, overbear the individual's free will. However, most cases addressing the issue have found no duress even when high pressure tactics are alleged.¹³⁶

6. Failure of Consideration

Historically, defenses to arbitration alleging an absence of

six per cent of the sum due from the Iranian Mission. . . . It is evident that Dreyfus merely exercised its business judgment in a difficult situation.

Id. at 758.

134. *Id.* at 757 (citing RESTATEMENT OF CONTRACTS § 492 (1932); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting); *Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67 (1918)). Professor Farnsworth summarizes the elements of duress as follows: "First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent." E. FARNSWORTH, *supra* note 56, § 4.16, at 257; *accord* *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942) (finding no duress in government demands placed on steelmaker in connection with large government contract); *Hartsville Oil Mill v. United States*, 271 U.S. 43 (1926) (no duress in government threat to breach current contract unless oil mill agreed within one hour to new contract more advantageous to government); *Alloy Prods. Corp. v. United States*, 302 F.2d 528, 532 (Ct. Cl. 1962) ("even threatened financial disaster is not sufficient" to support duress defense) (quoting *DuPuy v. United States*, 67 Ct. Cl. 348, 381 (1929)).

135. *See supra* text accompanying notes 57-66 (discussing *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). *See, e.g.*, *Dougherty v. Mieczkowski*, 661 F. Supp. 267 (D. Del. 1987); *Leone v. Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985) (fraud and duress defenses are arbitrable unless directed solely at procurement of arbitration clause of contract); *Stodolink v. Yankee Barn Homes, Inc.*, 574 F. Supp. 557 (D. Conn. 1983) (duress claims, like claims of fraudulent inducement, if directed to the entire contract rather than only the arbitration provision, are to be first heard and decided by arbitrator).

136. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391 (5th Cir. 1981) (discussed *supra* note 118); *see also* *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990) (rejecting attorney-employee's claim of duress in signing settlement agreement waiving right to bring ADEA claims against employer); *Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F.2d 59, 61 n.1 (8th Cir. 1984) (arbitration clauses not inherently unfair or oppressive).

or insufficient consideration have fared poorly.¹³⁷ As might be expected, written contracts with arbitration provisions usually contain at least two mutual promises, which thereby provide sufficient consideration because the law will not ordinarily inquire into the adequacy of the consideration. A recent case, however, suggests some potential for this defense in the particularly thorny area of employment contracts. In *Hull v. Norcom, Inc.*,¹³⁸ the court permitted an employee to avoid arbitration despite his signed employment contract containing an arbitration clause because such agreements were considered unsupported by consideration under applicable state law.¹³⁹ The court reasoned that an employee signing such a clause got nothing in return for his agreement to arbitrate because his compensation or other benefits did not increase in return for his agreeing to enter a dispute resolution forum favored by his employer.¹⁴⁰ In short, to the majority, there was nothing in it for the worker—he gave away tactical advantages while gaining nothing.¹⁴¹

7. Unconscionability, Adhesion, and Unfairness

a. The “Seriously Inconvenient” Forum

i. Commercial Cases

In its forum selection cases, the Supreme Court has shown concern with contract defenses, focusing either on the substan-

137. See, e.g., *Hellenic Lines v. Louis Dreyfus Corp.*, 372 F.2d 753 (2d Cir. 1967); *Gramling v. Food Mach. & Chem. Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957).

138. 750 F.2d 1547 (11th Cir. 1985), *reh'g denied*, 757 F.2d 287 (1986).

139. *Id.* at 1549-50. New York law was applied “[s]ince both parties relied on New York law to support their respective positions.” *Id.* at 1549. What the court must have meant by this ambiguous statement is that the parties had a choice of law clause in the contract which selected New York law. Even where the interstate nature of the contract otherwise invokes the federal Arbitration Act, such choice of law clauses make application of particular state contract law rules apt. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 476 (1989). In general, however, contract-based defense to arbitration should be governed by federal common law. See *infra* text accompanying notes 304-26.

140. See *Hull*, 750 F.2d at 1549 (citing *Miner v. Walden*, 101 Misc. 2d 814, 422 N.Y.S.2d 335 (Sup. Ct. 1979)).

141. A strong dissent suggested the majority had erred in its interpretation. *Id.* at 1551, 1552 (Nichols, J., dissenting) (interpreting *Miner v. Walden* differently and citing *Weiner v. McGraw-Hill*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982)); *Purchasing Assoc., Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963); *Waldron v. Goddess*, 93 A.D.2d 706, 460 N.Y.S.2d 793 (App. Div. 1983), *rev'd on other grounds*, 61 N.Y.2d 181, 461 N.E.2d 273, 473 N.Y.S.2d 136 (1984); *Deutsch v. Long Island Carpet Cleaning Co.*, 5 Misc. 2d 684, 158 N.Y.S.2d 876 (Sup. Ct. 1956). Subsequent developments in New York have strengthened the dissent's position.

tive fairness of the provision or the negotiation and bargaining power attending the contracting process. In *The Bremen v. Zapata Off-Shore Co.*,¹⁴² a case in which it upheld and enforced a forum selection clause in an international shipping transaction, the Court noted that the party opposing the clause failed to make a sufficient showing of any defect in the contract's formation.¹⁴³ *The Bremen* spoke in terms of "forum selection clauses" but its applicability to arbitration, perhaps the leading type of forum selection clause, was clear.¹⁴⁴ *The Bremen* stated that forum selection clauses that imposed substantively unfair forums on a disputant may be unenforceable—but was brief concerning the criteria for applying this standard.¹⁴⁵

Some subsequent cases have addressed the "seriously inconvenient forum" defense alluded to in *The Bremen*, although few have found this ground effective to support rescission of an arbitration agreement.¹⁴⁶ Some courts have demonstrated further hostility to the defense by finding it applicable to forum selection clauses but not to arbitration clauses.¹⁴⁷ One court stated:

While conceding that "unreasonableness of situs" has not been traditionally recognized as cause to cancel or modify an arbitration clause, [plaintiff] attempts to extend the rules relating to forum-selection clauses to the arbitration area. . . .

[Plaintiff's] attack [on the basis of *The Bremen*] falters on its initial premise that the *Bremen* unreasonableness test is applicable to arbitration clauses. Rather, . . . the enforceability of the arbitration clause at issue is governed exclusively by the

142. 407 U.S. 1 (1972).

143. *Id.* at 13-16.

144. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 (1974) (citing *THE BREMEN* as analogy and requiring arbitration of securities claim arising from international business contract); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-30 (1985) (citing *THE BREMEN* favorably in case requiring arbitration of antitrust claim arising from international business contract).

145. 407 U.S. at 13-16; *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (upholding forum selection clause in international contract but Arbitration Act not involved).

146. *See, e.g.*, USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 20 (1st Cir. 1978) (in dispute between manufacturers, clause providing for arbitration in England did not state claim of sufficiently serious loss of right to permit collateral order doctrine review of order compelling arbitration); Ferrara S.p.A. v. United Grain Growers, Ltd., 441 F. Supp. 778 (S.D.N.Y. 1977) (arbitration clause selecting New York as venue did not create seriously inconvenient forum defense for Italian grain merchant in contract with Canadian grain merchant), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978).

147. *See, e.g.*, Sam Reinfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 680-81 (5th Cir. 1976); Spring Hope Rockwool, Inc. v. Industrial Clean Air, Inc., 504 F. Supp. 1385, 1389 (E.D.N.C. 1981).

explicit provisions of the Federal Arbitration Act. . . . [The Act permits rescission where] the arbitration clause itself was a product of fraud, coercion or [where there exist] "such grounds as exist at law or in equity for the revocation of any contract."¹⁴⁸

This view represents an extremely crabbed reading of the Act. First, as previously noted, the Supreme Court has invoked *The Bremen* by analogy for guidance on arbitrability disputes.¹⁴⁹ Second, contracts providing grossly unreasonable terms have historically been subject to invalidation by courts. It is hard to imagine that the Act changes that part of the common-law. The restricted view of *The Bremen* also strains to find the statutory law of the Arbitration Act and the federal common-law of forum selection clauses in tension; logically, there is no tension between the two. In both instances, the avowed federal policy is to encourage private choice, predictability, and reduction in the workload of federal courts, subject to the limitation that defective contracts not be enforced. Rather than suggesting separate worlds, the Supreme Court's decisions in *The Bremen* and *Scherk* deem arbitration as a type of forum to be selected.¹⁵⁰ Perhaps courts attempting to separate the "seriously inconvenient forum" defense from arbitration litigation feared an erosion of the limited arbitration avoidance grounds set forth in the Act. However, section 2's reference to common-law revocation doctrine suggests that unconscionable provisions are suspect.¹⁵¹ A provision selecting a forum that effectively prevents one party from being heard often could be considered unconscionable.

ii. The Inconvenient Forum as a Form of Substantive Unconscionability

It appears that the cases in which the seriously inconvenient

148. *Sam Reisfeld*, 530 F.2d at 680-81 (citations omitted).

149. *See supra* text accompanying notes 137-40.

150. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-19 (1974). The decisions creating the forum selection/arbitration dichotomy can be explained by legal realism rather than the professed separation of forum selection and arbitration defenses. Most cases rejecting the inconvenience defense to arbitrability involve parties fully capable of representing themselves in a distant forum. *Sam Reisfeld*, for example, involved an importer of a Belgian company's products that had agreed to a clause providing for arbitration in Belgium. *Spring Hope Rockwool*, 504 F. Supp. 1385, involved a North Carolina manufacturer who had purchased goods and services from a California company and agreed to arbitrate in California.

151. *See infra* text accompanying notes 152-61 (discussing the roots of the unconscionability defense).

forum doctrine has been applied are properly viewed as unconscionability defenses to the arbitration contract rather than as a new genre of defense born out of *The Bremen*.¹⁵² I refer to true “substantive unconscionability” more than to what many might term “procedural unconscionability.”¹⁵³ This defense, although a subject of great academic interest,¹⁵⁴ has not found as much use in defeating arbitrability as it has in avoiding the terms of some business,¹⁵⁵ and especially consumer¹⁵⁶ and labor¹⁵⁷ contracts. However, the broad language of section 2, permitting arbitration to be avoided through any available contract defense, certainly permits use of the doctrine so long as arbitration agreements are not treated differently than other contracts.

For the most part, however, unconscionability claims either have not been made in arbitrability disputes or, where made, have been rejected by the courts, often because of the absence of evidence on the point.¹⁵⁸ Courts also seem to reject the sub-

152. *Spring Hope Rockwool* tacitly acknowledges this by distinguishing itself from the *AAACON* cases, discussed *infra* notes 155-65, in which the consumer plaintiffs were deemed to have no practicable ability to present their case in distant fora as could the merchants of *Spring Hope Rockwool*. 504 F. Supp. at 1388-89.

153. See Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (defining procedural unconscionability as “bargaining naughtiness,” sharp practices, coercion and the like while defining substantive unconscionability as terms that are so one-sided, oppressive, or unfair that a court must in good conscience refuse to enforce them); see also *infra* text accompanying notes 154-61, 292-94.

154. See E. FARNSWORTH, *supra* note 56, § 4.28, at 307 (“scholars lavished more ink [on U.C.C. § 2-302, the unconscionability provision] than on any comparable passage in the Code”).

155. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971) (gas station franchisee relieved of provision in lease waiving claims for injuries caused by lessor).

156. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (invalidating cross-collateralization provision in consumer furniture sale contract enabled seller to repossess all furniture sold where only portion of debt remained).

157. See, e.g., *Vasquez v. Glassboro Serv. Ass’n*, 83 N.J. 86, 415 A.2d 1156 (1980) (striking down housing provisions in migrant workers’ contracts). The *Weaver*, *Walker-Thomas*, and *Vasquez* cases have some aspects of procedural unconscionability as well. *Weaver*, as gas station franchisee, may have been lured into complacency by a seemingly cooperative endeavor with the oil company. The furniture contract in *Walker-Thomas* provided the unconscionable provision in fine print and complex prose on the back of the contract. The migrant workers in *Vasquez* may not have been fluent in English. Although the line between procedural and substantive unconscionability often blurs, analysis of contracts will generally be improved by attempting to separate the concepts. The gravamen of all three decisions posits that the challenged contract provisions are simply too unfair to deserve judicial enforcement.

158. See, e.g., *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (“The Piersons failed . . . to plead unconscionability to the district court.”); see also *Dow Corning Corp. v. Capitol Aviation, Inc.*, 411 F.2d 622, 627 (7th Cir. 1969) (hearing a prerequisite to finding of unconscionability).

stance or theory of most unconscionability claims in reported cases.¹⁵⁹ In particular, courts have been hesitant to accept an unconscionability argument based solely on one party's weakness,¹⁶⁰ correctly perceiving that the doctrine seeks to prevent substantive unfairness or deplorable contracting practices intolerable for society¹⁶¹ rather than to promote resource redistribution. Nonetheless, the defense remains clearly available under proper circumstances, although the courts have said little to help define or recognize those circumstances.

iii. Inconvenient Forums as Unconscionable in Consumer Cases

Whether termed unconscionability cases or inconvenient forum cases, a cottage industry of arbitration jurisprudence spawned from the standard form clause used by AAACon Auto Transport, Inc., a business that arranged to drive its customer's automobiles to various parts of the country. The AAACon clause provided that any claim "arising out of or relating to" the auto transport contract signed by AAACon "shall be settled by arbitration in New York City."¹⁶² In a typical transaction, AAACon agreed to transport the customer's car from Point A to Point B while the customer took a less demanding trip by air or rail or in any additional family cars. Disputes typically involved damage or loss of the car in transit, with most claims for less than \$1,000.¹⁶³

When trouble arose, the non-New York customers were predictably upset with the prospect of journeying to the Big

159. See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285-86 (9th Cir. 1988) (arbitrators' use of industry standard and custom not unconscionable even if accruing to advantage of defendants). State courts, however, have occasionally found traits such as industry custom or closeness to constitute unconscionability. See, e.g., *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 183 Cal. App. 3d 1097, 228 Cal. Rptr. 345 (1986); *Lewis v. Prudential-Bache Sec., Inc.*, 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986).

160. See, e.g., *Pierson*, 742 F.2d at 339 ("Contract law would lose much of its meaning if unfavorable contract provisions could be challenged merely on the basis of the relative size of the contracting parties."); *T.A. Moynahan Properties, Inc. v. Lancaster Village Coop., Inc.*, 496 F.2d 1114, 1119 (7th Cir. 1974).

161. See, e.g., *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 420 (5th Cir. 1980); *Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 366 (S.D.N.Y. 1982).

162. *AAACon Auto Transport, Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 651 (2d Cir. 1976). The AAACon form contract also provided customer consent to personal jurisdiction in New York and service of process by certified mail. *Id.*

163. *Id.* at 650 n.1 (citing *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, 124 M.C.C. 493 (Div. 1, Apr. 7, 1976) (N.Y. Administrative Proceeding)).

Apple to do battle with AAACon for a possible award that might fall short of the claimant's hotel and food bill. Despite the small stakes, however, enough customers or their auto insurers litigated the issue to produce several federal court opinions. In *AAACon Auto Transport, Inc. v. State Farm Mutual Automobile Insurance Co.*,¹⁶⁴ the court found the arbitration clause voidable, but found it "unnecessary to react to the contract-of-adhesion arguments."¹⁶⁵ However, the notion of a forum choice so inconvenient as to amount to surrender of a substantive right proceeds on implicit assumptions of substantive unconscionability. This approach views the forum selected as incapable of rendering fair process to the claimant because it is either too seriously inconvenient or marked by significant actual or structural bias against the claimant.

In *Miller v. AAACon Auto Transport, Inc.*,¹⁶⁶ the court grasped the mantle of unconscionability more directly and held the clause unconscionable, but also buttressed the holding by invoking the perceived statutory conflict between arbitration and the Interstate Commerce Act's non-waiver provision.¹⁶⁷ Primarily, however, *Miller* struck down the AAACon clause as substantially unconscionable and thus "invalid under 9 U.S.C. § 2" as well as 49 U.S.C. § 316(b), a Commerce Act provision not addressed in *AAACon v. State Farm*.¹⁶⁸ The *Miller* court regarded the clause as a "hammer" for AAACon in terms of its unfairness to the customer claimant who resided in Florida. Another district court case, *Aluminum Product Distributors, Inc. v. AAACon Auto Transport, Inc.*,¹⁶⁹ also struck down the arbitra-

164. 537 F.2d 648 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977).

165. *Id.* at 661. The court viewed the arbitration clause as a limitation on liability forbidden by the Interstate Commerce Act. However, in reaching this result, the *AAACon v. State Farm* court employed reasoning similar to the now overruled *Wilko v. Swan* securities exception, which equated forum selection with waiver of substantive rights. *Id.* at 653-56.

166. 434 F. Supp. 40 (S.D. Fla. 1977), *aff'd mem.*, 614 F.2d 292 (5th Cir.), *cert. denied*, 449 U.S. 918 (1980).

167. *Id.* at 42. The *Miller* facts were particularly egregious in that the customer's car simply never arrived. *Id.* at 40. AAACon asserted an "act of God" defense which, like Samuel Johnson's comment about patriotism, is perhaps the last refuge of a litigation scoundrel. *Id.* at 41; *cf.* G. STERN, *THE BUFFALO CREEK DISASTER* 11-18 (1976) (coal company asserted Act of God defense when inadequately constructed dam violative of state and federal law collapsed destroying several towns and killing 125 people). AAACon eventually offered a mere \$700 for the lost car and refused to split the arbitration fee with the customer claimant. *Miller*, 434 F. Supp. at 41.

168. *Id.* at 42-43.

169. 404 F. Supp. 1374 (W.D. Okla. 1975), *aff'd*, 549 F.2d 1381 (10th Cir. 1977).

tion term, stressing its fundamental unfairness in light of the nature of the parties and transaction, although it also buttressed the holding by reference to the Commerce Act.¹⁷⁰

iv. Unconscionability in Commercial Cases

At least one other reported case has expressly invoked unconscionability to support revocation of an arbitration clause. In *Pittsfield Weaving Co. v. Grove Textiles, Inc.*,¹⁷¹ the plaintiff agreed to purchase yarn from the defendant pursuant to a contract that required all claims against the defendant to be made within fifteen days of invoice date for "obvious" defects and sixty days for "latent" defects. When plaintiff Pittsfield Weaving found latent defects, it sued in state court. Defendant Grove Textiles sought dismissal on the basis of the arbitration clause, which the court found unconscionable because "the record reveal[ed] that some defects could not be detected until after processing, which would constitute a waiver of claim."¹⁷² The court also found that the yarn was sold and shipped before the plaintiff ever saw the contract and that the plaintiff had previously attempted to negotiate with suppliers over the arbitration clause but the suppliers had refused. These circumstances made the provision adhesive, especially because of an imbalance in party bargaining power, which "rendered the contract so coercive and one-sided as to prevent the plaintiff from having voluntarily assented to its terms."¹⁷³

Although *Pittsfield Weaving* is probably correct in finding that adhesion and unconscionability are "grounds as exist at law or in equity for the revocation of any contract," it also probably erred in forbidding arbitration at the outset. The court held that a claim of unconscionability of the entire contract included the

170. *Id.* at 1376. The court found the arbitration mechanism itself unfairly biased against claimants because restrictions on the arbitrator, options granted to AAACon but not its customers, and geographic inconvenience made the clause "a device utilized by defendant in an attempt to unlawfully limit or avoid liability for just claims" rather than a legitimate arbitration clause.

171. 121 N.H. 344, 430 A.2d 638 (1981).

172. *Id.* at 347, 430 A.2d at 640.

173. *Id.* 430 A.2d at 639-40 (citing the well-known case which invalidated a warranty disclaimer for a consumer purchase on adhesion/unconscionability grounds, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960)). By referring to the lack of negotiation, the *Pittsfield Weaving* court added some possible element of procedural unconscionability to its decision. However, as in the other cases of true substantive unconscionability, the gravamen of the court's position is that the position under challenge, no matter how arrived at, is just too unfair to be enforced.

arbitration clause, citing *Moseley*.¹⁷⁴ The court neglected to cite *Prima Paint* and could not have squared its decision with *Prima Paint*. Unlike the AAACon plaintiffs, who alleged that the arbitration mechanism established by the contract was itself unconscionable, *Pittsfield Weaving* did not quarrel with arbitration but rather attacked other aspects of the contract, particularly the time limitation provisions. Pittsfield Weaving's attack thus was closer to *Prima Paint*'s argument (that it had been hoodwinked by parts of the contract outside the arbitration clause) than to *Moseley Plumbing*'s argument (that the arbitration clause was central to a plan to defraud it).¹⁷⁵

b. Contracts of Adhesion: Unconscionability's Cousin

The status of adhesion defenses to arbitration is less certain than that of unconscionability. In part, this probably results from a tendency to commingle adhesion concepts with those of unconscionability. Courts also tend to misdefine adhesion solely in terms of party size, resources, or bargaining power rather than focusing on the nature of the contracting process.¹⁷⁶ At least one federal court has found undisputed adhesion alone to be insufficient to make an arbitration agreement voidable.¹⁷⁷ When adhesive aspects of an arbitration agreement have been cited as reasons for refusing its enforcement, the clause (or perhaps the contract as a whole) has also been seen by the courts as tinged with unconscionability, grave inconvenience to the resisting party, or conflicting statutory provisions.¹⁷⁸ In essence,

174. *Id.* at 640.

175. *See, e.g., Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 446 (S.D.N.Y. 1985) ("The court will become involved only if there is a specific allegation [directed against] the arbitration clause itself. Claims concerning duress, unconscionability, coercion, or confusion in signing should be determined by an arbitrator because those issues go to the formation of the contract.") (citations omitted); *accord Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. 1981).

176. *See infra* text accompanying note 250. For purposes of this Article, an adhesion contract or term is one offered on a "take it or leave it" basis, with no willingness of the contract drafter to negotiate about the term or to enter into the contract in the absence of the term. Most courts have imposed additional definitional criteria. *See, e.g., Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503, 511 (1985) (adhesion contract "imposed" by "party of superior bargaining strength"), *appeal dismissed*, 475 U.S. 1001 (1986).

177. *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988).

178. *See, e.g., Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963); *Wilko v. Swan*, 346 U.S. 427 (1953); *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263 (1949); *AAACon Auto Transp., Inc., v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Miller v. AAACon Auto Transp., Inc.*, 434 F.

there appears to be no judicially recognized adhesion defense. Rather, the adhesive nature of a contract or arbitration provision is occasionally noted and rhetorically invoked to support the court's holding based on other arbitrability defenses such as procedural unconscionability or public policy, but adhesion itself does not appear to constitute a sufficient basis for invalidating arbitration agreements.

8. Traces of Contract Doctrine in Public Policy Exception Cases

a. Securities Law

In the course of announcing public policy exceptions to arbitrability, the courts have frequently touched tangentially on issues of contract revocation. For example, in *Wilko v. Swan*,¹⁷⁹ perhaps the paradigmatic case finding an exception to arbitrability, the majority based its analysis on a perceived conflict between statutes and a strong distrust of arbitration. The court suggested that it found arbitration of 1933 Act claims pernicious because purchasers unknowingly waived more substantial rights than did other signers of arbitration agreements.¹⁸⁰ The majority also suggested that it was strongly influenced by the adhesive nature of brokerage agreements, analogizing Wilko's situation to that of railroad workers, whose signed stipulations restricting venue in Federal Employers Liability Act (FELA) actions had been struck down as violative of the FELA's provision banning exculpatory clauses.¹⁸¹ The concern over contract consent is valid. However, the assumption that investors have not made such consent in brokerage agreements, like the assumption that arbitration is evil, is too speculative to support the exception for all securities claims.

Supp. 40 (S.D. Fla. 1977), *aff'd mem.*, 614 F.2d 292 (5th Cir.), *cert. denied*, 449 U.S. 918 (1980).

179. 346 U.S. 427 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

180. *Id.* at 435. Below the surface, *Wilko* may have been driven by some notion of what this Article terms a "blameless ignorance" defense. See *infra* text accompanying notes 270-76.

181. See 346 U.S. at 437 (citing *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263 (1949)); *Krenger v. Pennsylvania Ry. Co.*, 174 F.2d 556 (2d Cir.), *cert. denied*, 338 U.S. 866 (1949); *Akerly v. New York Cent. Ry. Co.*, 168 F.2d 812 (6th Cir. 1948). Since only the most untextually anchored interpretation can equate forum selection with liability waiver, the real rationale of the FELA decisions must have been the Court's quite proper concern that railroad workers' employment contracts were adhesive and often obtained through economic duress and coercion.

The *Wilko v. Swan* dissent, unpersuaded of any statutory conflict, viewed the issue as one of contract. Said Justice Frankfurter:

We have not before us a case in which the record shows that the plaintiff in opening an account had no choice but to accept the arbitration stipulation, thereby making the stipulation an unconscionable and unenforceable provision in a business transaction. The Securities and Exchange Commission . . . does not contend that the stipulation . . . was a coercive practice by financial houses against customers incapable of self-protection. It is one thing to make out a case of overreaching as between parties bargaining not at arm's length. It is quite a different thing to find in the anti-waiver provision of the Securities Act a general limitation on the Federal Arbitration Act.¹⁸²

Although the dissent's conclusion is clear, it gives no guidance to lower courts facing arbitrability issues in situations where a public policy exception does not apply. It does imply that lack of choice alone makes a contract provision unconscionable, a position rejected by most courts¹⁸³ and by part III of this Article.¹⁸⁴ It also suggests that industry-wide uniformity would create a sufficient absence of choice to make the provision unenforceable on adhesion grounds.¹⁸⁵ At a minimum, the dissent suggests that duress or coercion in contracting would vitiate an arbitration agreement.

Conflicting perceptions of the 1933 Act, the judicial role, contract law, and the possible abuses of privatization permeated all levels of the *Wilko* decision. The district court refused to enforce the arbitration provision, primarily because it viewed the 1933 Act non-waiver provision as applying to forum selection as well as to substantive liability rules—the perceived statutory

182. 346 U.S. at 440 (Frankfurter, J., dissenting).

183. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (unconscionability that makes a contract voidable requires both unreasonably favorable terms and lack of meaningful choice). Currently, at least, arbitration is not considered unreasonably favorable to brokerage houses. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

184. See *infra* text accompanying notes 259-62 (distinguishing between contracts of adhesion and unconscionable terms or behavior.)

185. Part III herein rejects in part the dissent's suggestion that other investments can be substituted investments for securities where the industry as a whole has closed ranks around arbitration clauses, as appears to be the current case. See *infra* text accompanying note 289; see also, Comment, *supra* note 3, at 131 (of ten brokerage houses surveyed, all required arbitration clause to open margin account but only half insisted on arbitration clauses for cash trading accounts.)

conflict seen by the Supreme Court majority.¹⁸⁶ To a greater extent than the Supreme Court, however, the district court invoked a scenario of adhesion contracting, overreaching, and unfair surprise to find the brokerage agreement suspect.¹⁸⁷ The Second Circuit panel, which upheld the arbitration provision, reflected the polarized views of the transaction. Judge Thomas Swan's majority opinion regarded the brokerage transaction as sufficiently consensual to invoke standard contract analysis, viewing the customer's decision to sign a contract containing an arbitration provision binding even if unwise.¹⁸⁸ The majority also resisted the notion that a customer's choice of arbitration was inherently disadvantageous.¹⁸⁹ By contrast, Judge Charles Clark's dissent not only differed over 1933 Act interpretation but gave a divergent view of contracting realities and expressed concern that classical contract theory might make the judiciary an accomplice to thwarting legislative policy.¹⁹⁰

Unlike Judge Swan, Judge Clark saw a world of brokerage arrangements that did not result from knowing and voluntary exchange but that was rife with consumer ignorance, unfair surprise (the emphasis on "fine print"), adhesion, and coercion through superior economic bargaining power. In essence, Judges Swan and Clark divided over whether securities customer agreements are marked by procedural unconscionability. Yet neither really focused on the contracting parties of the instant case. Although the issue was never really addressed by the Court in subsequent years, the potential infirmity of broker-dealer contracts continued to lurk in the background of securi-

186. *Wilko v. Swan*, 107 F. Supp. 75, 77 (S.D.N.Y. 1952), *rev'd*, 201 F.2d 439 (2d Cir.), *rev'd*, 346 U.S. 427 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

187. *Id.* at 77-79. The district court saw great potential for unfair surprise and rampant privatization of securities matters in derogation of public rights and also viewed the brokerage services market as an adhesive one in which the consumer had no recourse. *Id.*

188. *Wilko v. Swan*, 201 F.2d 439, 443-44 (2d Cir.), *rev'd*, 346 U.S. 427 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Judge Swan's analysis ultimately became law during the 1980s. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). He also correctly anticipated the current law, holding that assertion of "a statutory cause of action is not alone enough to preclude arbitration of the controversy." *Wilko*, 201 F.2d at 443. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (rejecting contention that anti-trust claims, being statutorily based, are consequently too public to be resolved through private arbitration).

189. *Wilko*, 201 F.2d at 444.

190. *Id.* at 445-46 (Clark, J., dissenting).

ties arbitration cases. As the Court became more sanguine about the fairness of securities arbitration in general, its interpretation of statutory text shifted markedly.¹⁹¹

Beyond *Wilko*, other Supreme Court securities arbitration cases show the lurking presence of contract formation questions. For example, in *Shearson/American Express Inc. v. McMahon*,¹⁹² in which the Court rejected an arbitration exception for wholly domestic 1934 Act claims,¹⁹³ plaintiffs also contended that they should be relieved of the arbitration provision because it was a contract of adhesion—an argument rejected by the district court,¹⁹⁴ not addressed by the circuit court,¹⁹⁵ and officially not addressed but implicitly rejected by the Supreme Court. The Court, in discussing plaintiffs' non-waiver argument, noted that the McMahons contended that predispute arbitration agreements "tend to result from broker overreaching"¹⁹⁶ and "that arbitration clauses in securities sales agreements generally are not freely negotiated."¹⁹⁷ Although the Court found these

191. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-19 (1974).

192. 482 U.S. 220 (1987).

193. *McMahon* can, to a large extent, be seen as an extension of *Scherk* in that the Court, unhappy with the *Wilko* precedent, refused to extend it to other securities claims despite the virtual congruency of the 1933 Act's antiwaiver provision and the 1934 Act's antiwaiver provision. In addition, *McMahon* not only disapproved of *Wilko*'s obvious mistrust of arbitration but borders on lionizing arbitration and alternative dispute resolution.

194. 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part and rev'd in part*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987). The district court found:

that plaintiffs' arguments are wholly unconvincing. First, it is well settled that one who signs a contract, in the absence of fraud or misconduct by another contracting party, is conclusively presumed to know its contents and to assent to them. Julia McMahon signed the customer's agreement and has not demonstrated that it was entered into under fraud or duress. Arbitration clauses are routinely upheld by the courts, and, given plaintiffs' sizeable investment, there is nothing to indicate that they were without bargaining power.

Id. at 386 (footnote omitted). The McMahon account initially had \$350,000 in assets when opened in 1980 and ended with \$216,000 when closed in 1983. The McMahons also maintained, apart from the adhesion defense, that they signed the agreement over dinner with the broker, who was a social acquaintance. See Glaberson, *supra* note 31. Although the "sign here, it's just a formality" interaction suggested by the McMahons does not seem like great skulduggery (the McMahons could have bothered to read the form), it might nonetheless be a better fraud defense than acknowledged by the district court. Nevertheless, such testimony, however helpful before a jury, is irrelevant to the adhesion question. Since plaintiffs signed the agreement without objection, it is not clear that the contract was nonnegotiable.

195. 788 F.2d 94 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987).

196. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987).

197. *Id.* (citing Sterk, *supra* note 87, at 519).

traits irrelevant to the statutory question, it suggested that if “brokers ‘maneuver[ed customers] into’ an agreement . . . [this would be] grounds for revoking the contract under ordinary principles of contract law.”¹⁹⁸ Although a contract law defense to the arbitration agreement was technically outside the grant of certiorari in *McMahon*, such technicalities have usually not prevented the Court from reaching a dispositive issue in a case. In effect, the Court, like the district court, saw no contracting practices sufficiently sharp to invalidate the arbitration clause.¹⁹⁹ The dissent took a starkly different view of securities trading realities, quoting *Wilko*’s assessment that brokers have substantial bargaining advantages over customers.²⁰⁰ The dissent, however, employed this view in the service of reading the 1934 Act as implicitly forbidding arbitration rather than arguing, as it might have, that the perceived realities affecting the small investor in the stock market made *McMahon* and other transactions subject to contract revocation defenses. When *Wilko* was finally overruled in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,²⁰¹ neither the five-member majority nor the four-vote dissent addressed contract defenses to the arbitration clause at issue. In short, thirty years of securities law sturm and drang over arbitration have shed little light on the contract revocation defenses authorized by section 2 of the Act.

b. The Underlying Parallel of the FELA Cases

Similar judicial polarization ran through the FELA cases decided by the Supreme Court and circuit courts prior to *Wilko* and cited favorably by the *Wilko* majority.²⁰² In *Boyd v. Grand Trunk Western Railroad*,²⁰³ the Court ended a split in the lower

198. *Id.* (quoting *Wilko v. Swan*, 346 U.S. 427, 432 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)).

199. The ambiguity of the *McMahon* Court’s statements displays the traditional cursory attitude toward contract revocation defenses under the Act. If the Court intended the word “maneuver” to mean conduct triggering a narrow set of contract avoidance grounds found in the better reasoned precedents or criteria set forth by the Court, the statement could be accurate. If the Court intended “maneuver” to have its literal and ordinary meaning, the statement is nonsense. Advertisements maneuver consumers into contracts but few if any contracts are set aside even on the basis of tricky advertising that falls short of being false or substantially misleading.

200. 482 U.S. at 239 (Blackmun, J. dissenting) (quoting *Wilko v. Swan*, 346 U.S. 427, 435 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)).

201. 490 U.S. 477 (1989).

202. 346 U.S. at 437-38.

203. 338 U.S. 263 (1949).

courts²⁰⁴ regarding the enforceability of “expense advancement” contracts popular with railroads in dealing with injured workers. Frequently, the railroad approached an injured worker and offered to advance him living expenses pending resolution of the matter, provided the employee signed an agreement that he would attempt in good faith to settle the matter and, if suit were brought, to bring it only in the venue of worker residence or place of injury.²⁰⁵ *Boyd* invalidated these agreements as violating section 5 of the FELA, which makes void “[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter.”²⁰⁶ The *Boyd* court reasoned that this clause, like the antiwaiver provision at issue in *Wilko*, prohibited forum selection agreements.

In many ways, *Boyd* and other cases striking down the FELA forum limitation clause provide a better example of judicial chariness of forum selection agreements and strained statutory construction for the benefit of the disempowered than does *Wilko*. First, the FELA language at issue banned limits on “liability” rather than restricting waivers of “any provision” of the law as does the 1933 Act antiwaiver provision. The FELA thus presented a greater textual barrier. Second, the FELA contract agreements were post-dispute agreements while the *Wilko* arbitration clause was pre-dispute. If Justice Jackson’s *Wilko* concurrence, approving of post-dispute arbitration contracts, has any validity (and thirty years of subsequent legal adherence suggest it does),²⁰⁷ the same rationale should make courts wary of upsetting any post-dispute agreement to arbitrate, select forums, streamline procedures, exit the court system, or settle the matter.²⁰⁸ Third, the agreement in controversy, despite being

204. See *Akerly v. New York Cent. Ry. Co.*, 168 F.2d 812, 814 (6th Cir. 1948) (citing lower court cases reaching a similar result).

205. See, e.g., *Boyd*, 338 U.S. at 266; *Krenger v. Pennsylvania Ry. Co.*, 174 F.2d 556, 558 (2d Cir.), cert. denied, 338 U.S. 866 (1949); *Akerly*, 168 F.2d at 813-14 (describing railroad contracts in question).

206. 45 U.S.C. § 5 (1988).

207. Despite considerable judicial reluctance to enforce predispute arbitration agreements, courts have tended to enforce post-dispute agreements routinely, probably because less sophisticated parties are more likely to have counsel and to appreciate the stakes involved in forum selection after a dispute has arisen and framed the issues.

208. This was essentially the dissenters’ position in *Krenger* and *Akerly* in which the Second and Sixth Circuits, respectively, invalidated contracts similar to that in *Boyd*. See *Krenger*, 174 F.2d at 561 (Swan, J., dissenting); *Akerly*, 168 F.2d at 815 (Miller, J., dissenting).

drafted by the railroad (perhaps the paradigmatic “bad guy” in the romantic view of American civil litigation), was not nearly as restrictive to the worker as was the arbitration clause to the investor in *Wilko*. The *Boyd* agreement left the courts open to the worker and advanced funds. If the railroad had wanted to play true hardball, it would presumably have withheld funds while tendering a low settlement offer to the worker who would presumably warm to the settlement offer as he and his family approached destitution. It also appears that the worker could have rescinded the venue restriction by repaying the advance.²⁰⁹

The FELA cases were obviously affected by the view that genuine contract bargaining by the railroads and their workers was, even in the post-dispute context, illusory.²¹⁰ Nonetheless, the railroads appear not to have engaged in sharp bargaining practices in the reported cases.²¹¹ The FELA cases also suffer from the same logical gap found in *Wilko*: if the courts permit settlement, why should they restrict private agreements regarding forum? The most persuasive explanation posits that courts during the early post-War period were not only quick to see statutory or public policy bars to arbitration and related clauses such as forum selection, but also were equally quick to find situations unsuitable for a strict view of contract, differentiating between litigants according to their presumed bargaining power and sophistication.

c. Adhesion Fails Again in Antitrust Claims

The Court also alluded to adhesion contract theory in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²¹² rejecting an arbitrability exception for antitrust matters that had

209. *Krenger*, 174 F.2d at 560 (Hand, J., concurring). In addition, the amount advanced in some of these cases (\$1,750 in *Krenger*) was not trivial. The railroad could presumably have attempted to put the worker closer to the capitulation line of poverty through greater parsimony. Of course, a substantial advance is even less likely to be repaid, effectively terminating any rescission option for the worker.

210. On this point, Learned Hand, who concurred in the *Krenger* holding voiding the contract, was the most candid of the jurists facing the issue. *See id.* (“such contracts ought not indeed be enforced, unless the employee is adequately protected; but when he is, section 5 does not invalidate them.”).

211. *See, e.g., Akerly*, 168 F.2d at 815 (Miller, J., dissenting) (“No question is involved about the selection being an unreasonable one, or operating as a hardship in any way on the employee, or being procured by fraud, misrepresentation or duress in any degree.”).

212. 473 U.S. 614 (1985).

found favor in circuit courts for nearly twenty years.²¹³ It noted that courts adopting the antitrust exception had posited that contracts giving rise to antitrust disputes may often be contracts of adhesion. The Court found this

concern unjustified. . . . [A]n antitrust dispute does not alone warrant invalidation of the selected forum . . . [but a] party resisting arbitration . . . may attack directly the validity of the agreement to arbitrate. Moreover, the party may attempt to make a showing that . . . the forum-selection clause . . . was “[a]ffected by fraud, undue influence, or overweening bargaining power”; that “enforcement would be unreasonable and unjust”; or that proceedings “in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.”²¹⁴

This possible series of contract revocation defenses did not spur development of doctrine, as indicated by subsequent cases such as *McMahon*, in which the arguments were asserted but not supported, and *Rodriguez*, in which contract defenses were apparently not asserted at all. Despite its general tone, use of contracting cliché,²¹⁵ and “we’ll know it when we see it” faith in judicial ability to recognize injustice, unreasonableness, inconvenience, and grave difficulty, *Soler*’s litany provided a potential basis for a contract-based approach to arbitrability that did not develop.²¹⁶

d. The Civil Rights and Employment Exception Cases

Similarly, when the Court has addressed arbitration in the context of collective bargaining agreements, it has noted the occasional tension between the union’s objectives and those of the member employee seeking to make a statutory claim.²¹⁷ The Court, however, has stopped short of articulating a theory of

213. See, e.g., *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

214. 473 U.S. at 632 (citations omitted; brackets in original).

215. For example, a phrase like “overweening bargaining power” has a nice rhetorical flourish but provides little evidence or guidance.

216. Some of this trend may, despite my criticisms, simply be shrewd lawyering. Contract revocation defenses have generally failed while public policy defenses have been successful for a number of claims. Consequently, counsel may tend to pursue the latter even where the former are more germane or logically apt.

217. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54-56 (1974); *Barrentine v. Arkansas-Best Motor Freight Sys., Inc.*, 450 U.S. 728, 734-42 (1981); *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984).

union agency or employee consent to aid in determining the circumstances when employees should not be held to the arbitration agreement of the union. Instead, the Court has either mandated arbitration or announced a public policy exception to arbitrability, such as those affecting all claims under Title VII,²¹⁸ the FLSA,²¹⁹ and section 1983.²²⁰ The same all-or-nothing approach has tended to dominate conflicts over the arbitrability of ERISA and ADEA claims as well, although recent Supreme Court jurisprudence is to the contrary. A recent case found ERISA claims exempt from arbitration but focused entirely on the perceived statutory conflict and value laden concerns of forum competence while saying nothing about the enforceability of the arbitration clause under contract principles.²²¹ In perhaps the leading case taking the contrary view that ERISA claims are arbitrable, the Court similarly dwelled on statutory relations and arbitral adequacy.²²² Although the dissent in that case specifically questioned "whether the adhesion contract in this case should be enforced to deprive [plaintiff] of his day in federal court,"²²³ it did not explain why it found the agreement adhesive and why such adhesiveness should invalidate the arbitration provision. The other ERISA exception cases reach different results and fail to address in detail any contract formation and revocation issues, although words like "adhesion," "bargaining power," and "boilerplate" appear in their texts.²²⁴ The Supreme Court appears to have taken the pro-arbitration side of the issue, recently granting certiorari and vacating and remanding an

218. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

219. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

220. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

221. See *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir.), *vacated*, 110 S. Ct. 225 (1989). The Supreme Court granted certiorari in *Bird*, vacating and remanding for reconsideration in light of *Rodriguez*, the case which abolished the *Wilko v. Swan* exception for arbitrability of 1933 Act claims. See 110 S. Ct. 225 (1989). Under the circumstances, with four Justices dissenting despite no written opinion, it appears the ERISA exception to arbitrability has been abolished, with the Justices voting as they did in *Rodriguez*.

222. See *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

223. *Id.* at 479 (Gibson, J., concurring in part and dissenting in part).

224. See, e.g., *Challenger v. Local Union No. 1 of Int'l Bridge*, 619 F.2d 645 (7th Cir. 1980); *Lindahl v. American Tel. & Tel. Co.*, 609 F. Supp. 267 (N.D. Ill. 1985); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D. N.J. 1985); *Wilson v. Fischer & Porter Co. Pension Plan*, 551 F. Supp. 593 (E.D. Pa. 1982); *Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561 (S.D.N.Y. 1978); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977).

ERISA exception case for reconsideration in light of the demise of the securities exception.²²⁵

Cases construing the purported ADEA-arbitration conflict have been in of a similar vein. Here, courts more frequently refuse to enforce arbitration agreements, usually on the basis of the analogy between ADEA and title VII, for which the *Alexander v. Gardner-Denver Co.* precedent squarely rejects arbitration.²²⁶ Upon closer look, however, some of the ADEA exception cases seem highly affected by both collective bargaining agreements that contain the arbitration clause and questions of preclusion in subsequent litigation.²²⁷ One exception is *Nicholson v. CPC International, Inc.*,²²⁸ which involved both an individual employment contract and a prospective arbitration. The *Nicholson* majority found *Alexander*, *Barrentine*, and *McDonald* controlling, invoking both the statutory parallels of Title VII and ADEA as well as the attacks on arbitration's efficacy in discrimination claims.²²⁹ The *Nicholson* majority also touched upon a potentially promising contract revocation inquiry into adhesion and duress, noting that

it does not follow . . . that the arbitration requirement in individually negotiated employment contracts is therefore comparable to that contained in a contract entered into in a commercial context. The disparity in bargaining power between an employer and an individual employee is well known. Older employees who have invested many years of their career with a particular employer may lack any realistic option to refuse to sign a standard form arbitration agreement presented to them by their employers. New employees who need the job may be in a similar position. Although this may not constitute the type of duress that renders a contract voidable, we cannot close our eyes to the realities of the

225. See *supra* note 83.

226. See, e.g., *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143 (1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D. N.J. 1987) (finding ADEA claims not arbitrable). *But see Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.) (finding ADEA claims arbitrable), *aff'd*, 59 U.S.L.W. 4407 (U.S. May 13, 1991).

227. See, e.g., *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

228. 877 F.2d 221 (3d Cir. 1989).

229. *Id.* at 225-30.

workplace.²³⁰

However, the majority's sudden failure of nerve when on the verge of a useful contract-based holding converts *Nicholson* to yet another of the many opinions refusing arbitrability on "public policy" grounds that seem overly dependent upon the courts' views that arbitration provides poorer quality dispute resolution or disadvantages a party.

The *Nicholson* dissent, in addition to waging a persuasive attack on exceptions based on dislike for arbitration, especially in light of *McMahon* and *Rodriguez*, noted the distinction between *Nicholson's* individual employment contract and the collective bargaining agreements of *Alexander*, *Barrentine*, and *McDonald* and found this distinction determinative.²³¹ Neither of the two reflective *Nicholson* opinions attempted to develop a doctrine that could give courts a guidepost for determining when an arbitration agreement should be revocable. The dissent, despite its trenchant analysis of the statute, case law developments, and the relative competence of the forums, minimized the realities of individual employment arrangements, assuming without proof that the single employee has a more enviable position than the union employee saddled with a union that is only lukewarm about pursuing her claim.

To the contrary was the Fourth Circuit opinion in *Gilmer v. Interstate/Johnson Lane Corp.*,²³² which upheld an arbitration clause contained in an individual employment contract, marshalling reasons that mirror the *Nicholson* dissent. Not surprisingly, the *Gilmer* dissent read like the *Nicholson* majority.²³³

230. *Id.* at 229.

231. *Id.* at 231 (Becker, J., dissenting). The dissent also made a persuasive case that despite similarities, ADEA was not so like title VII as to mandate that *Alexander* be treated as controlling precedent.

232. 895 F.2d 195 (4th Cir.), *aff'd* 59 U.S.L.W. 4407 (May 13, 1991). *Gilmer* was decided as this article was going to press. Although *Gilmer* properly rejected a public policy exception to arbitrability, the Court's enforcement of the arbitration clause signed by plaintiff *Gilmer*, a stockbroker required to sign the clause in order to work in the industry, followed the historic contract law formalism found when courts enforce arbitration agreements. However, in distinguishing *Alexander*, *Barrentine*, and *McDonald*, the Court suggested that this article's detective agency defense (*see infra* pp. 1447-49) might be applicable to some claims arising out of collective bargaining agreements. *See Gilmer*, 59 U.S.L.W. at 4411.

233. *Id.* at 203 (Widener, J., dissenting). Perhaps the least persuasive portion of the *Gilmer* majority opinion is its attempt to label *Alexander*, *Barrentine* (the FLSA exception case), and *McDonald* (the § 1983 exception case) "inapposite" because "none of the three even mention the FAA [Federal Arbitration Act]." *Id.* at 201. Although all three were labor arbitration cases, which technically makes them part of § 301 of the Labor Manage-

Regarding contract doctrine defenses, the Fourth Circuit disposed of the question by quickly noting that employee "Gilmer has never asserted that his waiver [of litigation] was anything other than knowing and voluntary, nor is there anything to lead us to that conclusion."²³⁴ Unlike the *Nicholson* majority, the *Gilmer* majority rejected any notions of generic dangers of coercion or unconscionability in employer-employee contracts.

Because Supreme Court cases establishing public policy exceptions to arbitrability for title VII, FLSA, and section 1983 matters all involved arbitration clauses contained in collective bargaining agreements, these cases could also be construed as something of a bargaining unit or agency exception to arbitrability. This would be a more useful analysis for adjudicating future arbitration disputes as developed in the "defective agency" defense outlined in part III of this Article.²³⁵ In the surviving "exception trilogy" of *Alexander*, *Barrentine*, and *McDonald*, the Court expressed concern that the union prosecuting the individual employee's grievance would be lukewarm or perhaps even hostile to presenting the claim aggressively.²³⁶ Although this observation makes theoretical sense and is probably empirically correct in many cases, the conflict between individual and group logically permeates all grievance claims, not just those under title VII, the FLSA, or section 1983. If the special problems posed by contracts made through large bargaining units are significant, courts would presumably forbid arbitration for all claims in which the individual-group dichot-

ment Relations Act (LMRA), the distinction is blurred and every member of the panel must have known this. For example, labor arbitration cases are routinely annotated under the Arbitration Act portion of 9 U.S.C.A. §§ 1-15 (West 1970 & Supp. 1990), as well as the LMRA volume, 29 U.S.C.A. § 185 (West 1978 & Supp. 1990).

234. 895 F.2d at 200.

235. See *infra* text accompanying notes 295-301.

236. *Alexander* expressed the most suspicion, noting that unions had frequently engaged in racial and ethnic discrimination and that "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made." 415 U.S. at 58 n.19 (citing *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944)). However, *Alexander* also observed that "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit" even where there was no invidiously discriminatory motive. *Id.* *Barrentine* continued this theme, noting that "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1987) (footnote omitted). *McDonald* reiterated this theme noting that "[t]he union's interests and those of the individual employee are not always identical or even compatible." *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984).

omy became unbearably inconsistent. They have not. Instead, in cases like *Alexander*, *Barrentine*, and *McDonald*, most of the discussion has been devoted to matters of public interest, institutional competence, and other aspects of the cases. In short, labor arbitration cases read like and are most accurately categorized as public policy exception cases, even though divergence between individual and group may lie at the root of the courts' concern.

IV. A BETTER APPROACH TO ARBITRABILITY: FEDERAL COMMON-LAW DOCTRINE OPERATING EVENHANDLEDLY WITHIN THE STATUTORY FRAMEWORK

A. *The Approach*

A dislike for the public policy exception to arbitrability does not compel dislike for all results of its use. In the civil rights context in particular, it is disheartening to think of the judiciary enforcing an arbitration clause buried deep within the fine print boilerplate of an agreement that was imposed (rather than negotiated) upon the title VII claimant. Undoubtedly, such basic notions of fairness and justice animate the holdings in *Alexander*²³⁷ and *McDonald*.²³⁸ Nonetheless, the quick resort to the public policy exception and its pitfalls is troubling in light of a more fact sensitive approach authorized, perhaps even mandated, by the Arbitration Act that would achieve the benefits of the public policy exception without its dangers of disparate treatment and judicial aggrandizement of power.

I suggest that courts confronted with arbitrability questions should enforce written agreements to arbitrate without regard to the subject matter of the dispute or to the legal claims in the dispute unless the party resisting arbitration can demonstrate, by a preponderance of the evidence, that the arbitration "contract" between the parties is voidable because it was not the product of sufficiently genuine consent between the parties.²³⁹ A major

237. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (discussed *supra* text accompanying note 236).

238. *McDonald*, 466 U.S. 284 (1984) (discussed *supra* text accompanying note 236).

239. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion."). Although typical contract conversation speaks of "revoking" an offer prior to its acceptance and the formation of a contract, it appears that Congress intended the term "revocation" in § 2 to refer to an ability to avoid the implications of the agreement, in effect

indicia of true consent would be the degree of disclosure of the arbitration provision and its impact on the resisting party's knowledge or access to knowledge of the differences between arbitration and its alternative forums.²⁴⁰ Courts would begin the inquiry with a rebuttable presumption that a written contract providing for arbitration will be enforced unless the party resisting arbitration shoulders both the burden of production and the burden of persuasion on one or more of the delineated arbitration defenses. Determinations would be fact-specific, although, as in any common-law process, patterns would emerge according to the contract language, the parties, and the nature of the contracting process.

The proposed approach gives full effect to the legislative command that arbitration agreements be specifically enforced but would, if properly applied, avoid arbitration in unjust circumstances through the method specifically authorized by Congress. It is also consistent with current common-law norms because it relies not upon nebulous notions of public policy but upon the Act's own provision allowing arbitration agreements to be disregarded upon "grounds as exist at law or in equity for the revocation of any contract."²⁴¹ This approach posits that arbitration of any claim, even the important civil rights claims of title VII, section 1983, and the Constitution, is neither unjust nor inappropriate if the party making the claim adequately consented. Courts would decide each case on an individual basis. To structure the inquiry, I delineate five specific arbitration contract defenses for recognition: (1) blameless ignorance; (2) dirty-dealing; (3) inescapable adhesion; (4) substantive unconscionability; and (5) defective agency.²⁴²

treating revocation as a synonym for rescission. See H.R. REP. NO. 96, 68th Cong., 1st Sess. (Jan. 24, 1924); *Joint Hearings, supra* note 4, at 33 (statement of Julius Cohen).

240. New York Stock Exchange proposed Rule 637 provides a good basic outline of what should constitute sufficient disclosure in an arbitration provision. It provides that pre-dispute arbitration clauses be highlighted above the signature line and preceded by disclosure apprising the customer that arbitration: is final and binding; waives access to the court, including right to jury trial; provides less discovery than court proceedings; does not require factual findings or statements of legal reasoning by the arbitrators; and typically includes arbitrators who were or are affiliated with the securities industry. Of course, disclosure and explanation of an arbitration clause should not mandate enforcement. Defenses such as substantive unconscionability might still apply. See *infra* text accompanying notes 292-94. However, adequate disclosure would almost always eliminate the "blameless ignorance" defense discussed *infra* at text accompanying notes 266-75.

241. 9 U.S.C. § 2 (1988).

242. These defenses are discussed in full *infra* text accompanying notes 270-301.

B. *The Roots of the Approach*

Although a distinct change in modern application of the Arbitration Act, the approach is consistent with modern contract law, which is specifically incorporated into the Act. The suggested approach rests upon classic notions of agent authority, consent to contract, misrepresentation in contract, and the more recent subdoctrines of adhesion and unconscionability.²⁴³ Under the traditional approach, still the largely prevailing approach in American contract law, a contract occurs when there is a consensual agreement by the parties, usually evidenced by an offer, some discussion, modification, acceptance of the modified offer, and exchange of consideration.²⁴⁴ The classic "objective" theory of contract held that written manifestation of an agreement by both parties was sufficient to create a contract so long as the writing evidenced an agreement supported by consideration. Contract terms were accorded their "ordinary" meaning²⁴⁵ as understood by the court, unless the contract involved terms peculiar to a given trade.²⁴⁶ A contract that displayed objective

243. Although objective contract theory, which stresses the meaning of contract terms as understood by the judiciary or merchant reference group, still holds powerful influence in American contract law, courts have shown an increasing willingness to "police" contracts to avoid unfair or surprising results and enforcement of terms to which the objecting party may not have truly consented. See E. FARNSWORTH, *supra* note 56, §§ 3.6-3.9, 4.1-5.7; Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Leff, *supra* note 153; Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

244. See E. FARNSWORTH, *supra* note 56, §§ 2.1-2.20.

Although contracts scholars frequently debate the centrality of the role of contracting acts (e.g., signing the contract, initialing a change in text), bargaining activity, and consent, I believe that the treatment of arbitration agreements posed in this Article fits comfortably within this doctrinal debate. For an example of the differing views within the contract mainstream, see *Proceedings and Papers of the Conference On Contract Law: From Theory to Practice*, 1988 ANN. SURV. AM. L. 5-351. Particularly, note Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139 [hereinafter Linzer, *Uncontracts*] and the comments thereon by Professor Steven Burton and John Eddy, Esq., *Comments on Professor Linzer's Paper*, 1988 ANN. SURV. AM. L. 199, 206; Linzer, *Is Consent the Essence of Contracts?—Replying to Four Critics*, 1988 ANN. SURV. AM. L. 213, 213 ("though it remains important, consent is not the primary and unifying concept of contract"). Although I camp with the group that views consent as the principal unifying theme of contract, it is not necessary that one belong to this camp in order to support the arbitration defenses advocated by this Article. So long as one thinks consent is important enough to merit judicial attention, the consent-based defenses (blameless ignorance, dirty-dealing, inescapable adhesion, defective agency) are justified. To the extent one sees procedural or substantive fairness as important, these are addressed in the dirty-dealing and substantive unconscionability defenses, respectively.

245. See E. FARNSWORTH, *supra* note 56, §§ 3.1-3.9.

246. See *id.* § 7.13.

manifestations of assent (namely, written terms, signature, seal) was enforced.²⁴⁷

The objective theory of contract appears to have taken hold during the eighteenth century, reached its zenith in the nineteenth century, and ebbed somewhat in the twentieth century as courts became more solicitous of consumer protection and less credulous of the assumed reality of liberal theory.²⁴⁸ The objective approach was well suited to expanding mercantile societies. Once the writing was executed, both parties could be relatively confident of the terms and enforceability of the bargain struck. Classic objective contract theory intertwined with the modern social welfare state to produce a surviving but mutated contract doctrine.²⁴⁹ Against this new backdrop, courts and legislatures began paying more attention to consent issues or to the fairness of a given contract provision.²⁵⁰ In addition, certain sharp prac-

247. *Id.* § 3.6; accord, Linzer, *Uncontracts*, *supra* note 244, at 145 (objective approach “argued that the reasonable observer’s interpretation of behavior or words was what controlled, not the actual thoughts of the actors”).

248. See E. FARNSWORTH, *supra* note 56, § 3.6; G. GILMORE, *THE DEATH OF CONTRACT* 87 (1974); Linzer, *Uncontracts*, *supra* note 244, at 167-95 (noting judicial behavior at odds with objective theory and neoclassical “bargain” theory). By “liberal,” I refer to Western liberal thought, which stresses individual liberty and independence, positing free will and rational choice by individuals. See, e.g., R. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 93-99 (1990); Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988).

249. See E. FARNSWORTH, *supra* note 56, chs. 2-3; Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1190-98 (1983); Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974); Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) [hereinafter Slawson, *Standard Form Contracts*]; see also Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982). According to one writer, “[t]he ‘classical’ view of contract law—dominant from the post-Civil War period to the eve of the Second World War” has been replaced by “a less rigid view of contract and of the need for focused consent to the imposition of duties. This approach is sometimes described as ‘neo-classical,’ in that it does not seek to undermine the whole contract system but does seek to cleanse the classical system of its many inequities.” 3 LINZER, *A CONTRACTS ANTHOLOGY* 3 (1989). Professor Linzer attributes much of the change to the legal system’s response to legal realist criticism that exposed the inequities wrought by strict adherence to the formalism of the objective theory. *Id.* at 3, 68. *But see* Warren, *Comments on Professor White’s Paper*, 1988 ANN. SURV. AM. L. 49, 50-51 (legal realist movement did not change basic contract theory so much as it prompted contract to “split off into groups of circumstance-specific bodies of law” with the result that “[c]onsent now comes down to something that either you opt into the system in a contract or you opt out and that’s the only consent element of what goes on here—not line-by-line agreement.”).

250. See E. FARNSWORTH, *supra* note 56, §§ 4.26-4.29 (contemporary controls used in policing contracts).

tices were expressly forbidden or curtailed.²⁵¹ For example, the Uniform Commercial Code (UCC) gave courts authority to ignore or modify contract terms deemed "unconscionable."²⁵²

In my view, the fulcrum of contract law remained consent,²⁵³ but a more realistic and subjective version of consent. Where sufficient informed consent exists, courts enforce contracts with all the vigor of the objective theory. However, where the resisting party can demonstrate inadequate information through no fault of its own or can show that there was no real

251. *See id.* §§ 4.29, at 319-22. At least one seemingly influential witness at congressional hearings on the Arbitration Act thought fears of arbitration clause contracting abuse were unfounded because of other adequate regulation of contracting. *See Joint Hearings, supra* note 5, at 15 (statement of Julius Cohen: "people are protected [from unfair contracts] today as never before").

252. *See* U.C.C. § 2-302. Courts have applied the provision with some vigor. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (decided under non-Code District of Columbia law but with effective date of § 2-302 pending in District of Columbia); *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971). However, use of the unconscionability defense predates U.C.C. § 2-302. *See, e.g., Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948). Although the notion of an unconscionability ground for revoking a contract merits status as a separate development, it is also part of the overall trend away from the objective theory.

253. *See Barnett, supra* note 243. Professor Barnett identifies five major traditional contract theories: will, reliance, efficiency, substantive fairness, and bargain. He finds each inadequate to explain current contract law or "deficient" in terms of result. *See id.* at 271-91. Professor Barnett posits a consent basis for contract, which he argues is better than the other five in both normative goals and empirical results. The notion that consent rather than bargain, efficiency, will, or even reliance and substantive fairness, should govern contract law is sound and should be applied more regularly to arbitration agreements. The discussion throughout the remainder of this Article assumes a theory of contract grounded primarily upon consent (although not necessarily Professor Barnett's particular version of a consent theory of contract). However, even one unpersuaded by the superiority of consent-based contract doctrine should find the article's approach persuasive. The five permitted defenses to an arbitration agreement do not disregard the will of the parties. Similarly, this Article's approach vindicates rather than undermines a bargain theory of contract. To some extent, this Article seeks some meaningful return to a bargain assumption in an era of standard form agreements. *See generally Dauer, supra* note 249; *LINZER, supra* note 249, at 153-294. This Article's approach should lead to fairer results than application of outmoded objective contract principles that ignore modern contracting realities. A reliance based contract theory would perhaps find the proposed approach no better than current doctrine since both parties may rely equally but upon different assumptions (*e.g.*, the seller assumes its boilerplate arbitration clause will be upheld while the buyer assumes she will be able to sue in court if a dispute develops). However, the reliance of the nonarbitrating party (*e.g.*, the buyer in the foregoing example) is probably more worthy of judicial respect. The seller can both take steps to avoid justifiable buyer reliance and can, when it loses an occasional case on the facts, spread its losses. Proponents of an efficiency theory of contract will have the greatest difficulty with the proposed approach, many arguing that individualized fact-based consideration of arbitration defenses is too costly in light of the benefits received. Obviously, I disagree, for reasons that I hope are both apparent and persuasive in the remainder of the article.

consent to the term or contract in question, courts frequently ignore the written "contract." The modern approach does not mean easy avoidance of written agreements; a signed writing generally continues to create a judicial presumption of an enforceable contract.²⁵⁴ The burden of proof then falls on the resisting party, who must persuade the court that it acted reasonably yet was ill-informed or did not agree to some material part of the writing. Courts have prevented lack of consent and other defenses from becoming exceptions that swallow the rule by setting high standards of materiality and requiring more than mere assertions to prove that the resisting party did not consent to the term in question.²⁵⁵ Under either the objective theory of contract or the modern "informed consent" theory of contract, agreements obtained through fraud, misrepresentation, coercion, or duress were not enforceable.²⁵⁶

Twentieth century contract thought has particularly noted the logarithmic increase in "contracts of adhesion."²⁵⁷ A contract of adhesion is usually defined as one in which virtually all terms are authored by one party and offered to the other party strictly upon a "take-it-or-leave-it" basis.²⁵⁸ The only terms truly negotiated are those of price, quantity, and perhaps delivery period. Other provisions, such as warranty limitation, penalties for default, quality disclaimers, hold harmless agreements,

254. See E. FARNSWORTH, *supra* note 56, §§ 3.6-3.7, 4.26, at 295, chs. 7-8.

255. See E. FARNSWORTH, *supra* note 56, § 3.6; see also *Pervel Indus., Inc. v. T. M. Wallcovering, Inc.*, 871 F.2d 7 (2d Cir. 1989) (distributor bound to arbitrate in light of its history of contracting and receiving confirmation forms with arbitration clause, to which it did not object).

256. See E. FARNSWORTH, *supra* note 56, § 4.9-4.20; LINZER, *supra* note 249, at 343-51. As the classical objective view has receded, judicial notions of what constitutes duress appears to have expanded, but not in great degree. See Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 743 (1943) ("Anglo-American law, with its consensual-relational duties, its feudal survivals and its original tort theory of contract, can stretch its conception of consensual obligation pretty far.") (footnote omitted).

257. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919), is generally considered to be the genesis of the term "contract of adhesion," although Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) was the work that most popularized the term.

258. See E. FARNSWORTH, *supra* note 56, § 4.26, at 295. Contracts of adhesion, in addition to being nonnegotiable, are said to be characterized by their planned use in repeated, "mass" transactions. See *Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572, 574 (8th Cir. 1989). Professor Rakoff provides a longer list of definition criteria: (1) a printed form of many terms; (2) drafted by one party; (3) who routinely enters such transactions; (4) offered on a take-it-or-leave-it basis; (5) signed by the adherent; (6) who is not a repeat player; (7) whose principal contract obligation is the payment of money to the contract drafter. See Rakoff, *supra* note 249, at 1177.

and the like, are either ignored altogether or passively but grudgingly accepted by the "adhering" party. Modern contract thought not only recognizes the existence of adhesion contracts but characterizes them as constituting the overwhelming majority of contracts used in the industrialized world. Unfortunately, the concepts of the adhesion contract and the unconscionable term or contract have been commingled.²⁵⁹ Despite the unnecessary blurring, there is general agreement that a preprinted form agreement offered to a consumer is a contract of adhesion. In contrast, substantively unconscionable terms are those that are unreasonably one-sided or otherwise condemnable. Whether the consent consists of take-it-or-leave-it preprinted forms or individualized bargaining resulting in a custom-made classic contract, a contract is unconscionable if it is unreasonably favorable to one side concerning a major point.²⁶⁰

Nonetheless, courts have often apparently required both a lack of choice *and* an unreasonable term to avoid a contract on unconscionability grounds. This approach unnecessarily constrains the concepts in two situations. In one instance, the adhesive nature of a contract might so negate the element of consent to contract that courts should not enforce the contract even when it contains reasonable terms.²⁶¹ When the contract in

259. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Commentators organizing the field have distinguished the concepts but allowed discussion of them to blur. See, e.g., J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 4.1-4.9, at 9-44 (3d ed. 1987) (discussing cases under both adhesion and unconscionability rationales). Cases like *Weaver*, *Walker-Thomas*, and *Bloomfield Motors* may have required both adhesion and unconscionability to justify abrogating the written contract provision. Indeed, the *Walker-Thomas* decision defines adhesion as a necessary (but presumably not sufficient) condition of unconscionability. See *Walker-Thomas*, 350 F.2d at 449-50. In my view, they are analytically distinct concepts and should be employed separately in arbitrability analysis.

260. I equate major points and material points. A list of concerns used to determine if a term is material is provided by *RESTATEMENT OF CONTRACTS* § 275 (1932). See also *Murray*, *supra* note 243, at 25-27.

261. I regard arbitration agreements as justifying this departure from the usual neo-classical treatment of adhesion contracts. Unlike other reasonable adhesive terms, which are particular only to one contract in an ongoing stream of transactions (over a lifetime, consumers typically buy many goods on credit, merchants sell many widgets), the enforced arbitration clause precludes access to the judicial forum for dispute resolution. Not only do I view this right as more fundamental (than, for example, late fees on credit sales), but, for individuals, a crisis triggering a formal legal dispute is a relatively rare experience. See Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 *YALE L.J.* 122, 158-59 (1980) (only 15 percent of public experience even one acute legal problem; most have relatively few perceived legal problems in lifetime). If a contracting party, particularly a consumer, is to waive the right to litigate, courts should ensure that

question involves a fundamental necessity (such as food, clothing, and shelter) or a fundamental right (such as access to the courts), perhaps even reasonable adhesive terms should not be enforced. In the second instance, a contract term may result from nonadhesive bargaining but be so unfair or unwise that courts will decline to enforce it.²⁶²

C. *Application of the Approach*

How should these concepts—the quality of consent, fraud and its siblings, adhesion contracts, and unconscionability— affect arbitration agreements? I propose that courts approaching motions to stay judicial proceedings pending arbitration or to compel arbitration first look to determine whether there is a written arbitration agreement committing the dispute to arbitration, as they do already. Finding this, the court should adopt a rebuttable presumption that the arbitration agreement is specifically enforceable, give the language of the arbitration agreement reasonably broad construction,²⁶³ and refuse to deny arbitration

this more significant waiver is accompanied by a higher quality of consent. Where necessities are concerned, this requires courts to depart from the conventional tendency to enforce nonoppressive adhesion terms. Furthermore, the judicial system has a significant interest in policing the manner in which disputes are privatized. The judiciary should not forbid or unduly burden privatization. *See* Stempel, *supra* note 4, at 352-54 (criticizing public policy exceptions to arbitration as unduly restrictive of private ordering). However, courts should insist that privatization of the dispute resolution function be truly voluntary. Professor Rakoff has suggested that the current norm be reversed and that adhesive terms be presumptively unenforceable unless the drafter can justify the term. *See* Rakoff, *supra* note 249, at 1176, 1242-48. This approach, whatever its merits for most adhesion contracts, does not address my concern about access to judicial forums and adequate policing of private ordering. *See id.* at 1265-66 (adhesive arbitration clauses should not be enforced); Special Comm'n on Consumer Affairs, *Recommendation Regarding the Use of Mandatory Arbitration Clauses by Merchants in Consumer Contracts*, 31 REC. A.B. CIT. N.Y. 356, 362 (1976) (suggesting statute to prohibit mandatory arbitration clauses in consumer contracts).

262. Such as: suicide pacts, slavery sales, and contract terms providing for punishment for breach or payment by means that offend clearly discernible laws of policies against, for example, mutilation, child pornography, torture, etc. Most of these examples fit well into the typology suggested by Professor Scott in that they are restrictions on an individual's right to trade away too much personal integrity or limit the person's ability to exercise unacceptably bad judgment. *See* Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730 (1989).

263. In this respect, I agree with the arbitration precedents that state that close questions of text interpretation should be construed in favor of arbitrability. *See, e.g.*, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, [where] the problem at hand is the construction of the contract language itself"). Although this approach often runs counter to the traditional contract maxim that ambiguous language be construed against the contract drafter, *see* E. FARNSWORTH, *supra* note 56, § 7.11, at 499-

based on the nature of the dispute. If the party resisting arbitration or pursuing litigation in violation of an arbitration agreement suggests that public policy makes the arbitration clause unenforceable, the court should reject the defense unless the resisting party can demonstrate a clear statutory command prohibiting a predispute arbitration agreement governing the claim.²⁶⁴ Absent this showing, the resisting party may still revoke the arbitration clause if it can demonstrate, by a preponderance of evidence in rebuttal of the arbitration presumption, one of the following:

(1) *Blameless Ignorance*. The opponent was not adequately aware of the arbitration clause or the nature of arbitration as opposed to litigation, made reasonable efforts to acquire sufficient awareness, and would not have consented to a contract with the instant arbitration clause if he were aware of the differences between arbitration and litigation;

(2) *Dirty-Dealing*. The arbitration agreement or the contract as a whole was procured through fraud, misrepresentation, or coercion and the objecting party cannot be said to have constructively consented to arbitration.²⁶⁵

(3) *Inescapable Adhesion*. The arbitration clause is part of a contract of adhesion and the subject matter of the contract is *vital* to contemporary human existence, similar to those things that the law of contracting by minors has traditionally labeled as "necessary," and the opponent had no reasonable means of obtaining the good or service or its substantial equivalent from another source;

(4) *Substantive Unconscionability*. The arbitration forum, system, or chosen process decreed by the clause is so unreasonably favorable to the drafter as to be substantively unconscionable that the courts will not enforce the agreement;²⁶⁶

500, the pro-arbitration ambiguity doctrine results from judicial interpretation of the federal Act, which abrogates the common law rule. See *Moses H. Cone*, 460 U.S. at 24-25.

264. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (courts may set aside arbitration award on grounds of violation of public policy, but only under limited circumstances where contract or award "would violate 'some explicit public policy' that is 'well defined and dominant, [as] ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'") (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Rubber Workers*, 461 U.S. 757, 766 (1983), which quoted *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

265. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and discussion *supra* text accompanying notes 60-70. Although I agree with the precedents that suggest courts treat the arbitration clause as distinct from the entire contract, I believe some modification of *Prima Paint* is required to make this defense meaningful. See *infra* text accompanying notes 336-46.

266. To the extent the substantive unconscionability defense parallels a public policy

(5) *Defective Agency*. The opponent did not sign the arbitration agreement and the signer was not an agent of the opponent authorized to commit the subject matter of the instant dispute to arbitration or, if authorized, breached its fiduciary duty to the opponent in signing an arbitration agreement of such breadth.

Courts on occasion relax the general contract rule that signers understand and appreciate all aspects of contract text or allow this presumption to be rebutted when the protesting party can demonstrate that the term was esoteric or not capable of a common-lay understanding.²⁶⁷ Courts also construe language for the aggrieved party's benefit even when the text more easily admits construction favoring the drafter.²⁶⁸ Arbitration clauses, which by definition deal with a dispute resolution mechanism not well understood by laypersons other than frequent disputants,²⁶⁹ merit such nongeneral treatment.

1. Blameless Ignorance

In the overwhelming majority of commercial contracts, this approach will not adversely affect arbitrability. Two merchants making a contract usually understand the arbitration clause, its impact, and the nature of arbitration or have reasonable access to such information. Merchants regularly face disputes, some producing lawsuits and arbitrations.²⁷⁰ If not personally knowledgeable, the merchant²⁷¹ has both easy recourse to informa-

exception, it should be a limited exception according to the standards set forth in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987). See *supra* text accompanying notes 71-95 & note 264 (discussing public policy as influencing federal common law).

267. See E. FARNSWORTH, *supra* note 56, § 4.26.

268. See *id.* § 4.26, at 298.

269. Many have suggested that occasional disputants, "one-shot players" such as consumers, have inherent disadvantages in the litigation system when compared to "repeat players" such as businesses. See S. GOLDBERG, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* 14, 485-538 (1985); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974). It appears that this advantage is exacerbated in many specialized forums such as small claims court, landlord-tenant court, or industry arbitration, where repeat players can further hone their expertise, build relationships with decision makers, and take advantage of economies of scale. See Lazer-son, *In the Halls of Justice, the Only Justice is in the Halls*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 119 (R. Abel ed. 1982).

270. See Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 *CAL. L. REV.* 2005 (1987); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963) (suggesting that merchants, although often seeking to adjust and compromise contract disputes, are aware of disputing options such as arbitration and litigation).

271. By "merchant," as used herein, I mean the business organization as a whole.

tion²⁷² and economic incentive to obtain information. Even if the contract is standardized, merchants know or can reasonably become knowledgeable about arbitration and begin negotiating this aspect of the contract if desired. Arbitration clauses in merchant contracts should thus almost always be enforced when this defense is pleaded, a result similar to the current law.²⁷³

Contracts made in an environment in which one party is highly unlikely to read the form present a different situation, especially when the arbitration clause is unexpected. For example, when one walks into a discount appliance store and purchases a new dishwasher, the seller produces a form recording purchase of the item and price. The buyer signs the invoice and typically signs a separate form for credit card purchases. The back of the invoice may contain preprinted terms. Despite having purchased many durable goods in this manner, I do not know if the form language calls for arbitration because I have never looked at the back of one of these forms. If an arbitration clause was on the form, the buyer contesting it would, in my view, meet the first prong of this first defense—he could demonstrate lack of knowledge about the arbitration provision when he signed the invoice. Should the purchaser have read the contract despite the shipping clerk and twenty other customers breathing down her neck? Expecting consumers to peruse contracts under such conditions fails to reflect purchasing reality. To consumers, the “please sign here” purchase forms are nothing more than receipts. Courts should treat them as receipts and not as contracts.

A different and more ambiguous situation arises when a consumer, unfamiliar with arbitration or other key aspects of the contract's subject matter, is presented with a contract in a situation conducive to reflection and decision but the contract drafter

For example, Acme Widget salesman Gary Greenhorn, newly graduated with a B.S. from Stickwood College, may not know anything about arbitration. However, Acme Widget has great institutional appreciation of arbitration imputed to Greenhorn.

272. In addition to institutional resources, the typical merchant can call upon another merchant for information. By contrast, consumer laypersons frequently have few knowledgeable contacts. See Project, *supra* note 261, at 157-59. Where commitments stem from blameless ignorance, judicial enforcement runs counter to long-established Western thought. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. 3, ch. 1 (where action resulted from compulsion or ignorance, it should be treated as involuntary).

273. See, e.g., *Pervel Industries, Inc. v. T.M. Wallcovering, Inc.*, 871 F.2d 7 (2d Cir. 1989); see also C. PETERSON & C. MCCARTHY, *ARBITRATION STRATEGY AND TECHNIQUE* (1986); M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* §§ 5:01, 5:04 (rev. ed. 1984).

fails to provide minimally adequate disclosure of either the arbitration clause or its impact. This not only requires making the arbitration clause sufficiently prominent but also requires an adequate explanation of technical matter or the consequences of the arbitration agreement. For example, in *Lawrence v. Walzer & Gabrielson*,²⁷⁴ the court refused to enforce an arbitration clause contained in an attorney's retainer contract and permitted the client to pursue legal malpractice litigation. Plaintiff Lawrence not only appears to have been a "consumer" with little legal experience,²⁷⁵ but also retained the lawyer to represent her in divorce proceedings, a time when many persons are perhaps particularly vulnerable to overreaching.²⁷⁶

2. Dirty-Dealing

The second available defense—fraud and its cousins—is again unlikely to allow many resisting parties to avoid arbitration. To escape arbitration on this basis, the opponent must show either classic common-law fraud²⁷⁷ or misrepresentation.²⁷⁸ Since either defense requires misleading by the other

274. 207 Cal. App. 3d 1501, 256 Cal. Rptr. 6 (1989).

275. Under my construct, a sophisticated individual with significant legal experience, for example, Donald Trump, would be held to a broad attorney-client arbitration clause. See D. TRUMP & T. SCHWARTZ, *THE ART OF THE DEAL* 8, 14, 23, 67-68, 127-28, 163-64, 191-97 (1987) (discussing frequent litigation activity by Trump); Kenen, *Trump: A Gorbachev Host, Is an Icon of Capitalism*, Reuters, Dec. 1, 1988 (Trump boasts that his "killer lawyers," saved boxer Mike Tyson's millions in battle with management).

276. It is thus unclear whether invalidation of the arbitration agreement also resulted from application of some shade of dirty-dealing defense or from the "contracting environment" prong of the blameless ignorance defense as well. The *Lawrence* opinion itself is cast in more traditional arbitration analysis: the court's narrow holding found the arbitration clause insufficiently broad to cover legal malpractice actions. *Lawrence*, 207 Cal. App. 3d at 1506, 256 Cal. Rptr. at 9. Because the arbitration clause is in fact very broadly written, I view *Lawrence* as driven by aspects of the blameless ignorance, dirty-dealing, and perhaps the substantive unconscionability defenses. Apparently, the court would have enforced arbitration of a dispute as to costs or fees. In my view, this more limited arbitration would only be appropriate if the lawyer sufficiently highlighted the arbitration clause in an environment that gave the client the opportunity for reasoned consent. The situation is, of course, more complicated and favorable to the consumer because of the fiduciary nature of the attorney-client relationship.

277. Under the common law of most jurisdictions, a claimant demonstrates fraud when he shows: (1) with intent to deceive, (2) the knowing or reckless making of a material misstatement or nondisclosure of (3) fact (4) upon which the claimant relied (5) reasonably (6) to his detriment. See W. PROSSER, *LAW OF TORTS* §§ 106-08 (4th ed. 1971).

278. The elements of misrepresentation are essentially the same as for fraud except that a misrepresentation claimant need not prove scienter—an intent to deceive. *Id.* at § 107. In general, fraud is a tort creating an action for damages while misrepresentation is a contract defense that creates a right of rescission. *But see Hill, Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973).

party that is material, it is unlikely to be a successful defense absent one party that can demonstrate that it was willing to forgo contracting over forum selection issues and another party who is either unscrupulous or stupid. For this defense to apply, one party, rather than simply keeping quiet while handing over for signature a contract with a fine print arbitration clause, would need to invite fraud or misrepresentation allegations by making false statements or creating a contracting environment designed to mislead the other party.

The coercion or duress prongs of the dirty-dealing defense to arbitrability may be equally as rare but equally worthwhile. Classic duress is rare in contract formation but more subtle commercial coercion may not be so farfetched. For example, Acme Co. may be the only realistic supplier of Alloy used by Becme Corp. in making its Widgets. When Becme needs Alloy to fill a big order, Acme is in a position to offer Alloy for sale only if Becme agrees to arbitration. Under these circumstances, whether Acme is just playing the commerce game aggressively within the rules or is in fact improperly coercing agreement is a factual matter of degree to be determined by the court. Normally, even great competitive bargaining power will not amount to coercion since economic actors have no obligation to deal with anyone except on their own terms, terms normally kept reasonable by a market, unless either the adhesion without alternative defense or the unconscionability defense is also present. However, in some cases similar to the Acme-Becme hypothetical courts recognize an action for "economic duress."²⁷⁹

3. Inescapable Adhesion

This defense would be available not merely when a contract's arbitration term is adhesive, but when the adhesive arbitration agreement is part of a transaction involving a good or service necessary to the party forced to adhere and the adhering party has no reasonable alternative source or substitute for the product or service. In applying this defense, courts should in

279. See E. FARNSWORTH, *supra* note 56, § 4.19, at 267; LINZER, *supra* note 249, at 343-44 ("idea that economic duress undermines free will is old, going back at least to the eighteenth century. . . [but] use of economic duress as a policing device seems to be less in fashion today than good faith and unconscionability"). For an example of economic duress that allowed contract avoidance, see *Austin Instrument Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (supplier's ability to halt deliveries to a manufacturer constituted economic duress).

general adopt the line of cases concerning “necessaries” for which even a contract made by a minor may be enforced.²⁸⁰ Courts have generally viewed food, drink, clothing, shelter, medical care, and legal services as necessary.²⁸¹ They have divided on whether education, an automobile, and other items further removed from the precipice of life and death constitute necessities.²⁸² Traditionally, court definition of necessities has proceeded on a case-by-case basis. The inescapable adherence defense should be applied in a like manner, with a non-crabbed but narrow view of necessities. Courts should reject the notion that determining a necessary depends on the social position and situation of the party seeking contract avoidance.²⁸³ This will prevent the defense from expanding too greatly beyond a short and relatively fixed list of items regarded as necessities. A narrow definition of necessary and a broad definition of substitute goods are two concepts vital to intelligent application of the inescapable adherence defense. The availability of reasonable substitute items determines a buyer’s response to price changes and other conditions of purchase.²⁸⁴ The cross-elasticity concept has frequently been used in antitrust litigation, with courts less likely to find requisite market dominance when products are substitutable.²⁸⁵ This inescapable adherence approach focuses not only on the adhesive nature of the contract but also on the availability of reasonable alternatives, including substitute alternatives. If an adherence contract must be accepted, it has been obtained without real consent and should not be judicially enforced, no matter

280. See E. FARNSWORTH, *supra* note 56, § 4.5, at 220-21. As a general rule, contracts made by persons under the legal age of competency are voidable at the discretion of the minor. Where, however, the contract involves something viewed as necessary to the minor’s existence, the contract is enforceable without regard to age, although many courts hold minors to any contract where the minor has misrepresented age and the vendor has reasonably relied on the representation. *Id.* at 223-24.

281. See *id.* § 4.5, at 221-22 (necessary “clearly includes such needed food, clothing, and shelter as are appropriate to the minor’s situation”). Courts generally enforce loan agreements made by minors where the loan proceeds are to be used for necessities. See *id.* at 222 n.14.

282. For the most part, automobiles have not achieved necessary status and education has been oddly unsuccessful in view of the importance most people attach to education, at least rhetorically. See *id.* § 4.5, at 222-23 nn.12-13.

283. See *id.* § 4.5, at 221 (what is necessary should be determined by social position of minor).

284. See P. AREEDA, *ANTITRUST ANALYSIS* 196-97 (2d ed. 1974); see also, A. ALCHIAN & W. ALLEN, *EXCHANGE & PRODUCTION* 25-32 (3d ed. 1983).

285. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 426 (2d Cir. 1945) (noting substitutability of various food wraps for aluminum foil); see also P. AREEDA, *supra* note 284, at 196-97.

how reasonable the terms from the outsiders' perspective, unless courts are prepared to jettison respect for consent completely.

A relatively easy example for applying the defense would involve shelter. If, for example, all landlords in a neighborhood, city, or town included arbitration clauses as part of their form leases, tenants could, if this defense applied, set aside the arbitration provision absent some indicia of affirmative tenant consent or some degree of bargaining and exchange. For example, if the landlord offered the apartment at \$550 per month when the tenant signed a lease providing for arbitration and \$600 per month when the tenant's lease had no arbitration clause, this would indicate choice and bargaining. Such contracts, even if the terms are standardized and nonnegotiable, may not even be contracts of adhesion because of the choice among different forms and rental rates. Even if the leases are classified as adhesive, they are not adhesion contracts from which there is no escape. Of course, the real world seems to lack such options for tenants. Consequently, a typical consumer rental lease presents a good candidate for avoiding arbitration.²⁸⁶ In a similar vein, the adhesion defense should apply to arbitration contracts affecting basic food, clothing, educational, or transit needs.²⁸⁷

Employment contracts present another strong case for the defense. By seeking and obtaining an employment offer, applicants have invested substantial resources in obtaining the position. All but the most sought-after employees are in no position to bargain over an arbitration clause and risk losing a job needed to pay the rent, buy groceries, etc. Under these circumstances, there is no meaningful consent to arbitrate.²⁸⁸ In commercial

286. Classical contract purists may argue that the defense is inapt because tenants may escape the adhesive lease by purchasing a home. In my view, this is a situation-specific question of fact. If the tenant can prove lack of financial means to purchase a dwelling substantially equivalent to the rental sought, the adhesion defense should normally be available. If all reasonably available home sale contracts or mortgages provide for arbitration, the buyer may similarly avoid arbitration. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) ("Where the contract is one of adhesion, where there is great disparity in bargaining power" and where signer receives nothing in exchange for waiver, contract provision may be unenforceable).

287. *See Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (characterizing automobile as virtual necessity of modern life); *see also Plyler v. Doe*, 457 U.S. 202 (1982) (characterizing access to basic education as a virtual necessity triggering protection under the Equal Protection Clause of the fourteenth amendment). The Supreme Court has also applied the "necessity of life" approach in determining how much process is due under the due process clause of the Constitution. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (oral hearing required prior to termination of public assistance benefits).

288. Courts, in refusing to enforce certain contract clauses, have noted the impor-

sales situations, the defense will generally be appropriate only when the products or services desired are both important to the merchant's continued operation and unattainable at even a high price without the unwanted arbitration clause.

Applied to securities investment, the inescapable adhesion defense suggests enforcement of arbitration agreements. Assume that a prospective investor drops in on a broker to open an account. Assume further the investor has knowledge about arbitration and is not defrauded. He objects, but the broker refuses to open the account without the investor's signature on the arbitration agreement. To avail himself of the adhesion defenses, he must canvass a sufficient number of other broker-dealers in search of one that will handle his account without insisting on the arbitration clause. Even if he cannot find a broker willing to work without an arbitration agreement, the investor still has what most courts would deem reasonable alternatives—he can put his money in a non-margin account or in investment vehicles other than corporate equity securities.²⁸⁹

In addition to contracts involving vital necessities, a strong case for questioning consent (even in situations other than sales agreements confirmed by a mailed battle-of-forms) occurs in situations where a contract is made but non-negotiable contract documents are not presented to a party until long after the transaction has progressed to a point where the party has a reliance interest in successfully completing the transaction. For example, a consumer signs a purchase agreement to buy a house and

tance of the subject matter of the contract to the party and reasonableness of the important status attached to the contract item. *See Eisenberg, supra* note 249 (contracts made under quasi-duress environments often not enforced). *But see Estrin Constr. Co. v. Aetna Casualty & Sur. Co.*, 612 S.W.2d 413, 422 (Mo. Ct. App. 1981) (In general, contract "legitimacy derives from free negotiation" but "legitimacy of an adhesion contract derives, not from the social value of a transaction freely negotiated, but from the social value of goods produced more abundantly and cheaper from the reduced cost of legal and other distribution services."). Where the adhesive term concerns only a discrete aspect of a transaction (for example, late fees, payment deadlines), I do not disagree with the *Estrin* court. However, where the adhesive term affects pre-existing due process rights such as court access, adhesion terms should be measured against a consent standard rather than an efficiency standard.

289. Bank accounts, Treasury bills, United States Savings Bonds, other bonds, small real estate purchases, limited partnerships, joint ventures, and so on, all tend to be available without consent to arbitration and provide a reasonable return. Arbitration opponents may argue that these alternatives do not compare well with equity stocks, which have generally performed well since the Great Depression. However, by participating in a mutual fund, investors can reap many of the benefits of owning stock. Furthermore, the best investment category during the past 50 years has been real estate, including the old reliable single family home.

begins arranging financing, selling his former home, and arranging the logistics of relocation with reference to the closing date of his home purchase. At no point has the buyer seen the actual mortgage and its text, which is presented for signature at the closing or thereafter. Similarly, the closing documents, drafted by the seller's agent, are not available to the buyer until the closing date.²⁹⁰ If any of these documents contains an arbitration clause, the buyer, even one versed in the differences between arbitration and litigation, cannot be expected to do anything other than meekly sign the clause. He needs to close and move into the house; besides, he does not plan on defaulting on the mortgage payments or having any disputes. Under these circumstances, he cannot be viewed as legitimately consenting to arbitrate. He has no reasonable escape from adhesion. Similarly, an arbitration clause contained in a consumer insurance policy, which is usually not received by the insured until several weeks after application for insurance and payment of the first premium,²⁹¹ is one of inescapable adhesion and should be avoidable by the insured.

4. Substantive Unconscionability

Arbitration unconscionability requires the party resisting an arbitration agreement to demonstrate that the arbitration forum or process specified in the agreement is so one-sidedly adverse or inappropriate that mandating arbitration is unconscionable. To sustain this burden, the opponent must show that the arbitration scheme is highly likely to be biased, produce inaccurate determinations, create overwhelmingly unfair results, or is so hampered in its ability to accord relief that courts must not permit it, even if the signer consented to the provision.

In essence, I argue that very few arbitration agreements should be set aside, no matter how unfavorable to one side, when the agreement results from true informed consent absent fraudulent conduct or an adhesive lack of meaningful choice. If, for example, an arbitration agreement provided that the arbitrator would obtain hearing testimony through torturing witnesses, the

290. See Slawson, *Standard Form Contracts*, *supra* note 249, at 540-41. The example arises from Professor Slawson's purchase of a home, a result supporting this Article's thesis that certain adhesion contracts concerning certain items (mainly, food, clothing, and shelter) are rendered in a context where even legally sophisticated individuals or enterprises can not realistically be expected to resist even objectionable terms or practices.

291. See R. KEETON & A. WIDISS, *INSURANCE LAW* § 2.1 (Student ed. 1988).

agreement would be unconscionable and unenforceable no matter how genuine the parties' consent to this bizarre provision.²⁹² Other defective arbitration mechanisms²⁹³ may also tend to be void or voidable, even if not illegal. Such cases will be either nonexistent or at least extremely rare.

Arbitration agreements that come close to substantive unconscionability are often made under circumstances of adhesion, contracting in an atmosphere of questionable choice, or where the informed consent of the disadvantaged party is open to serious question. In these situations, the court's factfinding to determine whether to relieve the opponent of the arbitration obligation will be something of a gestalt, determining and considering the degree of lack of consent, adhesiveness, inadequate alternative, and unfairness of the arbitration mechanism.²⁹⁴ When these factors are weighed, the court is prepared to decide the issue, keeping in mind the language of the federal Act, its implicit policy favoring arbitration agreements, and the resisting party's need to carry the burden of persuasion on defenses. Properly applied, the first four defenses—blameless ignorance, dirty-dealing, inescapable adhesion, and substantive unconscionability—are unlikely to permit avoidance of an excessive number of arbitration clauses.

5. Defective Agency

The fifth defense—unfaithful or unauthorized agency—will perhaps force either invalidation or a narrowing construction of arbitration agreements contained in some agreements, particularly collective bargaining contracts. However, the area in

292. This is akin to courts policing slavery contracts. What differentiates this sort of contract abrogation from excessive use of a public policy exception to arbitrability is that the policies against slavery and torture are clearly discernible through and demonstrated by examination of existing laws, legal precedent, and sound evidence of social practices.

293. For example, a contract provision requiring disputes to be arbitrated by a duel to the death by the company principals would be similarly abhorrent and unenforceable.

294. In this sense, my proposed approach would be something like the preliminary injunction formula applied by courts in determining whether to grant interim equitable relief. The court considers: the nature of harm to the plaintiff; the harm to the defendant and the balance of harms; plaintiff's likelihood of success on the merits; and the public interest. Where, on balance, these factors weigh in favor of injunctive relief, the court issues the injunction. *See* D. HERR, R. HAYDOCK & J. STEMPEL, *MOTION PRACTICE* § 20.4.1 (2d ed. 1991). By analogy, a court faced with a defense to enforcement of an arbitration agreement should determine and weigh the factors suggested in this Article. Where, on balance, by a preponderance of the evidence, the court determines that the party resisting arbitration did not sufficiently consent to the clause, taking into account any probable unfairness of the arbitration mechanism, it will refuse to enforce the clause.

which this exception is most likely to be applied involves civil rights claims, an area already removed from arbitrability by the public policy exception.²⁹⁵ To qualify for this defense, a party resisting an arbitration agreement entered into by her agent can avoid arbitration where she can demonstrate that the signer of the agreement was not authorized to agree to arbitrate the instant claims.

Typically, the defense would occur in situations similar to *Alexander*²⁹⁶ and *Barrentine*,²⁹⁷ in which an individual worker is subject to a collective bargaining agreement containing an arbitration clause. Assume that hypothetical worker John Henry belongs to a union of workers on the A & B Railroad. Henry has implicitly authorized the union to act as his agent in dealing with the railroad concerning the terms and conditions of his employment.²⁹⁸ Logically, this would permit the union to bargain with the company about wages, hours, crew configuration, equipment, job safety, schedules, expenses, and the like. Assume that the union and Railroad make a collective bargaining agreement providing a typically broad arbitration clause committing "any and all disputes arising from, concerning, or relating to Railroad employment" to arbitration.

If Henry feels he should, under federal labor law, be compensated for time inspecting the safety of his equipment and is not paid for this under the agreement governing the steel-driving workers, Henry's claim should be arbitrable rather than litigable pursuant to the arbitration clause contained in the collective bargaining agreement. His claim is essentially one for more wages and clearly centers around the terms and conditions of his employment. Henry consented to the union contracting on his behalf in these matters; if it agreed to arbitrate these matters, Henry is bound by that decision as a matter of contract law and no judicially created public policy exception should relieve him of this obligation absent unusual and compelling

295. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (holding 42 U.S.C. § 1983 claims exempt from arbitration agreements) (discussed *supra* text accompanying note 227); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding Title VII claims exempt from arbitration agreements) (discussed *supra* text accompanying note 227).

296. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

297. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (finding Fair Labor Standards Act claims exempt from arbitration) (discussed *supra* text accompanying note 236).

298. See R. GORMAN, *LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 374-81, 695-98 (1976).

circumstances.²⁹⁹

In short, this fifth arbitration defense of unauthorized agency would probably not permit the *Barrentine* result.³⁰⁰ Barrentine authorized the union to commit him to arbitration over wage disputes; Barrentine's claim of underpayment was a wage dispute. The defective agency defense would, however, probably result in the same holdings found in *Alexander* and *McDonald*, but would reach them not on the basis of the particular claims raised by plaintiffs Alexander (title VII) and McDonald (42 U.S.C. § 1983) but because neither man can fairly be said to have authorized the respective unions to bargain away his right to litigate claims arising from matters outside the basic terms and conditions of his employment. The union had a perfect right to commit Alexander to arbitration over matters related to his performance at work. It had no right to act as his surrogate in contracting related to his right to be free of racial discrimination. McDonald's union had a complete right to contract for arbitration over matters related to his job performance. However, when McDonald alleged punishment for his extra-vocational speech, he invoked a dispute outside the rightful scope of the union's agency.

The ultimate resolution of defective agency defenses would turn on the facts of each dispute over arbitrability. Determining the characterization of a dispute will not always be easy but can ordinarily be achieved through fact-based adjudication by the courts. For example, a female employee may allege that she is overworked or underpaid relative to other employees. If her objection is based solely on job assignments, her claim should fall within standard collective bargaining arbitration clauses. However, if she asserts that she and other female workers have been systematically assigned to less desirable positions and that men have been assigned the plum jobs, she has stated a title VII

299. For example, the arbitration provision might establish a repulsive method of decision that truly violates ascertainable public policy, e.g., if workers who lose grievances are summarily shot or demoted. If a reasonably specific applicable law forbade arbitration of this claim, Henry would not be bound; however, he would escape arbitration not on the basis of some vague public policy exception displacing ordinary contract principles and the Arbitration Act, but rather because of a statutory command.

300. Justice Brennan's attempt to analyze *Barrentine* in terms of whether the union has individual or collective interests at heart ultimately misses much of the issue. The issue is not whether the interests are individual or collective but whether they are the types of interests for whom the union is the worker's authorized agent. Unions usually are such agents concerning wages and benefits; they usually are not concerning antidiscrimination and constitutional rights.

claim that would ordinarily not lie within the authorized agency of her union.

Unless there is evidence that the workers affirmatively thought of discrimination claims as part of their working condition concerns and that they authorized the union to represent them in this regard,³⁰¹ the union cannot realistically be viewed as an apt agent either for agreeing to an arbitration clause that waived access to the courts or for prosecuting the discrimination claim. One useful test for assessing effective agency might ask if the union had incentive to work on the member's behalf in the area of dispute (for discrimination claims, the answer will frequently be "no"). Another test might ask if the claim is one the agent and the member reasonably could foresee at the time of the collective bargaining agreement.

Although the fifth arbitration defense of defective agency would not normally change the result of an *Alexander* style case, different results are possible because the agency defense is fact specific rather than linked to the legal claim made. If, for example, the facts of record showed that minority workers organized a union for the primary purpose of forcing largely white management to stop mistreating its largely minority workforce, the court might conclude that Henry and other members intended the union to be its antidiscrimination agent as well. If the policeman's union in *McDonald* had been organized in response to past department efforts to discourage free speech by officers, the court might conclude that McDonald had authorized the union to agree to arbitrate first amendment claims and to prosecute those claims for him in grievance arbitration as well.

A tougher question is presented in *McDonald*-like cases when the worker alleges mistreatment because of the exercise of his constitutional rights at work (rather than when off-duty). In these instances, common sense suggests that the worker's conduct during the work operation (I am assuming that discussion during coffee breaks and on the time clock line are the equivalent of employee speech on the street, at PTA meetings, and the like) is a working condition issue and a time-place-man-

301. If the union was organized by a group victimized by discrimination, such as Asian railroad work crews bossed by whites in the western United States in the late 1800s, for the express purpose of getting better, less discriminatory treatment, this type of union might be one that is the employee's implicitly authorized agent for pursuing race discrimination claims. Women members entering such a mythical union 20 years later would not be subject to the posited agency relationship.

ner restriction that falls within the typical union's agency and the typical collective bargaining agreement arbitration clause. Of course, each situation would turn on its own facts, but the defective agency defense would probably not exempt the employee from grieving claims related to speech or action done in the midst of work. To the extent that the judiciary fears that employers, unions, and labor arbitrators will be insufficiently sensitive to the constitutional rights of employees, these concerns are best dealt with through a more searching review of labor arbitration decisions.

D. Likely Results Following the Approach

To prevent the Arbitration Act from becoming a means of enforcing defective agreements and wrongfully removing disputes and issues from the judicial forum,³⁰² courts should apply these defenses to arbitrability on a case specific basis. Four of the defenses to arbitrability outlined in this Article (blameless ignorance, dirty-dealing, inescapable adhesion, and defective agency) are to some extent an effort to recapture the paradigm of voluntarism and consent in this corner of contract law.³⁰³ To a

302. If an entire segment of the economy acts unchecked to insist upon arbitration, an entire class of cases may be removed from judicial scrutiny. Once so removed, the law not only fails to benefit from evolution through contemporary judicial construction, but may ultimately be unenforced or turned on its head by decisions directly contrary to those the courts would render in the same cases. There is some danger that the securities industry will move further in this direction. Although removing or limiting whole classes of disputes from the judiciary may be fine public policy when done affirmatively by the legislature (e.g., workers' compensation; disability benefits), it should not be accomplished by the actions of the entities positioned to profit from such privatization. *See also* Becker, *With Whose Hands: Privatization, Public Employment, and Democracy*, 6 YALE L. & POL'Y REV. 88 (1988) (criticizing government efforts to privatize workforce to avoid civil service protections and union-sought benefits and procedures). However, the legislature, rather than the courts, should act as the policing agency of any such trends.

303. A substantial number of scholars view the basic paradigm of contract voluntarism as hopelessly flawed. *See, e.g.,* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Mench, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753, 755 (1981) ("principle of free contract is incoherent on its own terms") (emphasis in original). In addition, many argue that contract law in application accrues to the benefit of those at the top of the economic, political, and social hierarchy.

Although a discussion of this criticism lies well beyond the scope of this Article, my own view is that contract law, despite its vulnerability to criticisms, has yet to be displaced with a more coherent theory of the private ordering of relations. In addition, incoherent and elitist or not, contract law is the law. My goal in advocating a shift in the contract law of arbitrability is to effect changes that will make contract outcomes approximate more closely the mythical idea of free contract rather than to retreat to either the product regula-

certain degree, the courts' ill-defined approach to arbitration is understandable. There exists a basic desire to conserve judicial resources. Consequently, courts have been reluctant to adopt doctrines that require detailed fact adjudication. Although adhering to objective formalism entails a considerable sacrifice of logic and respect for consent, an objective theory avoids the factfinding necessary to adjudicate this Article's posited defenses. Notwithstanding the superficial short-term efficiency of the classical objective approach, I argue for its rejection in order to promote consent and fairness. In addition, one can argue that a less formalistic approach will prove more efficient when error costs are adequately calculated.

After a number of cases were decided in the various jurisdictions, counsel would soon have ample guidance in determining what to tell clients, how to write clauses, how to contract, and whether and how to litigate disputes as to arbitrability. In my view, the guidance provided by this common-law engine is at least as predictable as any court's tendency to find a claim unsuitable for arbitration on policy grounds. Whatever inconsistency or unpredictability that occurs would result from variances of fact rather than variances of law or shifting policy preferences. In this same fashion, the contract-based arbitration defenses minimize and isolate judicial error and its consequences.

As precedent is developed for the new approach, parties will shape their conduct accordingly, usually avoiding litigation. To at least some degree, however, the choice between the current regime and this Article's suggested approach does trade off some efficiency of categorization (for example, all FLSA claims are nonarbitrable; all securities claims are arbitrable) to gain individualized justice and greater fealty to the statutory command of the Act. Courts should be willing to make the trade; their reason for being is to apply the law to individual cases. Even when this consumes more judicial resources, courts should embrace the opportunity to obtain more principled and just adjudication.

Although actual commercial behavior occasionally defies

tion view of contracts, *see, e.g.*, Leff, *Contract as Thing*, 19 AM. U.L. REV. 131, 157 (1970); Leff, *Unconscionability and the Crowd—Consumers and The Common Law Tradition*, 31 U. PITT. L. REV. 349, 352 (1970); Slawson, *Standard Form Contracts*, *supra* note 249, at 545-47, 556-61, or to the more radical critique that seemingly would support replacing contract law altogether with some undefined communitarian, egalitarian system.

even the most rational sounding economic theory,³⁰⁴ it is not unrealistic to expect that merchants faced with the possibility of unenforceable arbitration clauses would act both to improve their contracting practices and to compete with one another in the offering or waiver of arbitration and in pricing services in accordance with forum limitations. Most interesting, and of some importance if it occurred on a wide scale, is the notion of differential pricing based on forum selection limitations. The accepted wisdom is that merchants include arbitration agreements in their contracts in order to achieve greater certainty and predictability (regarding, for example, location of disputes; likelihood of successful claims; range of compensatory damage awards; likelihood of punitive damages; and so on) as well as to lower disputing costs (principally counsel fees, much of it spent on discovery in conventional litigation) and to reduce delays.³⁰⁵ If this theory of economic behavior is correct, the arbitration clause is valuable to the merchant and could be quantified by prorating savings to the enterprise from the use of arbitration clauses. Once the arbitration issue is of high enough profile, it becomes a trait of the product that can affect consumer (or commercial partner) choice.³⁰⁶ Like extended warranties,³⁰⁷ no-questions-asked return policies, customer help lines, and bucket seats, the arbitration clause or absence of it has the potential to be a factor weighed by contracting parties, even consumers asked to sign such agreements. Conceivably, some parties will pay higher commissions or prices, or accept more erratic delivery or a reduced warranty period in return for holding open the judicial option in the event of dispute. Others will prefer to accept arbitration and get more of something else in return. Logically, merchants in a competitive market will offer different

304. For example, Lester Thurow notes that labor markets consistently fail to "clear," or respond quickly to new conditions as predicted by economic theory. See L. THUROW, *DANGEROUS CURRENTS* 183-90 (1983).

305. See Dauer, *supra* note 253, at 14-16; Kessler, *supra* note 257, at 639-43; Slawson, *Standard Form Contracts*, *supra* note 249, at 530-33.

306. This impact is more likely to occur with merchants than consumers, since merchants will have more long-term economic incentive to shop around for the best possible terms in their repeated transactions and can better spread the search costs than can consumers, who may only buy, for example, one washing machine in a lifetime and will not rationally wish to scour New Jersey to find the dealer who offers the least onerous standard form contracts.

307. See Slawson, *Standard Form Contracts*, *supra* note 249, at 547-49 (suggesting that automobile dealers and other durable goods manufacturers do use warranty provisions to compete for sales). This appears to continue in practice, as Lee Iacocca's frequent television appearances trumpeting Chrysler warranties as "the best in the business" suggest.

options.³⁰⁸

One wonders why this utopia has not occurred in the real economic world. Instead, the typical arbitration agreement has only boilerplate provisions on arbitration that either sneak by or are meekly adhered to by customers. One obvious possible explanation is transaction costs. If they are high enough, it becomes too costly to offer two-track agreements. Perhaps the presumed benefits of arbitration in lieu of litigation, even if real and substantial, are too difficult to quantify and actuarially predict, making it too tough to price the nonarbitration version of a product. Of course, another possible explanation is that current arbitration law encourages covert, fine print formalism rather than a market for arbitrability.

Use of this Article's approach under most cases would result in enforcing reasonable arbitration clauses found in customer securities accounts, franchise agreements, sales contracts, virtually all commercial agreements between merchants, and the core employment claims of employees subject to collective bargaining agreements providing for arbitration. However, in most instances, discrimination (race, gender, religious, and ethnic) and other civil rights claims³⁰⁹ of union employees would not be arbitrable. Arbitration clauses in the contracts of most nonunion employees would probably be unenforceable unless the employee was one of unusual bargaining power³¹⁰ or had other comparable job options. Consumer contracts providing for arbitration would usually be enforced unless the consumer could demonstrate that she had no other consumption alternatives or was blamelessly ignorant of the arbitration clause. In my view, this means that arbitration clauses would usually be enforced for informed consumers when the written agreement was intended

308. See A. ALCHIAN & W. ALLEN, *supra* note 284, chs. 8-10.

309. See, e.g., 42 U.S.C. § 1981 (forbidding discrimination in private contracting); *id.* § 1982 (forbidding discrimination in housing); *id.* § 1985(3) (making conspiracies to discriminate illegal).

310. A job rises to the level of food, clothing, and shelter in importance and thus deserves special analysis when addressing contracts of adhesion. See *supra* text accompanying notes 276-91. However, a prospective employee of substantial wealth could walk away from adhesive contracts and continue to look for work while living comfortably on savings and perhaps should be bound by the clause. Similarly, an employee with special skill in high and immediate demand, such as a star musician or actor, should probably be held to the arbitration agreement. For star athletes, the issue is confounded by the player's anticipated membership in unions that often have bargained for arbitration in contracts or unanimous insistence on arbitration clauses by an oligopoly of owners.

to be a contract,³¹¹ but that the majority of uninformed consumers could escape arbitrability unless the contract form explicitly announced the arbitration provision and explained enough about it to genuinely apprise consumers in a setting that gives the consumer fair opportunity to consider the matter.

As to the particular cases criticized in this Article, the approach would provide better and more predictable results. At the very least, any errors or inconsistencies would be case specific and would not affect entire classes of claims. Securities and antitrust claims would be arbitrable, as would FLSA claims, but Alexander's title VII action and McDonald's section 1983 claim would probably escape arbitration. Age discrimination claims would probably not be arbitrable because of the peculiar inequities of individual employment contracting. However, ADEA claims by a unionized worker pursuant to a collective bargaining agreement that respects seniority should probably be arbitrable. ERISA actions by plan trustees and unions would be arbitrable; ERISA actions by individual employees would not.³¹²

311. This would not include situations involving ticket stubs, receipts, and other "non-contract clauses." See *supra* text accompanying notes 53-56; E. FARNSWORTH, *supra* note 56, § 4.26.

312. This Article's main focus on court construction of arbitration agreements in light of the federal Act prevents an extensive discussion of other areas of possible improvement, particularly those that require legislative action.

One task for legislative change is elimination of the jury trial right in § 4 of the Act. The seventh amendment does not require jury trial to compel arbitration since these motions are analogous to requests for injunctive relief. Even if the jury is superior, jury trial is significantly more difficult to schedule and more time-consuming to conduct. These administrative costs are justified where the jury sits to find facts and render decision on the ultimate merits of the case. Where the jury determines only a preliminary issue of forum selection, the extra work seems unworthy of the candle and tends to vitiate the Act's purpose of swift enforcement of arbitration.

The Act's standard of review should be amended to specifically empower courts to refuse to enter judgment on an arbitration award if the party opposing the award can demonstrate, by clear and convincing evidence, that the award was clearly erroneous as to the facts, a gross abuse of discretion, or at intolerable odds with the otherwise applicable law. These stronger standards of review would encourage "better" arbitration decisions consistent with what truly consenting parties probably intended and encourage arbitrators to give some explanation of their awards.

Section 1 of the Act provides that the Act shall not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). The majority of courts interpreting this phrase in recent years have concluded that it exempts only the employment contracts of workers engaged in interstate transportation of physical items. The prevailing interpretation is unconvincing. Section 1 should be amended or interpreted to exempt all employment contracts from the Act except collective bargaining agreements, which are of a different nature than ordinary job contracts. If so, fairer results would obtain.

E. The Imperative of a Federal Common Law of Arbitration Contracts

The approach outlined above requires application of a uniform body of federal common-law³¹³ of contract. Allowing some agreements to stand while others fall because of local differences in contract doctrine would cause unequal treatment, vitiate the national purpose underlying the Act, and undermine the pre-emptive effect accorded the Act.³¹⁴ The Supreme Court has sent mixed signals on this issue. Its decision in *Southland Corp. v. Keating*³¹⁵ held that the Arbitration Act creates a body of federal substantive law that must be applied in either state or federal court³¹⁶ and that state laws creating a different treatment for some arbitration contracts were inconsistent with the Act and countermanded by it.³¹⁷ However, in *Perry v. Thomas*,³¹⁸ the Court suggested that state contract principles will generally

313. Federal common law has been defined as substantive and procedural legal rules propounded by courts but lacking appearance "on the face of an authoritative federal text" but having "the status of federal law." Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7 (1985); accord Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986). However, as Justice Jackson's concurrence noted in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 472 (1942), federal common law "is founded" in the Constitution and statutes even if not on the face of the texts. "Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law." *Id.* at 472 (footnote omitted).

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), which acted as broadly as these definitions in applying federal common law to an interstate pollution dispute, Justice Blackmun, in his dissent, spoke of a "deeply rooted, more specialized federal common law that has arisen to effectuate federal interests embodied either in the Constitution or an Act of Congress. Chief among the federal interests served by this common law are the resolution of interstate disputes and the implementation of national statutory or regulatory policies." *Id.* at 334-35 (Blackmun, J., dissenting) (footnote omitted).

314. The Arbitration Act requires application of a consistent federal common law of contracts in order to implement the national statutory policy of the Act in favor of consensual arbitration. This federal interest is sufficiently important to satisfy the various definitions of federal common law discussed *supra* note 304, and lies within the breadth of federal judicial power. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 60, at 338-95 (4th ed. 1983); Field, *supra* note 313, at 891-92.

315. 465 U.S. 1 (1984).

316. *Id.* at 12.

317. *Id.* at 14-16; see also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Rubber Workers*, 461 U.S. 757, 766 (1983) (public policy applied by the courts to overturn labor arbitration result must be ascertained by reference to laws and legal precedent and not the courts' general considerations of "supposed" public interest). But see *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468 (1989) (allowing parties, by choosing state law in contract, to avoid application of Act).

318. 482 U.S. 483 (1987) (Federal Act pre-empts California Labor Code providing

govern application of the Act so long as they do not single out arbitration for disparate treatment. Said the Court:

state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue [is preempted by the Act]. A court may not . . . construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to [overcome the Act in a manner not permitted of state legislation].³¹⁹

The Court seems to both promote and undermine the Act. On one hand, any state regulatory scheme aimed specifically at arbitration contracts is likely to be preempted.³²⁰ On the other hand, even bizarre state contract precedent regarding unconscionability, fraud, duty of good faith, or other aspects of contract doctrine will not run afoul of the Act so long as the strange state law is not peculiar to arbitration agreements. This dichotomy is self-defeating. The Act sought to make arbitration agreements consistently enforceable. Although most state contract law gravitates toward the “better view” as advanced in the Restatement,³²¹ complete deference to state contract rescission defenses risks inconsistent results. Federal contract principles should be developed and applied to arbitration disputes if the goal of consistent federal arbitrability law is to be realized.³²²

wage collection actions may be maintained despite arbitration agreement provision) (discussed *supra* at text accompanying notes 40-42).

319. *Id.* at 493 n.9 (emphasis in original).

320. *See, e.g.,* Securities Indus. Ass’n v. Connolly, 883 F.2d 1114 (1st Cir. 1989) (invalidating Massachusetts law prohibiting brokerage houses from requiring customers to sign arbitration agreement as condition precedent to opening account), *cert. denied*, 110 S. Ct. 2559 (1990).

321. RESTATEMENT (SECOND) OF CONTRACTS (1981); *see, e.g.,* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987), which states that state contract law not specific to arbitration should control, may imply a variant of federal common law in which federal courts begin by looking to state substantive law but are free to fashion a different federal rule where the applicable aspect of state law would undermine a federal statute or policy. *See* C. WRIGHT, *supra* note 314, § 60, at 395-96; Field, *supra* note 313, at 886-87, 973-78.

322. *See* O’Hare v. Global Natural Resources, Inc., 898 F.2d 1015, 1017 (5th Cir. 1990) (In applying the federal common law to the question of waiver of ADEA rights, “[t]he better rule is to fashion a federal common law to determine this issue because the policies embedded in the federal statute should not be frustrated by state law.”).

In areas similar to the Arbitration Act, the Supreme Court has applied federal common-law in order to encourage national consistency in commercial dealings, where the United States was a party, or where an important federal policy was implicated.³²³ The strongest basis for federal common-law appears to exist "when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law."³²⁴ One of the broadest applications of this variant of federal common-law has enforced arbitration clauses in collective bargaining agreements through the Supreme Court's interpretation of section 301 of the National Labor Relations Act as authorizing a federal common-law of labor³²⁵ even though the face of the statute is but a grant of jurisdiction.³²⁶ The Arbitration Act, as previously noted, provides no independent basis of jurisdiction and in that sense provides less authorization for use of federal common-law. However, the Arbitration Act, much more than the NLRA or other statutes whose texts speak only of jurisdiction, establishes federal substantive rights and specifically refers to contract doctrine.³²⁷ Under these circumstances, the Act authorizes development of federal common-law. The Act has been deemed substantive law applicable in both state and federal courts.³²⁸ Construing arbitrability defenses according to federal common-law, which is similarly binding on both federal and state courts,³²⁹ would provide useful symmetry.

If Congress intended for the Act to create substantive law applicable in either state or federal courts, as the *Southland*

323. See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) (federal admiralty jurisdiction supports application of federal common law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (political implications of suit regarding U.S. foreign policy justify federal common law rule); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942) (commercial consistency demands federal common law, also applying federal common law because United States was a party to dispute); see also Field, *supra* note 313, at 908-11 (listing other cases seen as invoking federal common law).

324. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981); see also Field, *supra* note 313, at 892 (federal common law "includes rules that a court develops to fit within a scheme derived largely from . . . statutory interpretation").

325. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); see also, Merrill, *supra* note 308, at 40-41 (*Lincoln Mills* established delegation from Congress as legitimate rationale for judicial use of federal common law, although the Court's use of concept based on mere jurisdictional grant was of "doubtful" validity.).

326. See C. WRIGHT, *supra* note 314, at 391.

327. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (federal common law powers derive from Sherman Act).

328. See *supra* text accompanying notes 316-17.

329. C. WRIGHT, *supra* note 313, § 60, at 392.

Corp. v. Keating Court held, Congress must also have intended that the “grounds as exist at law or in equity for the revocation of any contract”³³⁰ be federal grounds. The Act was passed prior to *Erie Railroad Co. v. Tompkins*,³³¹ while the federal common-law of contract established in *Swift v. Tyson*³³² still reigned in diversity jurisdiction cases. Unlike *Swift*, which permitted inconsistent results where a state statute was on point or according to the citizenship of the parties,³³³ a federal common-law of arbitration contracts poses no such difficulty since the Act is already applied in all cases if the agreement has requisite nexus with interstate commerce.

Developing a federal common-law of arbitration contracts prompts minimal intrusion into state sovereignty. Court development of federal contract common-law in the service of a substantive federal statute appears well within the sphere of the common-law powers of the federal courts.³³⁴ A federal common-law of arbitration contracts is legitimate in that it is invited by an applicable federal statute, achieves consistency in an area of federal concern, and also can develop sensitively and consistently in conjunction with other federal statutes so that arbitration enforcement does not countermand other federal laws or important federal interests.³³⁵

330. 9 U.S.C. § 2 (1988).

331. 304 U.S. 64 (1938).

332. 41 U.S. (16 Pet.) 1 (1842) (holding that Rules of Decision Act, 28 U.S.C. § 1651, did not require federal courts in diversity matters to apply state judicial common law but that federal common law of contracts was to be applied in all interstate commercial disputes decided in federal courts). Unfortunately, the federal common law of contract has remained relatively undeveloped since 1938. Consequently, courts looking for precedent to apply to arbitration disputes might well find most cases to espouse the classical objective theory of contract that has been substantially modified since the Second World War. For obvious reasons, I urge expedited evolution of the federal common law of contract where it has been largely dormant since 1938. In advocating application of federal contract law, I am assuming that the law applied would be consistent with the general contract principles governing the better reasoned modern decisions.

333. See Field, *supra* note 313, at 899-901.

334. See C. WRIGHT, *supra* note 314, § 60; Merrill, *supra* note 313, at 46-47 (use of federal common law for arbitration contract revocation cases comports with four requirements suggested by author because of Arbitration Act authorization and utility of federal common law for such disputes); Field, *supra* note 313, at 890-97 (broad power exists to create federal common law in service of apt interpretation of federal statute, furtherance of federal policies).

335. For example, a federal common law of contract would presumably take cognizance of federal antidiscrimination laws such as Title VII and ADEA in applying this Article's defenses. Although the outcomes in many cases may resemble those rendered under public policy exception cases, the tool of federal common law would probably be both more fact-sensitive and less likely to strain to pose conflicts between the Act and later-

F. The Prima Paint Precedent

As previously noted, the *Prima Paint* decision³³⁶ generally requires that contract interpretation defenses first be referred to the arbitrators unless the defense is directed only at the arbitration provisions of the contract. Although this approach has been effective in promoting arbitration, it inhibits use of this Article's defenses. *Prima Paint* is premised on a false dichotomy to the extent that it separates issues of consent to the arbitration clause from issues of consent to the entire contract. In order to allow courts to fully employ contract revocation doctrine to arbitrability disputes, *Prima Paint* must be modified to permit courts to consider contract revocation arguments that attack the entire contracting process so long as the party resisting arbitration can establish a prima facie case that it would not have agreed to the contract at issue and to its arbitration clause.

In other words, courts should generally be willing to hear and decide defenses that extend beyond objections only to the arbitration clause of the contract. Thus, even defenses of fraudulent inducement (which, if proven, satisfies the dirty-dealing defense and perhaps the blameless ignorance defense as well) first should be decided by the court unless frivolous or ineffective to undermine the resisting party's consent to arbitration. Under this standard, *Prima Paint* would probably be decided the same way. Recall that plaintiff *Prima Paint* alleged that it had been fraudulently induced to contract with Flood & Conklin Manufacturing ("F&C") due to F&C's representations of financial solvency, made while F&C teetered on the verge of bankruptcy.³³⁷ Although *Prima Paint* felt suckered into the consulting arrangement with a financially troubled company, it is doubtful that *Prima Paint* could have introduced evidence to show that, as a commercial company that probably had agreed to hundreds of contracts providing for arbitration, it really would not have consented to the arbitration provision had it been better apprised of F&C's financial problems. Rather, *Prima Paint* was really alleging that it would not have consented to do business with F&C had it known all the facts. These types of dirty-dealing defenses,

enacted antidiscrimination laws. Although a public policy exception cut from whole cloth is an illegitimate aggrandizement of judicial power, use of federal statutes to inform the courts' views as to the quality of contract consent and unconscionability poses fewer separation of powers concerns.

336. See *supra* text accompanying notes 60-70.

337. See *supra* text accompanying notes 61-63 (discussing facts of *Prima Paint*).

those that can clearly be said not to involve the arbitration agreement,³³⁸ should continue to be decided by arbitrators in the first instance.³³⁹

However, when the consent-based defense encompasses not only the arbitration clause but other aspects of the contract, courts should decide whether there truly exists a contractual agreement that carries with it any obligation to arbitrate. In other words, the part of *Prima Paint* that commits contract interpretation questions to arbitrators should remain good law and be aggressively enforced. However, when the party resisting arbitration raises one of the four consent-based defenses going to the issue of contract formation³⁴⁰—the very existence of the con-

338. For example, a case such as *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809 (4th Cir. 1989), in which arbitration was ordered, would be decided the same way under the revised *Prima Paint* standard. In *Peoples Security*, two insurance companies entered into a settlement agreement containing a reasonably broad arbitration provision. *Id.* at 810. When a dispute arose, *Peoples Security* sought to litigate the dispute while *Monumental* invoked the arbitration clause. *Id.* *Peoples Security* responded by contending that *Monumental* had fraudulently induced the settlement agreement. *Id.* The Fourth Circuit, invoking *Prima Paint*, compelled arbitration, finding the fraud defense was directed at the entire settlement rather than the arbitration clause. *Id.* at 813-14. Notwithstanding this Article's proposed revision of *Prima Paint*, the outcome in *Peoples Security* would be the same in that the resisting party failed to target the arbitration clause as the product of fraud and lacked a credible basis for contending that it was duped into arbitration and that it had not consented to the clause. As a commercial actor advised by counsel, as was the case in *Peoples Security*, 867 F.2d at 814, an insurance company (a "repeat player" in the game of contract disputes if ever there was one) could not credibly claim that it had not consented to arbitration, even if it had been duped regarding substantive aspects of the settlement.

339. See, e.g., *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965) (question of whether party had waived right to enforce concededly consensual arbitration clause is issue for arbitrator); *United Merchants & Mfrs., Inc. v. American Textile Co.*, 512 F. Supp. 757 (S.D.N.Y. 1981) (claims of abandonment of contract containing arbitration clause is arbitrable even if substantive contract rights have indeed been abandoned); *Clifton D. Mayhew, Inc. v. Mabro Constr., Inc.*, 383 F. Supp. 192, 193 (D.D.C. 1974) (claim of cancellation of contract arbitrable pursuant to arbitration clause); *In re Ropner Shipping Co.*, 118 F. Supp. 919 (S.D.N.Y. 1954) (accord and satisfaction defense arbitrable). As these and a myriad of other cases suggest, refining *Prima Paint* so that courts review consent-based attacks on contract formation leaves untouched a large class of contract defenses that courts may continue to assign to arbitration with a minimum of judicial proceedings. Hence, the proposed revision of *Prima Paint* should not greatly tax judicial resources.

340. Although the defense of true substantive unconscionability does not contest contract formation (it instead admits agreement to the unconscionable term but asks judicial relief), it does, if successful, avoid the contract, which is effectively the same result obtained when a court finds that the parties never formed a contract or formed one which the party resisting arbitration may repudiate. Notwithstanding the federal policy in favor of arbitration and the *Prima Paint* Court's desire to expedite arbitration and limit judicial involvement, a credible allegation that the arbitration mechanism is substantively unconscionable should be heard by the court rather than the arbitrator. The arbitrator chosen to

tract—the court should adjudicate these defenses.³⁴¹ In *Prima Paint* and a host of other cases, the Supreme Court and lower courts have consistently maintained that arbitration is a matter of contract and that no individual is obliged to arbitrate absent consent.³⁴²

When a litigant contends either that there is no contract or that the contract may be avoided because of one of the contract formation defenses outlined above, there is effectively no genuine consent to commit any issues in the dispute (for example, fraud in the inducement, fraud in the factum, interpretation of terms) to an arbitrator. In these instances, the courts are unrealistic to maintain that the arbitration agreement is a separate entity from the entire contract. If the contract was never formed due to lack of consent, the arbitration agreement contained within this “noncontract” must be equally lacking in force and cannot justify allowing the arbitrator to adjudicate the defense. The limited judicial review given arbitration awards only exacerbates the potential unfairness of *Prima Paint’s* artificial dichotomy. Committing a consent-based arbitration defense to the arbitrator in the first instance is generally the same as giving the arbitrator absolute authority over the matter.

Although *Prima Paint* purports to be the result of legislative edict, the Arbitration Act does not require the separation of the contract formation questions. According to the *Prima Paint* Court, the “statutory language [of the Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”³⁴³ The Court took this view because section 4 of the Act states that a court, upon being satisfied that “the making of the agreement for arbitration . . . is not in issue,”

preside over such a device undoubtedly has a poor perspective for evaluating the fairness or acceptability of the device. Under these circumstances, courts waste the time of all concerned and may even allow illegal activity by deferring decision on the substantive unconscionability question.

341. See, e.g., *E.F. Hutton & Co. v. Schank*, 456 F. Supp. 507, 510 (D. Utah 1976) (finding resisting party’s defense that he was unaware of arbitration clause due to contracting circumstances is attack on arbitration clause as well as attack on contract in general).

342. See, e.g., *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Peerless Importers, Inc. v. Wine, Liquor & Distillery Workers Union*, 903 F.2d 924, 927 (2d Cir. 1990); *Oil, Chemical & Atomic Workers Int’l Union v. American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976); *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688 (S.D.N.Y. 1966).

343. 388 U.S. 395, 404 (1967).

should enter an order compelling arbitration.³⁴⁴ The Court leaps a chasm without benefit of logic by assuming that a claim of nonconsent to the entire contract does not entail a claim of nonconsent to the arbitration clause. Rather, the claimed lack of contract formation by definition includes a claim that the resisting party also did not agree to the arbitration clause. As previously noted, courts may reject this presumption when the facts show the resisting party to be a merchant or other repeat player who has used arbitration in the past or when the consent-based defense cannot be said to have affected the resisting party's agreement to arbitrate. For consent-based attacks on contract formation, the presumption of *Prima Paint* should be reversed, especially in consumer cases: a claimed lack of consent to the contract should create a rebuttable presumption that the defense is directed toward the arbitration agreement as well; the party desiring arbitration must then rebut the presumption based on the particular facts surrounding the litigants, the contract, and the dispute. Although this refinement of *Prima Paint* will create additional work for the judiciary, it also provides an opportunity for more accurate and sensitive enforcement of arbitration clauses in accordance with the Act's true textual command that valid arbitration agreements be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract."³⁴⁵

V. CONCLUSION

The classical view of contract bargaining and agreement, even if accurate in the nineteenth century, is widely viewed as inaccurate for most twentieth century contracts.³⁴⁶ Regarding arbitrability, however, the assumptions and reasoning underlying classical contract doctrine continue to assert a dominant hold, with only some modification. Among the several modern views of contract, a consent-based theory has the greatest logic and explanatory power, yet courts have been reluctant to utilize consent-based analysis when faced with arbitration contracts. Courts would promote greater subtlety, fairness, and principled decisionmaking by recognizing and developing federal common-law contract doctrine defenses to arbitrability in lieu of the cur-

344. 9 U.S.C. § 4 (1988).

345. *Id.* § 2.

346. See generally Dauer, *supra* note 249; Slawson, *Standard Form Contracts*, *supra* note 249.

rent approach, which conflates between unrealistically formal enforcement of arbitration clauses and haphazard, unprincipled invocation of public policy exceptions to arbitrability.