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Creeping Mandatory Arbitration: Is It Just?

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CREEPING MANDATORY ARBITRATION: IS IT JUST?

Jean R. Sternlight*

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INTRODUCTION

The emergence of mandatory arbitration over the last two decades has dramatically changed our legal system. With the approval and even encouragement of the Supreme Court, U.S. companies are increasingly using form contracts, envelope stuffers, and Web sites to require their consumers, patients, students, and employees to resolve future disputes through binding arbitration, rather than in court. While arbitration has been used as a dispute resolution technique for thousands of years, in the past it has been agreed to knowingly and voluntarily, typically by two or more businesses. The

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involuntary imposition of arbitration in lieu of open court procedures is a new and most controversial phenomenon.¹

Critics' attacks on mandatory consumer arbitration have been impassioned. For example, one of the most colorful court opinions states, "The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic."²

Academic and journalistic critics have been harsh as well. One well-known article states:

As architecture, the arbitration law made by the Court is a shantytown. It fails to shelter those who most need shelter. And those it is intended to shelter are ill-housed. Under the law written by the Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees; the protective

1. The controversy surrounding mandatory arbitration begins with its name. Critics of the process feel comfortable labeling it "mandatory," "compelled," or even "cram down" arbitration. *See, e.g.,* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 39 (1999) (using the term "cram-down arbitration"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (using the term "compelled arbitration"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996) (using the term "mandatory arbitration"). In contrast, defenders suggest this nomenclature is inappropriate and unfair. Such defenders urge that as consumers always have the option to refuse the services or products connected to binding arbitration, such arbitration is not mandatory at all. *See, e.g.,* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 780 (2003) (using the term "promulgated arbitration"); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 201 (1998) [hereinafter Ware, *Consumer Arbitration as Exceptional Consumer Law*] ("The consumer is free to put the pen down without signing the form. There is no duress in the typical 'adhesion' contract. A consumer who contracts in such circumstances does so voluntarily."); Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) ("I ask Professor Sternlight . . . to stop calling contractual arbitration—mandatory arbitration.").

In this author's view it makes no sense to dwell a great deal on the nomenclature, given the practical reality that consumers have little if any choice but to accept the arbitration provision mandated by the company. Even in those rare instances when a consumer has read and understood the arbitration clause being required by the company, she likely has little choice but to accept the clause. In many instances competitor companies will require the same or a similar clause. Even if a competitor existed that did not mandate arbitration, it likely would not be worth the consumer's time to conduct the extensive research necessary to identify the competitor. Thus, this Article will continue to call the process "mandatory" arbitration.

2. *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

police power of the federal government and especially of the state governments is weakened . . .³

Another academic critic urges that

The Supreme Court has created a monster. With the Court's enthusiastic approval, pre-dispute arbitration clauses—agreements to submit *future* disputes to binding arbitration—have increasingly found their way into standard form contracts of adhesion. . . . Given the Supreme Court's blessing in the name of a "national policy favoring arbitration," adhesive pre-dispute arbitration clauses should expand beyond their current strongholds in consumer contracts in health insurance, banking and securities investing to other areas of the economy and society. . . . The doctrine of rigorous enforcement of adhesive pre-dispute arbitration clauses—what I call "compelled arbitration"—has given large firms the power to displace the judiciary from its role in enforcing common law claims and statutory rights.⁴

Journalists from many of the most prestigious U.S. newspapers have described the practice harshly as well, as one can see from articles in the *New York Times*, *Washington Post*, *Wall Street Journal*, and *San Francisco Chronicle*.⁵ At least one British journalist has also focused on the U.S. phenomenon of mandatory arbitration, criticizing Americans for failing to focus on the huge importance of the phenomenon. A *Financial Times* article characterizes the growth of arbitration as "a silent revolution" through which "[l]arge areas of American life and commerce have silently been insulated from the lawsuit culture."⁶

At the same time, mandatory arbitration has its advocates. While few, if any, would defend the most unfair arbitration clauses in which companies impose nonneutral arbitrators or greatly limit possible recoveries, some contend that fair binding arbitration is better for claimants than the alternative of litigation. They urge that when companies include arbitration in form contracts, they help consumers and employees by providing them with a forum that is cheaper, quicker, and more accessible than litigation.⁷ Such defenders also urge

3. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401.

4. Schwartz, *supra* note 1, at 36-37.

5. See, e.g., Reynolds Holding, *Private Justice*, S.F. CHRON., Oct. 7, 2001, at A1; Caroline E. Mayer, *Hidden in Fine Print: "You Can't Sue Us,"* WASH. POST, May 22, 1999, at A1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1; Jane Spencer, *Signing Away Your Right to Sue*, WALL ST. J., Oct. 1, 2003, at D1.

6. Patti Waldmeir, *How America Is Privatising Justice by the Back Door*, FIN. TIMES (London), June 30, 2003, at 12. While Waldmeir offers praise as well as criticism for the phenomenon, she urges Americans to focus on how arbitration "threatens to transform their experience as consumers and employees." *Id.*

7. See, e.g., Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 158 (2001) ("Fair arbitral procedures can provide a more expeditious and less expensive alternative that may benefit workers more than judicial proceedings."); Samuel Estreicher, *Saturdays for*

that to the extent companies reduce their own dispute resolution costs, market forces will ensure that they pass on such savings to their workers in the form of higher wages, and to their customers in the form of lower prices.⁸ Some of these defenders also assert that voiding the contract would deny consumers/employees their freedom of contract.⁹

To fully understand the phenomenon of mandatory arbitration one must move beyond the level of rhetoric. One must also step beyond an insistence that the way our legal system is or has been is ideal or inevitable.

Part I of this Article will examine the phenomenon of mandatory binding arbitration in the United States. It will provide a brief history of the emergence of this process, consider how common it is in this country, look at how courts have responded to the phenomenon of mandatory arbitration, and note that mandatory arbitration has not yet emerged in other countries.

Next, Part II will analyze mandatory binding arbitration's actual impact on individuals. Although the question of whether mandatory arbitration positively or negatively impacts most individuals has been widely debated among academics and practitioners, empirical data is scant and not likely to resolve this question in the near future. We have little choice but to rely on anecdotal information and common sense to determine how mandatory arbitration affects individuals.

Finally, Part III will focus on the broader societal impact of mandatory arbitration. Clearly the use of mandatory arbitration is curtailing the use of jury trials and class actions, is leading to fewer precedential decisions, and is limiting public access to our justice system. While many would say that these impacts, alone, show that mandatory arbitration is unjust, this Article will take a broader perspective and consider whether the undermining of our current civil system of justice is really a bad thing. After all, jury trials and class actions have not always existed, nor have other aspects of our current system. To consider whether the use of mandatory arbitration is just, this Article will go

Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) ("In a world without employment arbitration as an available option, we would essentially have a 'cadillac' system for the few and a 'rickshaw' system for the many."); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999).

8. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (arguing that mandatory arbitration lowers consumer prices because competition forces businesses to pass their cost savings on to consumers). For a critique of the Ware argument, see Jean R. Sternlight & Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 93 (suggesting that Ware's Panglossian argument that companies pass on all savings to their customers is based on oversimplified economic assumptions).

9. See Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS, Apr. 18, 2002, at 8, available at <http://www.cato.org/pubs/pas/pa433.pdf> ("What opponents of so-called mandatory arbitration really oppose is freedom of contract.").

back to first principles and examine the proper goals of a system of justice. It concludes that while informal private processes such as arbitration are not inherently unjust, mandatory arbitration is problematic for two fundamental reasons: lack of consent and lack of public scrutiny. First, it is highly problematic to permit the most powerful actors in a society to craft a dispute resolution system that is best for them but not necessarily their opponents or the public at large. Second, principles of justice require that disputants have access to a dispute resolution process that is transparent and open to public scrutiny. While disputants may, in particular situations, choose private processes, it would be improper for a society to establish entirely private dispute resolution processes.

I. THE PHENOMENON OF MANDATORY BINDING ARBITRATION IN THE UNITED STATES

A. *The Pedigree of Binding Arbitration*

Voluntary binding arbitration has a long and honorable history in the United States,¹⁰ and also predates the formation of this country.¹¹ Traditionally, businesses have voluntarily agreed to resolve disputes through binding arbitration, rather than through other means, because they sought expertise, speed, efficiency, privacy, and neutral decisionmakers. Arbitration has been particularly popular within certain industries or societies possessing their own unique approach to dispute resolution.¹² Internationally, arbitration has been used because it allows businesses to avoid feared biases from each others' courts, and to obtain a result that is more enforceable in another country than a court decree would often be.¹³

10. See, e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 32-33, 43-44, 101-14 (1983) (examining arbitration that existed in colonial America); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 194 (examining uses of arbitration in New York, beginning with the Dutch West India Company in the 1600s, and concluding that "arbitration has been an important means of deciding disputes since the earliest days of European settlement in New York in the seventeenth century").

11. See, e.g., JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO (1929) (discussing, inter alia, arbitration among the Gods in Greek mythology); Daniel E. Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 ARB. J. 193 (1961).

12. See, e.g., Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

13. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 7-11 (2d ed. 2001). Arbitration agreements are typically more enforceable in foreign countries than are court decrees because over one hundred countries have adopted the New York Convention requiring them to enforce arbitral awards issued by other signatory countries. *Id.* at 8. In contrast, fewer countries are signatory to conventions requiring them to enforce each others' court decisions. *Id.*

Courts have always supported the use of voluntary binding arbitration. They have historically enforced both arbitral awards and postdispute agreements to arbitrate.¹⁴ While predispute agreements to arbitrate have a more complex history, with some courts refusing to use their equitable powers to hold parties to such agreements,¹⁵ the passage of the Federal Arbitration Act (FAA)¹⁶ in 1925 has required U.S. courts to grant motions to compel arbitration pursuant to such agreements.

Until quite recently, however, arbitration agreements were not used by U.S. businesses to require consumers, employees, franchisees, or other weaker parties to resolve disputes through private arbitration rather than in court.¹⁷ Instead, the use of arbitration was limited to business-to-business or management/union contexts. Indeed, to the limited extent that the possibility of such arbitration was considered by Congress in 1925, when it passed the FAA, those few who spoke on the issue made clear that they did not view such a use of arbitration as appropriate. For example, when one Senator voiced a concern that arbitration contracts might be “offered on a take-it-or-leave-it basis to captive customers or employees,” the Senator was reassured by the bill’s supporters that they did not intend for the bill to cover such situations.¹⁸

B. *The Evolution of Mandatory Arbitration*

The emergence of “mandatory” arbitration¹⁹ occurred during the last fifteen to twenty years. Its rise is linked to the Supreme Court’s issuance of a series of decisions that permitted businesses to use arbitration in situations they had never previously thought permissible. While the securities industry had long required its investors to sign form agreements agreeing to arbitrate rather than litigate future disputes,²⁰ a 1953 Supreme Court decision, *Wilko v. Swan*,²¹ refused to apply such clauses to securities fraud claims, reasoning that the

14. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 19 (1992).

15. *See, e.g.,* *Tobey v. Bristol*, 23 F. Cas. 1313, 1319-23 (D. Mass. 1845) (No. 14,065) (refusing to use equitable powers to enforce predispute agreement to arbitrate). For a good discussion of the “ouster doctrine,” see Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 598-601 (1997).

16. 9 U.S.C. §§ 1-16, 201-208, 301-307 (2000).

17. As noted earlier, *see supra* note 1, some would quibble with my use of the word “require” to describe companies’ imposition of arbitration.

18. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (citing *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 9-11 (1923)); *see also* Schwartz, *supra* note 1, at 75.

19. *See supra* note 1.

20. According to Constantine Katsoris, the New York Stock Exchange began to require its investors to arbitrate future disputes in 1872. Constantine N. Katsoris, *The Resolution of Securities Disputes*, 6 FORDHAM J. CORP. & FIN. L. 307, 310-11 (2001).

21. 346 U.S. 427 (1953).

Securities Act of 1933 must be interpreted to prohibit such a mandatory usage of arbitration. Emphasizing that the Act “was drafted with an eye to the disadvantages under which buyers labor,”²² the Court explained that arbitration does not offer the same remedy as litigation, in that arbitrators may make awards “without explanation of their reasons and without a complete record of their proceedings,”²³ and because that arbitrator’s conception of the legal meaning of statutory requirements cannot effectively be challenged.²⁴

However, the Supreme Court’s attitude toward commercial arbitration changed dramatically beginning in the 1970s and 1980s. While the earliest cases marking this shift involved arbitration between two business entities,²⁵ by 1989 the Court had applied these precedents to reverse *Wilko* and require courts to enforce arbitration clauses imposed by securities brokerage houses on their investors.²⁶ In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,²⁷ the Court enunciated, for the first time, the idea that federal policy favors arbitration of commercial disputes.²⁸ Then, in 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*,²⁹ the Court held that a securities broker could be compelled to arbitrate his federal age discrimination claim against his employer.³⁰ This decision shocked many employers and employees, who had

22. *Id.* at 435.

23. *Id.* at 436.

24. *Id.*

25. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (holding that social policy favoring the use of arbitration in the international commercial context supported requiring the use of arbitration in a § 10(b) securities claim between American and German companies).

26. *de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

27. 460 U.S. 1 (1983).

28. *Id.* at 24-25 (explaining that because questions of arbitrability “must be addressed with a healthy regard for the federal policy favoring arbitration,” “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”). Interestingly, the Court did not provide an explicit rationale for *why* arbitration should be favored over litigation, and it can reasonably be inferred that the Court was influenced by a perception, true or not, that courts were swamped with cases. *See Sternlight, supra* note 1, at 660-66. While the Court had long expressed enthusiasm for arbitration of collective bargaining concerns, its decisions had always emphasized that labor arbitration is justified by entirely different policy concerns than justify commercial arbitration. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (explaining that whereas in commercial disputes “the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other,” in the collective bargaining context “arbitration is the substitute for industrial strife”).

29. 500 U.S. 20 (1991).

30. *Id.* at 35. *Gilmer* argued that requiring arbitration of employment discrimination claims would be inconsistent with public policy and undermine the role of the EEOC, but the Court rejected both arguments. *Id.* at 26-29. The Court also found that *Gilmer* had failed to

previously assumed that public policy concerns would prevent courts from compelling employees to resolve employment discrimination claims through binding arbitration.³¹

Once the Supreme Court began to issue decisions stating that commercial arbitration was “favored” and that arbitration of employment claims could be permitted, businesses jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced. In an era when they feared aspects of litigation including publicity, jury awards, punitive damages, extensive discovery, and class actions, companies saw arbitration as potentially protecting them from all of these “evils.” Thus, companies in a wide array of areas soon followed the lead of the securities industry and began to use form agreements to require their customers to agree to resolve all future disputes through arbitration rather than litigation. By reading the decisions in reported cases, one can see that arbitration soon began to be mandated by a broad range of industries, including financial institutions (as to personal accounts, house and car loans, payday loans, and credit cards),³² service providers (termite exterminators, gymnasiums, telephone companies, and tax preparers),³³ and sellers of goods (mobile homes, computers, and eBay).³⁴ Arbitration has even been mandated in connection

provide sufficient evidence to support his claims that the particular arbitration procedures called for in his agreement were inadequate. *Id.* at 30-35.

31. Many had previously interpreted the Court’s decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), to proscribe courts from forcing employees to arbitrate claims against their employers. In that case, the Court had held that employees whose union contracts contained arbitration clauses could nonetheless bring discrimination claims in court, even if they had already lost on those claims in arbitration. While *Gilmer* did not reverse *Alexander*, see *Gilmer*, 500 U.S. at 33-35, it certainly created a tension with that decision that remains to this day, leaving open the question of whether union members retain a right to sue their employers in court on statutory claims. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Court granted certiorari to resolve a split among the circuits on this issue, but ultimately punted on the question, instead ruling only that at minimum a collective bargaining agreement could be interpreted to require an employee to waive litigation of statutory claims only if that waiver was “clear and unmistakable.” *Id.* at 79-80.

32. See, e.g., *Wash. Mut. Fin. Group v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (upholding arbitration clause imposed on illiterate consumer borrower); *McKenzie Check Advance of Miss. v. Hardy*, 866 So. 2d 446 (Miss. 2004) (upholding arbitration clause imposed on payday-loan borrowers).

33. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (upholding arbitration clause imposed on consumer purchasing termite extermination services); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903 (7th Cir. 2004) (upholding arbitration clause imposed on person who obtained tax preparation services, and generally stating that unconscionability arguments are improper where arbitration is selected “voluntarily”); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003) (striking, as unconscionable, arbitration clause imposed on telephone users).

34. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (upholding arbitration clause imposed on computer purchasers by including arbitration provision in

with games sponsored by the McDonald's hamburger chain³⁵ and with respect to a mail-in on a Cheerios cereal box.³⁶ In this new millennium, consumer arbitration has quickly expanded as well to health care (hospitals and health maintenance organizations),³⁷ nursing homes,³⁸ and educational institutions.³⁹ Also, some companies are now using arbitration offensively, to obtain speedy default judgments against consumers who allegedly owe them money.⁴⁰

It is difficult to assess how common mandatory arbitration clauses have become, but they certainly seem ubiquitous. Readers can each do their own empirical study on this question by taking note of how often they come across mandatory arbitration clauses in their own life. I have seen arbitration mandated by my bank, my broker, my cell phone provider, various credit cards, and my mortgage lender. One recent study of the "average Joe" in Los Angeles showed that approximately one-third of the consumer transactions in his life were covered by arbitration clauses.⁴¹ With respect to employment, while the

warranty brochure in computer box); *Cavalier Mfg., Inc. v. Clarke*, 862 So. 2d 634 (Ala. 2003) (upholding arbitration clause imposed on mobile home purchasers).

35. See *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 777-78 (N.D. Ill. 2002).

36. See Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, § 1, at 37.

37. See, e.g., *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1014-15 (Ariz. 1992) (voiding an arbitration clause imposed by an abortionist on a patient); *Engalla v. Permanente Med. Group*, 938 P.2d 903, 922 (Cal. 1997) (holding that evidence supported claim that arbitration was fraudulently imposed on an HMO customer); *Sosa v. Paulos*, 924 P.2d 357, 361-62 (Utah 1996) (refusing to void an arbitration clause imposed on a patient in an operating room).

38. See, e.g., *Briarcliff Nursing Home, Inc. v. Turcotte*, 2004 WL 1418698 (Ala. June 25, 2004) (upholding arbitration clause imposed on nursing home resident despite claims of alleged bias and lack of opportunity to obtain nursing home placement without accepting arbitration); *Sanford v. Castleton Health Care Ctr., L.L.C.*, 813 N.E.2d 411 (Ind. Ct. App. 2004); *Howell v. NHC Healthcare-Ford Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003). See generally Nora Lockwood Tooher, *Arbitration Agreements in Nursing Home Admissions Becoming Widespread*, LAWYERS WEEKLY USA (Sept. 27, 2004), available at <http://www.lawyersweeklyusa.com> (subscription required).

39. See, e.g., Elizabeth F. Farrell, *Signer Beware: For-Profit Colleges Increasingly Use Arbitration Agreements to Prevent Lawsuits*, CHRON. HIGHER EDUC., Apr. 18, 2003, at A33; *Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8 (1st Cir. 1999) (upholding arbitration clause imposed by school); *Accomazzo v. CEDU Educ. Servs., Inc.*, 15 P.3d 1153 (Idaho 2000) (holding that a child was not bound to an arbitration clause imposed by an educational service provider because the child was merely a third-party beneficiary to the clause).

40. See Press Release, Trial Lawyers for Public Justice, *New Trap Door for Consumers: Card Issuers Use Rubber-Stamp Arbitration to Rush Debts into Default Judgments* (Feb. 17, 2005), available at <http://www.consumerlaw.org/initiatives/model/content/ArbitrationNAF.pdf> (asserting that one arbitration provider, the National Arbitration Forum, handles about fifty thousand arbitrations of debt collection cases each year, and that consumers almost never prevail, even though a number of the consumers were victims of fraudulent misuse of their credit cards).

41. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55 (focusing on industries that provided what the authors

percentage of employees required to arbitrate future disputes is probably lower than one-third,⁴² it is rising.⁴³

The new consumer and employment arbitration has a few features that were not present even in the securities arbitration upon which it was based. First, whereas the arbitration clauses prepared by brokerage houses were typically included in documents required to be signed by investors, companies soon realized that an actual signature was not required in order for an arbitration agreement to be enforced by many U.S. courts. The FAA requires that arbitration agreements be written, but does not mandate they be signed, in order to be enforceable.⁴⁴ Thus, companies often impose arbitration on their consumers by including an arbitration agreement in a document that is received by the consumer but not necessarily read and certainly not signed. Specifically, it is now common to include arbitration clauses in small print notices, envelope stuffers, or warranties contained in boxes or sent to consumers in the mail.⁴⁵ Some arbitration clauses are contained in Web sites,⁴⁶ and some arbitration clauses have even been e-mailed to customers.⁴⁷

term "important purchases"—transactions that were expensive (e.g., automobile purchases), ongoing (e.g., long distance telephone service), or that had a potentially large impact (e.g., purchase of health care services)).

42. One article estimated that between 8-10% of nonunionized U.S. employers require their employees to resolve disputes through binding arbitration. Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, in *EMPLOYMENT DISPUTE RESOLUTION & WORKER RIGHTS IN THE CHANGING WORKPLACE* 27, 27 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); see also Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, CORNELL J.L. & PUB. POL'Y (forthcoming 2005) (citing surveys from 1998 and 2003 of establishments in the telecommunications industry indicating that between 14-16% of such establishments had adopted mandatory arbitration).

43. According to one recent article, from 1998 to 2003 the number of employees required to arbitrate by American Arbitration Association clauses increased from three to seven million. *Employees Signing Away Right to Sue*, MIAMI HERALD, Oct. 15, 2003, <http://www.miami.com/mld/miamiherald/business/7024386.htm?1c>.

44. 9 U.S.C. § 2 (2000).

45. See, e.g., *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (striking, as unconscionable, an arbitration clause imposed on telephone users using an envelope stuffer); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (upholding an arbitration clause imposed on computer purchasers by including an arbitration provision in a warranty brochure in a computer box).

46. See, e.g., Dell Inc., *Dell's Online Policies: U.S. Terms and Conditions of Sale*, at <http://www1.us.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~ck=lf&~section=012> (last visited Feb. 19, 2005); eBay Inc., *Your User Agreement*, at <http://pages.ebay.com/help/policies/user-agreement.html?ssPageName=f:US> (last visited Mar. 19, 2005); Gateway, Inc., *Gateway Consumer Service Plans*, at http://content.gateway.com/www.gateway.com/about/legal/warranties/8510306ConVAS88757B_306.pdf (last visited Feb. 19, 2005).

47. See, e.g., *Campbell v. Gen. Dynamics Gov. Sys. Corp.*, 321 F. Supp. 2d 142 (D. Mass. 2004) (holding e-mail notification insufficient to require employee to resolve future disputes through binding arbitration).

Second, whereas the arbitration imposed by securities brokers was typically required at the beginning of the business relationship—that is, at the time that the customer opened the account—companies now commonly impose arbitration after the relationship has already commenced. Credit card companies, for example, often send their customers small print notices stating that all future disputes will be governed by arbitration. Sometimes companies even attempt to use such clauses to replace ongoing litigation with arbitration. For example, a clause issued by Banana Republic in June 2004 states that “[t]he New Arbitration Provision applies to Claims previously asserted in lawsuits filed before the effective date of any previous arbitration provision.”⁴⁸

Third, the broad expansion of consumer arbitration has likely meant that a less educated cadre of persons is now covered by arbitration clauses. Though not all securities investors are well educated, it seems reasonable to assume that such investors are better educated than the general public. In contrast, virtually all consumers have phones and credit cards, purchase termite extermination services, and so on. Thus, courts have had to face situations in which consumers to whom arbitration notices were provided denied that they were aware of the clause, understood the clause, were literate, or could see.⁴⁹

A fourth important feature of the new consumer arbitration is that companies are increasingly using their arbitration clause not only to require arbitration but also to further limit consumers’ procedural and even substantive rights. For example, some companies have included clauses in their arbitration agreements that shorten statutes of limitations,⁵⁰ limit or eliminate discovery,⁵¹ require a claimant to file in a distant forum,⁵² prevent consumers from joining

48. Banana Republic, Important Notice Regarding Banana Republic Credit Card Accounts Monogram Credit Card Bank of Georgia 1-2 (June 2004) (on file with author).

49. See *infra* notes 66-80 and accompanying text for a discussion of how courts have handled such clauses.

50. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (holding invalid an employment clause that imposed a shortened statute of limitations on employees); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (holding shortened time limit unconscionable).

51. The typical arbitration clause leaves the extent of discovery in part to the discretion of the arbitrator, but it is well recognized that less discovery is usually available in arbitration than in litigation. This limit on discovery will often have an adverse impact on claimants, since information is often in the possession of the company. See Schwartz, *supra* note 1, at 46-47; Sternlight, *supra* note 1, at 683-84. A few courts have held that they will not enforce arbitration clauses that unduly limit access to essential documents and witnesses. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 (Cal. 2000).

52. See, e.g., *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 565-66 (Ct. App. 1993) (refusing to enforce an arbitration clause imposed by a financing organization on California consumers that apparently required arbitration to be heard in Minneapolis, observing that procedures that might be fair as applied to business entities are not necessarily fair as applied to consumers); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571-75 (App. Div. 1998) (finding unconscionable an arbitration agreement that required consumers to arbitrate claims against a computer vendor in Chicago).

together in a class action,⁵³ or bar consumers from recovering particular forms of relief (injunctive relief, compensatory damages, punitive damages, or attorney fees).⁵⁴

C. U.S. Courts' and Legislatures' Response to Mandatory Arbitration

Following the lead of the Supreme Court, lower federal and state courts have generally enforced mandatory arbitration agreements just as they have enforced arbitration agreements entered into voluntarily by two or more business entities. Courts have repeatedly stated that the mere fact that an agreement is imposed in a form agreement, or contained in fine print, is not a legitimate reason to refuse to enforce the arbitration clause.⁵⁵ While plaintiffs have attempted to challenge these clauses using arguments drawn from the U.S. Constitution, federal statutes, state constitutions, state statutes, and common law, most of these challenges have failed, as briefly discussed below.

1. Constitutional arguments

When a party contends it has been required or mandated to resolve its claims through binding arbitration, rather than in court, it sometimes attempts to argue that its rights under the U.S. Constitution have been violated. While these arguments have some intuitive appeal, and have been championed by some scholars, they have not to date been particularly successful in court. In order to establish a violation of the Due Process Clause, arbitration opponents would have to first demonstrate the existence of state action, and this has proved very difficult. When two private parties agree to arbitrate future disputes, most courts have found no state involvement sufficient to rise to the level of state action.⁵⁶ Moreover, even once state action is established, the

53. For a discussion of unconscionability attacks made on clauses that proscribe class actions, see Sternlight & Jensen, *supra* note 8.

54. See, e.g., *Adams*, 279 F.3d 889 (holding an arbitration clause imposed on employees unconscionable in part because it limited the amount of damages and front and back pay); *Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002) (holding an arbitration clause unconscionable to the extent it foreclosed consumers' right to recover punitive damages).

55. See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 176-77, 182-84 (3d Cir. 1999) (upholding the enforceability of an arbitration clause appearing in small print on the back and near the bottom of a form contract employed as part of a secondary mortgage contract allegedly used as part of a scheme to defraud elderly, unsophisticated low- and middle-income home owners); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997) (enforcing an arbitration agreement appearing on page thirty-one of an employee handbook).

56. See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200-01 (9th Cir. 1998). For two arguments that state action may exist in such circumstances, see Reuben, *supra* note 15, at 615-19 (arguing that the intertwining of public and private processes in enforcement of contractual arbitration gives rise to state action), and Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*:

challenger must demonstrate that the arbitration process is sufficiently unfair as to violate the norms of due process.⁵⁷ Given the Supreme Court's flexible view of due process,⁵⁸ this will not be easy, and to date no court has refused to enforce a private arbitration agreement on due process grounds.

Challengers may also attempt to argue that a binding arbitration provision violates their rights to a jury trial under the Seventh Amendment. This argument can only be made in cases in which a Seventh Amendment right would otherwise have applied: cases brought in federal court, "at common law," and claiming damages of at least twenty dollars.⁵⁹ The Seventh Amendment argument seems promising for challengers in this limited number of cases. No state action need be proven, and in the nonarbitration context courts have upheld jury trial waivers only when the waivers are made knowingly, voluntarily, and intelligently. Many mandatory arbitration provisions arguably would not pass this test. Nonetheless, the Seventh Amendment argument has rarely succeeded in the arbitration context.⁶⁰

2. Federal statutory arguments

Challenges made to arbitration agreements under federal statutes have been somewhat more successful. Even in this most pro-arbitration era, the Supreme Court has always made clear that Congress has the power to make claims nonarbitrable.⁶¹ Moreover, while it is true that, post-*Wilko*, the Supreme Court has not found any federal statute that totally precludes arbitration of claims brought under that statute, the Court has also explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."⁶² Thus, where a challenger can show that the arbitration clause was written in such a way as to effectively prevent the challenger from

A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1, 40-47 (1997) (arguing that state action exists at least to the extent courts are relying on a preference for arbitration over litigation to interpret the validity and scope of arbitration agreements).

57. See generally Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1046-86 (2000); Sternlight, *supra* note 56, at 80-98.

58. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (stating that due process is flexible, and emphasizing that requirements of due process depend on the context of the dispute).

59. U.S. CONST. amend. VII.

60. For a longer discussion of the Seventh Amendment argument, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

61. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

62. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

vindicating her rights under a particular federal statute, the Court has explained that the arbitration clause should not be enforced. For example, although the facial attack made by the plaintiffs in *Gilmer* failed, the Court left open the possibility that future age discrimination plaintiffs could void a particular arbitration clause if they could show it prevented them from adequately vindicating their rights due to specific failings in the arbitration process (e.g., nonneutral arbitrators, insufficient discovery, or inadequate appeal opportunities).⁶³ Similarly, in *Green Tree Financial Corp.-Alabama v. Randolph*,⁶⁴ the plaintiffs attempted to show that they could not effectively vindicate their rights under federal law because the costs of arbitration were too high. Although the Court rejected the plaintiffs' claim due to an inadequate factual showing, the Court recognized that this kind of attack on an arbitration clause can be valid.⁶⁵

3. Contractual and common law attacks

The most successful means for challenging arbitration clauses has not been either constitutional or federal statutory arguments, but rather contractual and other common law attacks. As section two of the Federal Arbitration Act makes clear, and as the Supreme Court has frequently stated, arbitration clauses can be invalidated on standard common law grounds.⁶⁶ For example, the challenger may argue that the agreement was invalid due to lack of consideration,⁶⁷ that the clause did not cover the particular claim,⁶⁸ that it was invalid due to fraud,⁶⁹ or that the clause was unconscionable.⁷⁰ Clauses most likely to be defeated as unconscionable are those that impose excessive costs, require claimants to travel to distant locations, limit remedies, impose a biased

63. *Gilmer*, 500 U.S. at 30-33.

64. 531 U.S. 79 (2000).

65. *Id.* at 92. For an analysis of cases in which plaintiffs attacked arbitration clauses on the ground that the costs of arbitration would be excessive, see Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143 (2002).

66. 9 U.S.C. § 2 (2000); see, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (stating that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract'" (quoting 9 U.S.C. § 2)).

67. See, e.g., *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131-32 (7th Cir. 1997).

68. See, e.g., *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 642-43 (Fla. 1999).

69. See, e.g., *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 916-22 (Cal. 1997).

70. See, e.g., *Ting v. AT&T*, 182 F. Supp. 2d 902, 939 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).

arbitrator, or eliminate the opportunity for class actions.⁷¹ Arbitration clauses have also been voided on such grounds as lack of mutuality,⁷² that insufficient notice of the arbitration provision was afforded,⁷³ or that the party urging arbitration waived that right by participating in litigation.⁷⁴

However, while arbitration clauses have been defeated on each of these grounds, most mandatory arbitration clauses are upheld, even in the consumer and employment contexts. While a few courts have refused to enforce particular unsigned arbitration clauses for various contractual reasons,⁷⁵ in general courts do enforce arbitration clauses contained in small print documents, even though they were not signed by the consumer.⁷⁶ In some cases, although the company has not been able to provide specific evidence that the customer actually received the notice, courts have nonetheless enforced the clause, relying on evidence regarding the system the company had in place to send the notice to each and every customer.⁷⁷ As well, while there are some exceptions, for the most part courts have held that even illiterate⁷⁸ or blind consumers or employees⁷⁹ can be bound by unsigned small print arbitration

71. For a discussion of the question of whether prohibiting class action remedies renders arbitration clauses unconscionable, see Sternlight & Jensen, *supra* note 8.

72. See, e.g., *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998).

73. See, e.g., *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Ct. App. 1998) (finding that bank customers had not consented to arbitration merely by agreeing that the bank could unilaterally change any “term, condition, service or feature” of the account).

74. See, e.g., *Palm Harbor Homes, Inc. v. Crawford*, 689 So. 2d 3 (Ala. 1997) (finding that manufacturer waived right to require consumer to arbitrate breach of warranty claim by substantially invoking litigation process).

75. The predominant reason some courts have refused to enforce arbitration clauses is unconscionability. See, e.g., Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004).

76. However, if a contract leaves a place for a signature and remains unsigned, it should not be unenforceable. See *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615 (Ala. 1997).

77. See, e.g., *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 916-19 (N.D. Tex. 2000) (holding that consumers bear burden of proving nonreceipt of arbitration clause once company has presented evidence that the clause was mailed); *Craig v. Brown & Root, Inc.*, 100 Cal. Rptr. 2d 818, 820-21 (Ct. App. 2001) (holding employee bound by arbitration clause he claimed he had not received).

78. A recent case to this effect is *Washington Mutual Finance Group v. Bailey*, 364 F.3d 260 (5th Cir. 2004), in which the court found that a group of illiterate plaintiffs were bound by the arbitration clause they had signed in connection with obtaining loans together with insurance they now say they did not want or need. The illiterate plaintiffs complained that even after they told the bank they “could not read and inquired as to the nature of the documents they were signing,” the bank stated only that they were signing “insurance and finance papers.” *Id.* at 265. The Fifth Circuit found this complaint irrelevant, explaining that parties to contracts have a duty to read the contract or have it read to them. *Id.* at 266.

79. See *Am. Gen. Fin. Servs., Inc. v. Griffin*, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004) (holding that blindness is not a valid defense to formation of an arbitration agreement).

notices. In sum, courts typically void only those clauses where challengers have presented substantial evidence of unfairness, and most arbitration clauses are never challenged at all. Moreover, if the court finds only a single provision of the arbitration clause to be problematic, it may well sever just that portion of the clause, rather than void the arbitration provision in total.⁸⁰

4. *State statutory and constitutional arguments*

In addition to raising contractual arguments, challengers may also seek to invalidate arbitration clauses on the ground that they are void under a state statute or state constitution. Some plaintiffs have argued that mandatory arbitration violates jury trial rights provided by state constitutions or statutes.⁸¹ To prevail on any such state law claim, the challenger would have to defeat the argument that the relevant state statute or constitutional provision was preempted by the FAA. Occasionally these challenges have succeeded.⁸² More frequently, however, courts find that challenges under state statutes or constitutional provisions fail because the FAA preempts the relevant state provision.⁸³

D. *A Uniquely U.S. Phenomenon*

To date, at least, it seems that the mandatory imposition of predispute binding arbitration on consumers and employees by companies is virtually uniquely a U.S. phenomenon.⁸⁴ Indeed, policies issued by the European Union

80. Compare *Alexander v. Anthony Int'l*, 341 F.3d 256, 270-73 (3d Cir. 2003) (finding that entire arbitration clause must be voided due to unfair portions), with *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (holding that a punitive damages exclusion provision in arbitration agreements should be severed, rather than voiding the entire arbitration clause).

81. For discussion of possible jury trial arguments, see Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003).

82. See, e.g., *Mitchell v. Am. Fair Credit Ass'n*, 122 Cal. Rptr. 2d 193 (Ct. App. 2002) (invalidating arbitration provision under California Credit Services Act of 1984 because, contrary to requirements of the Act, the arbitration provision was not signed by the credit consumer); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 773 A.2d 665 (N.J. 2001) (holding that employees may waive the right to judicial remedy for violation of the New Jersey Law Against Discrimination in favor of binding arbitration only if the waiver is clear and unequivocal so as to ensure the waiver was knowing and voluntary).

83. See, e.g., *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 683 (1996) (holding that the FAA preempted a Montana statute requiring that arbitration clauses in franchise agreements be "typed in underlined capital letters on the first page of the contract"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that the FAA preempts an Alabama statute proscribing use of predispute arbitration provisions).

84. For a comparison of usage of mandatory binding arbitration in the United States to usage in the rest of the world, see Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest*

preclude companies from replacing consumers' litigation option with binding arbitration.⁸⁵ However, it is important to further explain this statement to prevent confusion.

Consumer arbitration does exist outside the United States, but it is not imposed on a predispute, mandatory basis. For example, in Britain the Chartered Institute of Arbitrators offers a number of arbitration "schemes" to resolve disputes in an array of industries, including travel, Internet provision, mortgages, and home construction.⁸⁶ After a dispute has arisen, consumers can elect to take their disputes to arbitration, rather than litigation. In some instances, if arbitration is elected by the consumer, the company must accept an arbitral forum.⁸⁷

In addition, in many countries consumer disputes are resolved by a special governmental agency. Sometimes these processes are called "arbitration" because they are relatively informal. However, these processes are unlike what we call "arbitration" in the United States in several respects. First, there is a great difference between a legislature mandating arbitration and a private company doing the same. Second, whereas U.S. arbitration permits disputants to pick their own private arbitrator, other countries' processes provide a government-salaried employee as the arbitrator. Third, although U.S. arbitration is typically conducted privately, and often creates no public record or precedent, most countries' government agencies would likely provide at least some access to their determinations.

Thus, what is it that is unique to the United States? What is apparently unique to the United States, at least so far, is the phenomenon of private companies requiring their customers to agree to resolve future disputes through private binding arbitration rather than in court. While it is very difficult to conduct research as to the entire world, and while it is particularly difficult to conduct research to confirm the absence of a phenomenon, to date at least this author has not found mandatory binding arbitration in use in other countries.

Indeed, as noted above, it seems that the use of mandatory predispute arbitration would be prohibited in the consumer context, at least in the European Union. In 1993, the Council of the European Union issued a directive

of the World, 56 U. MIAMI L. REV. 831 (2002). There may be some use of mandatory employment arbitration in Canada. See generally John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL'Y J. 1007, 1008 (2002) (stating that such clauses are "still relatively uncommon" in Canada but implying that at least some do exist).

85. See *infra* notes 88-91 and accompanying text.

86. Dispute Resolution Servs., Surveyors' Arbitration Scheme 2003, at http://www.arbitrators.org/DRS/Schemes/chartered_surveyors.htm (last visited Feb. 19, 2004).

87. See Sternlight, *supra* note 84, at 863.

entitled "Unfair Terms in Consumer Contracts."⁸⁸ An annex to the directive listed specific practices, including mandatory binding arbitration, which "may" be regarded to be unfair if they significantly and detrimentally impact consumers' rights.⁸⁹ While the directive, by its terms, would not seem to unequivocally bar all mandatory consumer arbitration, subsequent interpretive documents reveal that EU bodies have effectively prohibited the practice. For example, a 1998 European Commission "Recommendation" states that "out-of-court alternative[s] may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised."⁹⁰ Apparently based on these documents, a number of EU countries have proscribed companies' imposition of binding arbitration on consumers.⁹¹

II. THE IMPACT OF MANDATORY BINDING ARBITRATION ON INDIVIDUALS

The debate over whether mandatory binding arbitration is good or bad takes place on two levels: the effect of mandatory binding arbitration on individual consumers and employees and the effect of mandatory binding arbitration on society as a whole. This Part will examine the first question.

A. Attacks on Mandatory Arbitration from the Individual Perspective

The critics' argument that mandatory consumer arbitration is detrimental and thus unfair to individual consumers has many subparts. First, critics urge that the nonconsensual nature of mandatory consumer arbitration is itself a problem per se. Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.⁹² Some companies may even deliberately design

88. Council Directive 93/13 of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 [hereinafter Council Directive 93/13]. For further discussion of the European approach to consumer arbitration, see Sternlight, *supra* note 84, at 844-48.

89. Council Directive 93/13, *supra* note 88, at Annex (1)(q).

90. Commission Recommendation 98/257 of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (Text with EEA Relevance), 1998 O.J. (L 115) 31, 33. The recommendation relies on Article 6 of the European Human Rights Convention, which it characterizes as providing that "access to the courts is a fundamental right that knows no exceptions." *Id.* at 32. Commission recommendations are commonly referred to as "soft law." Although they are not technically binding on member countries, they do have a strong practical effect.

91. See Sternlight, *supra* note 84, at 847.

92. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002) (analyzing literacy research which demonstrates that a shockingly high percentage of literate adults are incapable of extracting pertinent information from form contracts); see also Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1179 (1983) (stating that empirical studies show that consumers are

their arbitration clauses in a manner geared to decrease the likelihood that the consumer will focus on the arbitration clause.⁹³ Moreover, even to the extent that consumers might read and understand an arbitration clause imposed on a predispute basis, psychologists have shown that predictable irrationality biases will prevent them from properly evaluating the costs and benefits of accepting such a clause. For example, because people tend to be overly optimistic, they will often underpredict the need they might have to bring a claim against a company and thus undervalue what they are losing by giving up a right to sue.⁹⁴ Similarly, psychologists have shown that people are risk-seeking with respect to certain prospective losses.⁹⁵ Given the motivation for profit maximization, it seems inevitable that, absent regulation, companies will seek to take advantage of consumers' irrational behavior by manipulating arbitration clauses together with other aspects of consumer contracts.⁹⁶

In short, under most reasonable definitions mandatory arbitration is nonconsensual, given that consumers and employees don't typically read or understand the clauses. Critics urge that predispute mandatory arbitration is wrong as a matter of policy on that basis alone. By definition, arbitration eliminates rights consumers would otherwise have had to a trial before a judge or jury. By comparison to the rights they would have had in court, arbitration almost certainly limits the amount of pretrial discovery available to consumers and also limits their opportunity for appeal. Critics assert that it is fundamentally wrong and unfair to deprive consumers and employees of their access to court on an involuntary, unknowing basis.

Second, critics often point out that many (although admittedly not all) consumer and employment arbitration agreements also try to slant the odds in companies' favor from a substantive standpoint.⁹⁷ There are virtually an infinite number of ways in which a company, as the drafting party, can try to

unlikely to have read adhesion contracts before signing them, and even less likely to have understood what they read).

93. See, e.g., *Ting v. AT&T*, 182 F. Supp. 2d 902, 911-13 (N.D. Cal. 2002) (showing AT&T spent substantial resources determining how best to implement their binding arbitration provision so that it would not be opposed by consumers), *aff'd in part*, 319 F.3d 1126 (9th Cir. 2003).

94. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW & ECONOMICS* 13, 39 (Cass Sunstein ed., 2000).

95. Cognitive psychologists Daniel Kahneman and Amos Tversky developed the widely accepted account of decisionmaking known as "prospect theory." Under this theory, people are often risk-seeking with respect to moderate- to high- probability losses, and risk-averse with respect to low-probability losses. See, e.g., Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (Daniel Kahneman et al. eds., 1982).

96. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 747 (1999) ("Manufacturers, to survive, *must* behave 'as if' they are attempting to manipulate consumer risk perceptions.") (emphasis added).

97. See, e.g., Schwartz, *supra* note 1, at 110; Sternlight, *supra* note 1, at 652.

use an arbitration clause to gain the upper hand, including arbitrator selection, imposition of high costs, and limitation of remedies. While it would be wrong to suggest that most of these excesses are included in most arbitration clauses, some of them are quite common.

The drafter of the arbitration clause has the opportunity to select the arbitrator or the arbitration provider. In the most egregious situations, companies have selected arbitrators who might clearly be expected to be biased, such as a representative of management of the company against whom a claim might be made. Some medical clauses have required that the arbitrator be a specialist in the same field as the doctor accused of malpractice;⁹⁸ some suspect this will lead to few findings of malpractice. It is even possible that a clause would name an arbitration provider that, while sounding from its name like an independent organization, would turn out to be an alter ego of the company or a group that only exists to service claims against that particular organization.

Selection bias can also be somewhat more subtle. Arbitration critics frequently discuss a phenomenon known as the “repeat provider” problem.⁹⁹ Arbitration organizations, such as the American Arbitration Association (AAA) and the National Arbitration Forum (NAF), are now competing to provide arbitration services for particular companies that require their consumers to arbitrate future disputes. Companies and providers often sign agreements to the effect that a particular company will be named as the provider in arbitration clauses involving certain kinds of disputes. Obviously, once an entity is named as the provider, financial benefits accrue to that provider. Some providers take a percentage of the fees charged by their arbitrators. In addition, even when arbitrator fees are paid only to individual arbitrators, rather than the provider, the provider itself earns fees for administering the disputes. Thus, charge the critics, providers have a financial incentive to make sure that the company is pleased with the results in arbitration. If the disputant company is displeased with the results secured through a particular provider, it may well switch providers. Needless to say, providers and arbitrators vehemently deny the charge that they are biased. Providers urge that they have no direct influence over their arbitrators. Yet, critics maintain that, consciously or unconsciously, arbitrators may slant the result in companies’ favor.

A related purported phenomenon is known as the “repeat player” bias.¹⁰⁰ Whereas a given company will tend to arbitrate many consumer disputes, a given consumer or employee will typically arbitrate, at most, one. Thus, the

98. See, e.g., *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) (requiring claim brought by patient against orthopedic surgeon to be heard by board-certified orthopedic surgeon).

99. See, e.g., Menkel-Meadow, *supra* note 1, at 35-37.

100. The “repeat player” concept was first introduced by Marc Galanter, in the context of litigation. See Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (discussing multiple advantages of “repeat players” over “one shotters” in our legal system).

companies have far greater experience with and exposure to the arbitration process than do the consumers or employees. There is some limited empirical evidence that the repeat player does somewhat better in arbitration than the nonrepeat player.¹⁰¹

Companies can also use arbitration clauses to impose costs on consumers and employees and thereby discourage them from bringing claims against the company. Using the lingo of economics, companies can impose terms that increase customers' or employees' transaction costs.¹⁰² Examples of the ways in which companies can impose high costs on consumers include selecting an arbitrator or provider with high fees,¹⁰³ locating the arbitration in a distant forum,¹⁰⁴ and limiting available discovery and thereby requiring consumers to try to gather evidence through more expensive means.¹⁰⁵

Another method companies may use to increase consumers' or employees' costs is to bar them from proceeding jointly with others in a class action. Companies are increasingly using arbitration clauses to prevent class actions from being brought against them, either in arbitration or in litigation.¹⁰⁶ One study showed that such prohibitions were contained in roughly one-third of the consumer arbitration clauses studied in Los Angeles in 1999.¹⁰⁷ Proscribing class actions increases prospective plaintiffs' costs and decreases their ability to

101. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 239 (1998) ("The repeat player effect is a cause for concern because in dispute resolution, sometimes the perception of fairness is as important as the reality. There is undeniably a repeat player effect in employment arbitration . . ."); cf. Hill, *supra* note 1, at 814 (recognizing existence of repeat player effect but denying that it is due to "repeat arbitrators").

102. See Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 221 (explaining that by controlling dispute-system design, one party can impose transaction costs on the other, thereby dramatically altering the available settlement range or making it no longer cost-effective for the opposing party to bring a claim); see also Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 70-72 (pointing out that when one party imposes high transaction costs on the other, it may encourage a settlement that would not otherwise have been desirable).

103. An extreme was the clause formerly used by Gateway Computers. By imposing the arbitration rules of the International Chamber of Commerce, this clause required consumers to pay thousands of dollars to resolve even a simple claim. See Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, FLA. B.J., Nov. 1997, at 8, 12. This clause was eventually struck down as unconscionable in *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571-75 (App. Div. 1998).

104. See, e.g., *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 565-67 (Ct. App. 1993) (refusing to enforce arbitration clause, imposed by financing organization on California consumers, that apparently required arbitration to be heard in Minneapolis).

105. See *supra* note 51.

106. For further discussion of the class action issue, see Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Sternlight & Jensen, *supra* note 8.

107. Demaine & Hensler, *supra* note 41, at 58-65.

prevail in a variety of ways. Many employment and consumer claims—the latter in particular—simply are not viable, from a financial standpoint, if brought individually.¹⁰⁸ A single plaintiff who has been harmed to the extent of a few dollars or even perhaps a few hundred dollars would not rationally bring a claim in arbitration to recover those damages. The costs in terms of time, travel, expenses, and attorney fees simply would not be worthwhile in view of the likely recovery. The Supreme Court and many other lower courts have repeatedly explained this rationale for allowing class actions.¹⁰⁹ In addition, and somewhat less obviously, class actions permit claims that would not otherwise be brought due to lack of information. Many prospective plaintiffs may be unaware that they have been treated illegally.¹¹⁰ Nor, given the small sum of money involved, might it even be worth their while to try to investigate whether they are being treated illegally, even assuming they had a suspicion. Yet, if one knowledgeable consumer figures out that a company is acting illegally with respect to a group of consumers, she can bring a class action to protect her less-informed fellow consumers. Similarly, whereas an individual consumer or employee may be unaware how to bring a claim from a procedural standpoint, class actions allow the more knowledgeable and their attorneys to assist the less educated.¹¹¹ Given these benefits of class actions, it is clear that by eliminating the class action option, companies increase plaintiffs' costs of pursuing a claim and thereby make it more difficult, if not impossible, for them to bring claims against the company.

The third main argument critics make to attack mandatory consumer and employment arbitration is that some companies use their arbitration clauses as a means to limit plaintiffs' access to substantive relief. That is, at the same time that they mandate arbitration, such clauses may shorten plaintiffs' statutes of limitations;¹¹² bar recovery of punitive damages, compensatory damages, or attorney fees;¹¹³ or bar recovery of injunctive relief.¹¹⁴ Although, as has been

108. See Sternlight & Jensen, *supra* note 8, at 85-88.

109. See, e.g., *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617-18 (1997); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). See generally Sternlight, *supra* note 106, at 28-30.

110. See Sternlight & Jensen, *supra* note 8, at 88-90.

111. *Id.*

112. See, e.g., *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (holding a provision in Circuit City's arbitration clause unconscionable because it shortened the applicable statute of limitations to one year); see also Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 411 (2002) (noting that a growing number of courts have found arbitration clauses unconscionable due to substantive remedial restrictions, such as shortening the applicable statute of limitations).

113. For a general discussion of such clauses, see David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003).

114. See, e.g., *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 142-43 (Ct. App. 1997) (quoting employment arbitration provision that, inter alia, precluded employee from recovering injunctive relief).

discussed, courts have stricken or rewritten a number of arbitration clauses containing these sorts of provisions, it is not easy or cheap to attack clauses on such grounds. To the extent such clauses exist and are enforced, they may impact plaintiffs adversely not only by diminishing their recovery, but also by making it more difficult for them to secure legal representation. Presumably, when attorneys make a determination as to whether to represent a particular client, particularly on a contingent fee basis, they take into account the extent of the client's likely recovery, if successful. To the extent that a prospective plaintiff's relief has been substantially limited by an arbitration clause, the individual may find it difficult or impossible to secure legal representation, and this in turn may make it difficult or impossible for the individual to win her case.

B. Defenses of Mandatory Arbitration from the Individual Perspective

Those who defend mandatory arbitration against claims that it is unfair to individuals make four main points: (1) contracts of adhesion are rampant throughout our economy and are no less appropriate with respect to procedural issues than they are for substantive matters; (2) employees and consumers gain better access to justice through arbitration than they would have through the legal system; (3) courts strike down those few mandatory arbitration clauses that overreach; and (4) it is not feasible to afford access to arbitration on a voluntary, postdispute basis because the company and the consumer or employee would never agree to take the same cases to arbitration, postdispute. Each of these points is discussed briefly below.

1. Adhesive contracts are common outside arbitration

Stephen Ware has emphasized that contracts of adhesion are very common in our economy and has urged that adhesive arbitration agreements should not be attacked on that basis any more than we attack adhesive credit card agreements, insurance contracts, or loan documents.¹¹⁵ He points out that our complex multijurisdictional economy could not function effectively if each such contract were negotiated individually.¹¹⁶ He further observes that standard contract law assumes consent from the formal exchange of documents and does not require proof of actual subjective understanding.

While Ware is clearly correct that adhesive contracts are rampant and typically enforced by courts, these facts do not justify the use of adhesive mandatory arbitration agreements. First, although adhesive contracts are rampant in banking, insurance, and other areas, their substantive content is also

115. Ware, *Consumer Arbitration as Exceptional Consumer Law*, *supra* note 1, at 200 (noting that adhesion contracts are typical).

116. *Id.* at 209-13.

regulated by federal and/or state law.¹¹⁷ Second, it can at least be argued that it is more inappropriate to deprive a person of access to court on a nonconsensual basis than it is to increase their interest rate without actual subjective consent. After all, the right to a jury trial is guaranteed by the federal Constitution, and more general access to court is assured by many state constitutions. Surely we would not allow police to use adhesive contracts to deprive alleged criminals of their rights to an attorney?¹¹⁸

2. *Is arbitration more just than litigation?*

Samuel Estreicher has colorfully and metaphorically argued that it is better to provide all consumers and employees a Saturn automobile than it is to allow a few fortunate individuals to drive Cadillacs while most have no car at all.¹¹⁹ He and others quite rightly point out that our litigation system is far from perfect, and that many consumers and employees cannot afford a lawyer to represent them in bringing their claim.¹²⁰ However, it is not clear, at least to this author, that mandatory arbitration offers a better and more just alternative. First, such an argument implicitly assumes that consumers and employees who cannot afford legal assistance in court can successfully represent themselves pro se in arbitration. Yet, this may well not be true.

Second, by compelling all consumers and employees to take their claims to arbitration, rather than to court, companies may well be making it more difficult than it would have been for such claimants to obtain attorneys. Attorneys who take cases on contingent fees may well reject matters slated to go to arbitration, rather than court, fearing that the likely lower recovery in arbitration will not provide them with adequate compensation.¹²¹ Particularly if their arbitration clauses foreclose class actions, consumers and employees will

117. Ware does recognize the existence of government regulation, explaining that regulation renders certain rights “inalienable.” *Id.* at 206-09.

118. *See generally* Sternlight, *supra* note 60; Sternlight, *supra* note 81.

119. Estreicher, *supra* note 7.

120. *See id.*; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 57 (1998).

121. It seems well recognized that the average recovery in arbitration is lower than the average recovery in litigation. *See, e.g.*, Estreicher, *supra* note 7, at 565 (admitting that median compensation in employment cases is likely lower in arbitration than in litigation); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 114-15 (2003). The disparity in non-civil rights employment cases may be smaller or nonexistent. *See* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2003/2004). Also, note that one article in this Symposium takes a contrary position, urging that “there is no evidence that plaintiffs fare significantly better in litigation” than in arbitration. David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005).

find it even tougher to obtain legal representation in arbitration than they would have in litigation.

Third, although proponents of mandatory arbitration argue that this process will allow more claimants to file claims against companies, it is not clear whether more claims are indeed being filed. One credit card company, First USA, revealed that in the two years since it implemented its mandatory arbitration clause in early 1998, only four consumers had filed arbitration claims against the company.¹²² In contrast, First USA itself filed 51,622 arbitration claims against consumers in the same period.¹²³

Fourth, even if it were true that mandatory arbitration is the Saturn, why do companies have the right to take away some consumers' and employees' Cadillacs? That is, should it not be a legislature, rather than private companies, that decides it is legitimate to take away some individuals' rights to boost others' opportunities?

3. *Do courts strike the worst clauses?*

Defenders of mandatory arbitration have frequently argued that critics inappropriately focus on the "few" egregiously unfair arbitration clauses. While recognizing that some imposed arbitration agreements may be unfair, such defenders seek to reassure as to the fairness of mandatory arbitration in general, explaining that we can count on courts to strike down such clauses as unconscionable or otherwise unenforceable.¹²⁴ The Supreme Court, similarly, has frequently observed that state common law on unconscionability or fraud will play an important role in protecting consumers or others from unfair arbitration agreements.¹²⁵

While this argument may, at first glance, seem quite appealing, the financial and other realities of litigation greatly undercut its strength. The basic problem with the argument is that it takes a lot of time, effort, and money to convince a court to void an arbitration clause. The burden of proof for voiding

122. See Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1.

123. *Id.*

124. See, e.g., Sherwyn et al., *supra* note 7, at 119 ("Courts will only enforce arbitration policies that provide a fair process for the adjudication of employees' statutory rights.").

125. See, e.g., *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (recognizing that states have the power to void arbitration clauses on common law grounds); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 627 (1985))).

arbitration clauses has been placed on the party challenging the clause.¹²⁶ Moreover, following the Supreme Court's lead, lower courts frequently state that generalized attacks on arbitration clauses are not sufficient.¹²⁷ What all of this means, in the real world, is that plaintiffs must build a substantial factual record, often including expert affidavits and based on significant amounts of discovery.¹²⁸ Many plaintiffs won't be able to afford to mount such a challenge, and many lawyers won't agree to take on such challenges. Thus, in the real world, even some egregiously unfair clauses may remain on the books because plaintiffs and their attorneys lack the resources or affinity for risk to attack them.

4. *Is it infeasible to offer arbitration to individuals on a voluntary postdispute basis?*

Critics of mandatory arbitration have often suggested that if arbitration is so great for all concerned, why not just let claimants and respondents agree to it voluntarily, on a postdispute basis?¹²⁹ Responding to this rhetorically appealing argument, defenders of mandatory arbitration such as Estreicher have urged that this is a "chimerical alternative to predispute arbitration agreements," in that in reality such agreements will almost never be negotiated.¹³⁰ Focusing on the issue in an employment context, Estreicher explains that in a given case, either plaintiff or defense counsel will reject arbitration in favor of litigation. He states:

If the former employee cannot obtain counsel, it is not in the employer's interest to offer arbitration because the lower costs of arbitration will make more likely the pressing of a claim that otherwise simply would languish in the administrative agency. If, on the other hand, the former employee's economic losses are high enough to attract competent counsel, that lawyer is exceedingly unlikely (absent unusual circumstances) to proffer arbitration

126. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (refusing to void an arbitration clause based on mere "speculation" that arbitration would be excessively costly); *Gilmer*, 500 U.S. at 30 (noting that generalized attacks on arbitration are out of step with Court's strong endorsement of arbitration). *But see Randolph*, 531 U.S. at 92-96 (Ginsburg, J., dissenting) (urging that a company defending a clause should have the burden of proof to defend its fairness).

127. See F. Paul Bland, Jr., *Is That Arbitration Clause Unconscionable? PROVE IT!*, CONSUMER ADVOC. (Nat'l Ass'n of Consumer Advocates, Washington, D.C.), July-Aug. 2002, at 1 ("Fighting a mandatory arbitration clause is not for the lazy, the meek, or those exclusively inclined to broad abstractions. The key to success for a consumer advocate who wishes to avoid having her client forced into a particularly unfair arbitration system is both simple and difficult; one should put a powerful factual record before the court.").

128. *Id.*

129. David Schwartz has explained the differences between pre- and postdispute agreements to arbitrate in depth. See Schwartz, *supra* note 1, at 104-05, 110-21.

130. Estreicher, *supra* note 7, at 567.

even if the lawyer would prefer not to go to trial . . . for such a proffer reduces the settlement value of the case¹³¹

Estreicher's argument is troubling in two important respects. First, it takes for granted the idea that plaintiffs with strong cases will perceive litigation to offer a more favorable forum than arbitration. Yet, if arbitration is truly a fair forum, better and cheaper for all, shouldn't it attract plaintiffs and their lawyers as well as defendants?¹³² In the employment area, plaintiffs' counsel have found mediation to be a very attractive form of dispute resolution,¹³³ and I suggest that they would be interested in postdispute arbitration as well, if they were comfortable that it offered a fair outcome to their clients. Indeed, plaintiffs' attorneys that I know, who are generally critical of mandatory arbitration, will voluntarily take their clients to arbitration when they think that the particular arbitration process is fair. The fact that plaintiffs' attorneys do not choose arbitration in more disputes in my view reflects defendants' failure to offer the process or plaintiffs' attorneys' perception that a particular process would be less desirable for their client, rather than an inherent aversion to arbitration in "good" cases.

Estreicher's second point, that companies would fail to offer postdispute arbitration in disputes where they perceive a plaintiff's case to be weak in terms of the merits or amount of damages sought, is more troubling. As Estreicher describes the phenomenon, defendants are deliberately limiting plaintiffs to a venue (litigation) where they will not be able to obtain a result on the merits due to their inability to secure legal counsel. While I have no reason to question that defendants employ this strategy, I do question Estreicher's idea that this somehow justifies the imposition of predispute arbitration on prospective plaintiffs by prospective defendants. If anything, defendants' strategy would seem, to me, to justify imposing arbitration on companies in those claims where plaintiffs and society would find arbitration preferable to litigation.¹³⁴

131. *Id.* at 567-68.

132. While I have often heard defense-side lawyers argue that it is plaintiffs' lawyers, as opposed to plaintiffs, who oppose arbitration, this also does not make sense. Particularly to the extent that plaintiffs' counsel are working on a contingent fee basis, they should be very interested in a process that will resolve a matter quickly, so long as the result will not be egregiously unfair.

133. For an example of a plaintiffs'-side employment lawyer's defense of mediation, see Robert B. Fitzpatrick, *Non-Binding Mediation of Employment Disputes: An ADR Method That Is Consistent with the American Promise of Fairness*, ALI-ABA CLE COURSE OF STUDY, Feb. 25, 1998, at 1301.

134. I make this suggestion somewhat tongue in cheek. Politically, such a proposal would never be enacted in our current Congress. Constitutionally, companies could claim that such an imposition violated their jury trial rights. Yet, from a policy standpoint, I think the idea is quite defensible. If society has decided that arbitration can be a better dispute-resolution forum than litigation, and if plaintiffs are eager to resolve disputes in that forum, why should defendants be permitted to insist on litigation as a means of preventing plaintiffs' disputes from ever being resolved?

Yet, I suspect that this form of “mandatory arbitration” would not be supported by those who have advocated allowing companies to impose arbitration on their consumers and employees.

Voluntary postdispute arbitration is not impossible. Indeed, in other countries such as Great Britain, consumers do voluntarily arbitrate disputes with various companies.¹³⁵ Thus, rather than dismiss the possibility of voluntary postdispute arbitration, we should consider what changes or regulations might be necessary to make this a reality in the United States.

C. Empirical Studies of the Effect of Mandatory Arbitration on Individuals

Many of the disputes outlined above cry out for empirical studies. Both critics and defenders of mandatory arbitration make assertions that, while empirical in nature, are founded on gut-level beliefs rather than on actual data. Unfortunately, researchers have found it very difficult to evaluate mandatory arbitration, for a number of reasons. First, to a large extent, researchers cannot obtain access to the data they need to perform good studies. As we have seen, one of the fundamental traits of arbitration is that it is typically private. Thus, researchers can only obtain data on arbitration to the extent that disputants or arbitration providers make the data available, which they often do not. A second problem researchers face is that even if they had data regarding results of claims filed in arbitration and in court, it would be difficult to know how to compare that data. After all, the same case is never brought in both processes, and one cannot simply assume that claims brought in arbitration were otherwise identical to those brought in litigation. Third, to the extent researchers look only at who wins or loses and how much they obtain when a claim goes to trial/arbitration, they are missing a large part of the dispute resolution picture. Specifically, it seems likely that the choice between arbitration and litigation may also affect such things as whether a disputant can obtain a lawyer, whether a disputant chooses to bring a claim at all, whether a claim settles (and if so, for how much), and whether a claim is resolved by motion prior to a hearing. Studies that focus only on results at trial as compared to arbitration miss this bigger picture. For example, as noted above, one credit card company’s statistics showed that in the two years after it imposed mandatory arbitration, only four customers filed claims against the company. In contrast, during that same period the company brought 51,622 arbitration claims against consumers.¹³⁶ In short, focusing exclusively on results achieved in arbitration

135. For a description of several programs or “schemes” for consumer arbitration sponsored by the British Chartered Institute of Arbitrators, see Chartered Inst. of Arbitrators, Welcome to the Chartered Institute of Arbitrators, at <http://www.arbitrators.org> (last visited Feb. 19, 2005).

136. Mayer, *supra* note 122 (discussing policy implemented in early 1998).

as compared to litigation obscures many of the important differences that may exist when disputes are funneled to one approach or the other.

The only published consumer arbitration studies of which this author is aware examine securities arbitration. Securities arbitration is more public than most forms of consumer arbitration and is also governmentally regulated. The consumers involved with securities arbitration are presumably wealthier than many consumers. Thus, although the availability of data permits the study of securities arbitration, big questions exist as to whether it is proper to assume that securities arbitration results are applicable in other areas. Several studies done by the General Accounting Office and others show that customers win slightly more than fifty percent of their claims against brokers.¹³⁷ While this sounds promising, several caveats must be noted. First, although investors prevail, they may be awarded just a small percentage of the relief to which they claim they were entitled.¹³⁸ Second, even to the extent investors win at arbitration, they may not be able collect on their awards.¹³⁹ Third, investors may need to secure legal representation to have a chance of making a good recovery.¹⁴⁰ Fourth, one study has shown that repeat player brokers tended to do better in arbitration than those companies that had less experience with the arbitration process.¹⁴¹

Some empirical studies have also been done on employment arbitration, but the results here are inconclusive as well. For example, Lisa Bingham's study of employment arbitration has shown that repeat player companies gain an advantage in arbitration, but that the voluntary imposition of fairness requirements through due process protocols may diminish this advantage.¹⁴²

137. GEN. ACCOUNTING OFFICE, SECURITIES ARBITRATION: ACTIONS NEEDED TO ADDRESS PROBLEM OF UNPAID AWARDS 23 (2000) (reporting that investors prevailed 51% of the time between 1992 and 1996) [hereinafter 2000 GAO REPORT]; GEN. ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE 7 (1992) (stating that approximately 60% of investors prevail); *Public Customer Award Survey*, SEC. ARB. COMMENTATOR, May 1996, at 1, 3 (stating that investors prevail 54% of the time). See generally Richard A. Voytas, Jr., *Empirical Evidence of Worsening Conditions for the Investor in Securities Arbitration*, SEC. ARB. COMMENTATOR, June 2002, at 1, 5 (showing decline in investors' rate of success from 1992 to 2000).

138. Several recent studies show that investors who prevail win approximately twenty-five percent of the amount they sought. See, e.g., Voytas, *supra* note 137, at 5. However, it is also true that investors may be claiming more than the amount to which they are really entitled.

139. See 2000 GAO REPORT, *supra* note 137, for an extensive discussion of this problem.

140. See Voytas, *supra* note 137, at 7 (showing represented investors did substantially better than nonrepresented investors).

141. See *id.* at 6 (showing that brokers who are repeat players did significantly better than non-repeat player brokers both in defending themselves against investor claims and also in bringing counterclaims against investors).

142. See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 893-97 (2002).

On the other hand, a study comparing litigated nondiscrimination employment claims to those arbitrated before the AAA found that higher-level employees (those most likely to have negotiated arbitration clauses rather than have had them imposed upon them) received similar results in both fora.¹⁴³ However, the study was careful to note that the results might well not be generalizable to other types of claims or claims brought before other arbitrators, and further recognized many of the methodological problems noted above.

Frustrated by the lack of data on consumer arbitrations, the California Legislature recently mandated that all arbitration providers keep and publish certain information regarding arbitrations that they administer.¹⁴⁴ At least two major providers, the AAA and JAMS, have now published reports pursuant to this legislation, as have two providers (Kaiser Health and Alternative Resolution Centers) more focused on California.¹⁴⁵ Once analyzed, this data may help us to learn about the percentage of consumer and employment arbitration claims that are settled or withdrawn prior to a ruling, the percentage that are resolved through a paper hearing rather than live testimony, the percentage in which consumers and employees are represented by attorneys, the respective win rates of represented and unrepresented consumers and employees, and the fees charged by arbitrators in such cases and by whom they are paid.

143. Eisenberg & Hill, *supra* note 121, at 44-55; *see also* Estreicher et al., *supra* note 121 (summarizing prior empirical studies on employment arbitration and concluding that while arbitration is clearly faster than litigation, more research needs to be done regarding plaintiffs' relative rates of success and damages awards in litigation and arbitration). In this author's view, the Estreicher et al. article oversimplifies the limited information that can be taken from existing studies on employment arbitration by failing adequately to distinguish between nonstatutory claims of highly paid employees and statutory discrimination claims often brought by lower-pay employees. The fact that arbitration may prove to be a fair venue for the former claims says little or nothing about the adequacy of arbitration for the latter set of claims.

144. CAL. CIV. PROC. CODE § 1281.96 (West Supp. 2005).

145. The AAA data is available at Am. Arbitration Ass'n, CA Provider Organization Report, at <http://www.adr.org/sp.asp?id=22442> (last visited Mar. 19, 2005). The JAMS data is available at JAMS, Consumer Arbitration—JAMS Disclosures for California Consumer Arbitrations, at http://www.jamsadr.com/arbitration/consumer_arbitration_data.asp (last visited Mar. 19, 2005). The Kaiser data is available at Office of the Independent Administrator, Disclosures by the Office of the Independent Administrator, at <http://www.oia-kaiserarb.com/oia/Disclosures.htm> (last visited Mar. 19, 2005). The Alternative Resolution Centers data is available at Alternative Resolution Ctrs., Consumer Arbitration Reporting, at <http://www.arc4adr.com/car.html> (last visited Mar. 19, 2005). Another provider, the National Arbitration Forum (NAF), is being sued by consumer groups for its failure to provide information required by California law in *Corbett v. National Arbitration Forum*, No. 04-431430 (Cal. Super. Ct. filed May 17, 2004). Press Release, Trial Lawyers for Public Justice, TLPJ Charges National Arbitration Forum with Violating CA Disclosure Law (May 17, 2004), available at http://www.tlpj.org/pr/naf_051704.htm. However, NAF has made some data available on its website. *See* Nat'l Arbitration Forum, Consumer ADR Proceedings in California, at http://www.arbitration-forum.com/focus/consumers/ca_consumer.asp (last visited Apr. 4, 2005).

Unfortunately, even the California data will not enable us to analyze what happened in those consumer and employment arbitration claims that were settled or withdrawn. Nor can the California data help us examine those claims that were never brought, perhaps because the consumer could not get a lawyer or did not think her likelihood of success was sufficient. It seems that we will not soon be able to resolve the debate over mandatory arbitration using empirical studies.

III. THE SOCIETAL IMPACT OF MANDATORY BINDING ARBITRATION

A. *The Public Justice Critique*

The most significant attacks on mandatory binding arbitration relate to its effect on society as a whole, rather than to its effect on individual consumers or employees. Even if it could be shown that mandatory arbitration were beneficial for many or potentially all consumers and employees who had claims, some argue it would still be detrimental to society in that it curtails the use of public (sometimes jury) trials and eliminates the development of public precedent.¹⁴⁶ As a corollary, such critics note that to the extent mandatory arbitration eliminates class actions, it also diminishes the public's opportunity to use the public justice system to enforce public laws.¹⁴⁷

The "public justice" critique is founded on the underlying principle that society as a whole benefits from public exposition of the law. William Landes and Richard Posner famously explained that the public aspects of our justice system can be viewed as a "public good."¹⁴⁸ From an economics standpoint,

146. See, e.g., William M. Landes & Richard A. Posner, *Adjudication as Private Good*, 8 J. LEGAL STUD. 235, 235-40, 261 (1979) (arguing, from a law and economics perspective, that adjudication is a public good in that it not only resolves disputes but also creates rules of law needed to promote social compliance therewith, and that the public good of precedent is likely to be underproduced in the private dispute resolution market); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 426-27 (1999) (emphasizing that, in contrast to arbitration, civil litigation not only resolves disputes but also "generates specific and general deterrence, educates the public, creates precedent, develops uniform law, and forms public values"); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 703-11 (2004) (critiquing mandatory arbitration in part because it erodes public knowledge and precedent); see also Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 98 (suggesting that by deemphasizing courts' role in resolving disputes through litigation, "we run the risk of finding ourselves without an institution that has the political legitimacy to make fact- and law-based decisions when we need them"); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 279 (arguing that mandatory arbitration threatens democratic values).

147. See Sternlight, *supra* note 106.

148. Economists explain that a public good exhibits two closely related characteristics: (1) consumption is nonrivalrous, meaning that consumption of the good by one person does not reduce the amount available for any other consumer; and (2) it is nonexcludable,

we cannot count on the private market (arbitration) to provide this public good, because although it benefits the public at large, private parties may not find it cost-effective to pay for the good. As David Luban has succinctly explained, “Why would litigants who engage the services of a rent-a-judge want to pay extra for a reasoned opinion enunciating a rule that benefits only future litigants?”¹⁴⁹

What, specifically, are the public goods that are served by the public litigation system? Two primary categories of such goods can be described as “rule of law” and “public education.”

From a rule of law standpoint, we hope that our public litigation system will ensure predictable, fair, and consistent interpretation of the society’s laws. The fundamental premises of the “rule of law” are that similarly situated persons should be treated similarly under the law and that persons of privilege or influence should not receive special treatment. To the extent the system is fair and consistent, public trust in the system of justice will be enhanced, thereby serving another public good.¹⁵⁰

Our public litigation system performs an educative function as well. By making court hearings open to the public and by publishing judges’ reasoned written opinions, we inform not only the parties but also the public at large regarding how the laws are being interpreted. That is, our public court hearings educate the public and potential wrongdoers as to how the law is being interpreted, thereby deterring potential wrongdoers from violating the law, educating victims as to their rights, and inviting the public to take action to help reform the law should it not be satisfied with the public results. As well, the public justice system may discover and publicize facts, and this information can then be used in our legal and political system.¹⁵¹ The popular phrasing is that the public benefits from processes being “transparent.”

The argument that our public litigation system serves these public purposes has been spelled out in detail elsewhere. For example, one well-known body of articles contrasts the litigation and negotiation of disputes and argues that negotiated resolution of disputes fails to provide public benefits offered by litigation. Owen Fiss has been one of the primary figures in spelling out the

meaning that once the good has been provided to some consumers, it is very difficult/prohibitively expensive to exclude other (nonpaying) consumers from consuming it. The presence of a public good causes market failure, in that the market will undersupply the good. Classic examples include national defense and research on a technology for which patent protection is not perfect. See ROBERT S. PINDYCK & DANIEL L. RUNINFELD, *MICROECONOMICS* 609, 665-71 (6th ed. 2005).

149. David Luban, *Settlements and the Erosion of the Public Realm*, 83 *Geo. L.J.* 2619, 2622 (1995) (suggesting that settlements, as well as arbitration, will underproduce public goods, including not only rules and precedents but also publication of facts and fostering of faith in the judicial system).

150. *Id.* at 2625.

151. *Id.*

benefits of litigation in contrast to negotiation.¹⁵² Judith Resnik, similarly, has often written of the benefits of our public adjudicative system, not merely for individual disputants, but also for the larger society.¹⁵³

Although it seems well recognized that public litigation provides a public good, there is less agreement as to whether alternative forms of dispute resolution might also serve these same public interests or perhaps provide other public goods. The literature comparing negotiated and litigated solutions is divided on this issue. Fiss's important article *Against Settlement* emphasizes the dangers of allowing too many disputes to be resolved through settlement rather than through public litigation.

However, Luban, building on Fiss's work, urges that while public adjudication serves public interests, negotiation, too, can potentially serve such interests. He urges that "the settlement process can realize some of the values Fiss and I both find in adjudication. These include openness, legal justice, and the creation of public goods."¹⁵⁴ Thus, concludes Luban, "We cannot really be against settlements; nor can we really be against settlements that vastly outnumber adjudications. But we can be against the wrong settlements."¹⁵⁵ For Luban the "wrong" settlements are those that are secret.¹⁵⁶

Carrie Menkel-Meadow goes one step beyond Luban, urging that settlements, even secret settlements, can potentially serve important public interests that are not served by litigation. In particular, settlement can promote such values as "consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice."¹⁵⁷ Explaining that "both categories of 'settlement' and 'adjudication' contain enough variation within them to make them almost meaningless concepts to compare in the abstract,"¹⁵⁸ Menkel-Meadow points out that settlements need not be mere unseemly compromises, that settlements

152. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) (emphasizing that "[c]ivil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals"); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 29-44 (1979) (emphasizing the importance of judges' role in engaging in public factfinding and imposing regulatory obligations).

153. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (examining emerging hostility toward adjudication and urging preservation of the accomplishments of the Federal Rules of Civil Procedure); Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 200 (2003) (arguing that the last century has seen the triumph of adjudication but also its demise, through growth of ADR and administrative process, and that "[a]djudication's supporters need to return to their claims for adjudication and ask how adjudication can be refashioned to deliver its promises more broadly").

154. Luban, *supra* note 149, at 2620.

155. *Id.* at 2662.

156. *Id.* at 2648-62.

157. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669-70 (1995).

158. *Id.* at 2671.

can focus on important nonmonetary issues that would be neglected in litigation, and that settlements potentially achieve results that are more fair than a winner-take-all solution might be.¹⁵⁹

Rather surprisingly, only a few commentators have focused directly on whether arbitration in general or mandatory arbitration in particular is consistent with public justice. Looking specifically at arbitration with respect to employment discrimination claims, Geraldine Moohr points out that our employment discrimination statutes are intended to “achieve the public goal of eliminating discrimination in the workplace.”¹⁶⁰ She then points out that litigation, as compared to arbitration, is more effective in achieving this goal by deterring employers from violating the law, educating the public, creating precedent, developing uniform law, and forming public values.¹⁶¹

Richard Reuben makes a far more general argument, examining whether arbitration is democratic.¹⁶² He urges that mandatory arbitration, in particular, is inconsistent with important democratic values. He explains that while arbitration in general has a “contingent” democratic character, and indeed has the capacity to “enhance democratic governance” by both achieving efficiency gains and augmenting personal autonomy,¹⁶³ the mandatory version of arbitration diminishes democracy by, for example, providing little accountability, limiting transparency, providing substantial discretion that does not demand rationality, and failing to provide equal protection or due process.¹⁶⁴

Clearly, when disputes are resolved in private settings, such as binding arbitration, typically neither public access¹⁶⁵ nor public precedent are assured.¹⁶⁶ But, does this matter, and, if so, when does it matter? This privacy causes greater concern when the subjects handled in arbitration affect public interests. That is, we care more when federal statutory claims such as

159. *Id.* at 2672-75.

160. Moohr, *supra* note 146, at 399.

161. *Id.* at 426-39.

162. Reuben, *supra* note 146.

163. *Id.* at 295-97.

164. *Id.* at 298-303.

165. It is not impossible to envision an arbitration that would be open to the public. Indeed, some arbitrations involving public agencies have been public. However, the vast majority of arbitrations are handled privately, and such privacy is vaunted as one of the major advantages of arbitration over litigation. *See, e.g.,* Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 3, 6 (citing privacy as one of the significant advantages of arbitration).

166. Similarly, some few arbitrations do lead to decisions that are publicly available to a greater or lesser degree. Some labor arbitration decisions are published and even made available through online databases. Also, securities arbitration decisions are filed with public agencies and sometimes available online as well. However, the securities arbitration decisions usually contain too little analysis to be useful as precedent, and the labor arbitration decisions are simply an exception to the norm of private unpublished arbitration decisions.

employment discrimination are taken away from the public eye than when a dispute over the quality of soybeans shipped from Missouri to Nevada is handled privately.

B. Rethinking the Public Justice Critique

1. *Why rethink?*

This public justice critique is significant and indeed has been espoused in the past by this author. In multiple articles, I have pointed out that mandatory binding arbitration potentially deprives persons of their jury trial rights, although courts have not typically seen fit to test arbitration clauses under the traditional jury waiver standards.¹⁶⁷ In another article, I critique those mandatory arbitration clauses that would deprive persons of the opportunity to pursue public justice using class actions.¹⁶⁸ And, yet another article observes that where a society becomes too heavily dependent on informal private forms of dispute resolution, such as mediation, it jeopardizes law enforcement opportunities made available by litigation.¹⁶⁹

Nonetheless, it is appropriate in this author's opinion to reopen and rethink the question of whether a private arbitral system of justice is truly unjust, or whether such a system is simply inconsistent with the way we have typically done things in the United States. That is, I challenge the critics of mandatory arbitration, such as myself, to take a step back and reconsider whether, and if so why, mandatory consumer and employment arbitration is truly unjust.

I embark on this mission based on the recognition that the features of a justice system that have been eliminated by mandatory arbitration may not, in fact, be essential for a legal system to be just. That is, not all societies' legal systems feature public trials, reasoned written public precedent, or class actions. Do we critics of mandatory arbitration really mean to say that all such "deficient" legal systems are unjust? Thinking globally and historically about justice systems, it is clear that public trials and published written precedent are a relatively recent phenomenon. Do we really mean to say that all preexisting legal systems that lacked these features were unjust, and that for as long as humans exist on this planet we must use public adversarial trials and reasoned published precedent in order to resolve our disputes? Surely such a proposition proves too much.

167. See Sternlight, *supra* note 60; Sternlight, *supra* note 56; Sternlight, *supra* note 81.

168. See Sternlight, *supra* note 106.

169. See Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401 (2004).

2. Back to fundamentals

The task of setting out the fundamentals of a system of justice is daunting, and I will not purport to do anything but commence this important project. Others have spent books and lifetimes trying to define justice.¹⁷⁰ Yet, I believe I can make some advance in the discussion of mandatory arbitration by setting out even a few preliminary ideas.

Those who have tried to define justice have typically recognized that justice has many aspects, and I too believe this is critical. Indeed, I will present here two sets of multifactor theories of justice: those that distinguish procedural, substantive, and reconciliatory aspects of justice; and those that distinguish individual from more public justice. Each of these perspectives is useful, and the two sets of theories should be overlaid on one another. Ideally a system of justice will serve all of these needs, although I believe there are inevitable tensions among these goals.¹⁷¹

Procedural, substantive, and reconciliatory justice. As I have briefly discussed elsewhere,¹⁷² justice systems ought to serve three sets of interests: procedural, substantive, and reconciliatory. The idea of substantive or distributive justice requires little exposition for these purposes. While we all may have different conceptions of substantive justice, we all agree that the results of any system of justice are critically important in determining whether that system is indeed “just.” If a single party or group were to win all disputes, if equally situated persons received disparate results, or if the “justice” system led to increasingly unequal division of resources, few if any of us would feel that justice had been served.

The procedural aspect of justice is also well recognized. Social psychologists such as Tom Tyler¹⁷³ have done some terrific work in recent years emphasizing that the procedural aspects of justice are as important as the substantive, at least from the perspective of disputants. Drawing upon

170. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971) (setting out a theory of political justice based on a “veil of ignorance”); JOHN RAWLS, POLITICAL LIBERALISM (1993) (critiquing own prior views); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001) (reformulating earlier book based on later insights).

171. See Sternlight, *supra* note 169.

172. Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289 (2003).

173. Much of the key work in this area has been done by Laurens Walker, John Thibaut, E. Allan Lind, Tom R. Tyler, and their students or former students. See, e.g., E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 247 (1993); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850 (1994); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (Joseph Sanders & V. Lee Hamilton eds., 2001); Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APP. SOC. PSYCHOL. 295 (1974).

laboratory and field research, this work has shown that perceptions of procedural justice are more influential than perceptions of distributive justice with respect to how disputants will assess the fairness and legitimacy of the entire system.¹⁷⁴ As Nancy Welsh explains, procedural justice researchers have found three key elements to disputants' experience of procedural justice: (1) their perception that they had an opportunity to voice their concerns and present evidence to a third party, and that they had some control over this presentation; (2) their perception that the third party actually considered these concerns; and (3) their perception that they were treated in a dignified and respectful manner.¹⁷⁵

In my view, it may also be appropriate to ask our systems of justice to serve a third and more controversial purpose: reconciliation. While Western post-Enlightenment societies have typically emphasized that the main point of a justice system is to apply publicly selected laws and rights in a fair and just manner,¹⁷⁶ other visions of justice are also possible. Non-Western European societies have frequently counted on their system of justice to help create balance, harmony, or reconciliation among the members of the society.¹⁷⁷

174. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 860 (2001) [hereinafter Welsh, *Making Deals*] (arguing that court-connected third-party processes "should and must be judged against the standard of procedural justice"); see also Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 180 [hereinafter Welsh, *Hollow Promise*]; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 78-92 (2001) [hereinafter Welsh, *Thinning Vision*] (suggesting steps that should be taken to ensure that mediation enhances rather than diminishes self-determination, a component asserted by procedural justice studies to be imperative to the perception of a fair process).

175. Welsh, *Making Deals*, *supra* note 174, at 820; see also Hensler, *supra* note 146, at 84-95 (drawing on procedural justice literature to suggest that the move to use mandatory court-connected mediation has been based on a false theory that litigants prefer nonadversarial methods of dispute resolution, when in actuality litigants prefer to have their disputes resolved on the basis of fact and law by a neutral third party).

176. Sternlight, *supra* note 172, at 300.

177. For example, James Wall and Ronda Callister have described the Ho'oponopono process, which they call "an integral and ancient part of Polynesian culture," and which later migrated to Hawaii. James A. Wall, Jr. & Ronda Roberts Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation*, 11 NEGOTIATION J. 45, 46 (1995). This process, used to resolve all manner of interpersonal and what would elsewhere be criminal matters, typically consists of twelve steps ultimately geared to untangle the disputants and make things right between them. *Id.* at 47-52. Similarly, in describing the Navajo system of justice, Robert Yazzie explains that concepts of justice are closely related to concepts of healing and that when Navajo describe law, they say "life comes from it." Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 1994 N.M. L. REV. 175, 177-87 (explaining that the Navajo system of justice can best be described as "horizontal," in contrast to the Western "vertical" system of justice; where the vertical system relies on hierarchy and power to resolve disputes, the horizontal is instead best symbolized by the circle, in which no authority has to determine what is true, and the goal is healing and restoration rather than determining right

While many have suggested that such an emphasis on harmony or reconciliation may not be appropriate or even possible in a modern Western society,¹⁷⁸ and others have urged that harmony has negative controlling aspects,¹⁷⁹ as well as a potential positive allure, I see no reason why an emphasis on protection of rights has to be exclusive of an emphasis on improving relations among members of society.¹⁸⁰ Yet, as this view is controversial and not essential to analyzing whether systems of mandatory arbitration are just, I will not explore it further at this time.

Public and private purposes of a justice system. An alternative way to cut the justice pie is to distinguish between individual and public interests in justice. This perspective is similar to that taken by such scholars as Fiss and Luban, and has been examined earlier.¹⁸¹ However, whereas Fiss and Luban seemingly elevated public over private interests, implying that only the public interests warrant being identified with "justice," my own perspective is closer to that of Menkel-Meadow, who urges that individuals' interests, and especially their rights to autonomy and self-determination, are also entitled to consideration in designing a system of justice that serves the public interest. Thus, in a prior article focused on what kinds of dispute resolution systems are most appropriate to resolve employment discrimination claims, I urged that we need to take account of not only societal interests such as interpreting public laws, applying them equally, and shaping future behavior in accordance with those laws, but also individual interests in, for example, speedy decisions, low-cost and accessible processes, private results (at times), and procedural fairness.¹⁸² I urged in that article that no single procedure can likely serve all of these interests, and that societies are often best off providing multiple processes including, for example, the use of formal litigation for some disputes (to serve the public interests in lawmaking, consistency of results, deterrence, etc.) and private, nonadversarial processes such as mediation for others (to serve private interests in speedy, low-cost, accessible processes).¹⁸³ The difficulty, of course,

and wrong). Through a process of talking, and community, the Navajo seek to work things out as a community. *Id.* at 180-87.

178. See, e.g., Richard L. Abel, *Introduction* to 2 THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982) (arguing that the characteristics of informal justice in precapitalist societies demonstrate why comparable institutions cannot be created under Western capitalism, in that the precapitalist society features a social structure in which relationships are multiplex and continuous, in which residential mobility is limited, and in which reputation is highly prized and easily lost).

179. See, e.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

180. Sternlight, *supra* note 172, at 302.

181. See *supra* Part III.A.

182. Sternlight, *supra* note 169, at 1482-89.

183. *Id.* at 1490-99.

is that the society must also create a “switching mechanism” to select among these multiple dispute resolution tracks.¹⁸⁴

3. *So, is formal litigation necessary to achieve justice?*

Having briefly laid out these multiple visions of justice, we must then ask whether formal litigation as we know it today in the United States is necessary to achieve the kinds of justice described above. This Article boldly asserts it is not.

First, formal litigation is not necessary to achieve distributive or substantive justice. Tribal societies, communes, families, and many other groups manage to distribute resources and resolve disputes without using formal courts, public precedent, class actions, or discovery. Instead, such groups may use forms of mediation or arbitration to resolve their disputes. While individual results can of course be challenged, it seems impossibly narrow-minded to assert that none of these informal dispute resolution mechanisms can achieve substantive justice.

Second, it also seems clear that informal dispute resolution mechanisms can meet procedural justice concerns. Welsh has recently made this point clearly, with respect to mediation. She explains that mediation, if properly designed, can allow disputants all the elements of procedural justice: opportunity to voice their concerns and present evidence to a third party, provision of some control over this presentation, consideration of the concerns by the third party, and a dignified and respectful forum.¹⁸⁵ While Welsh certainly does not assert that mediation *always* meets procedural justice concerns, she does show that nonlitigation approaches are capable of making disputants feel that their concerns have been heard and that they have been treated fairly and with dignity.¹⁸⁶ Again, even a cursory familiarity with nonlitigation approaches used by other societies supports this point, as clearly not all societies have felt it necessary to establish formal discovery, public precedent, or even an adversarial system in order for their members to feel they have received treatment that is procedurally just.

Third, we certainly cannot say that the formal litigation system is essential to the fulfillment of individuals’ interest in a speedy, low-cost, potentially private decisionmaking process. Indeed, the expense, slow speed, and high cost of our formal litigation system is well documented, and causes many to question whether indeed our high aspirations for formal justice cause injustice

184. *Id.* at 1495-98.

185. Welsh, *Making Deals*, *supra* note 174, at 792; *see also* Welsh, *Hollow Promise*, *supra* note 174; Welsh, *Thinning Vision*, *supra* note 174. *But see* Hensler, *supra* note 146, at 94 (arguing that litigation is better than mediation in meeting procedural justice concerns).

186. Indeed, Welsh recognizes that many court-connected mediation programs do not meet these concerns.

for those who either cannot access the system or are dragged through it at high cost.

Finally, we must even question whether our formal litigation system is necessary to achieve the public purposes of a justice system: rule of law, transparency, adherence to social norms, etc. This is the claim that is the most plausible, and the critiques of ADR offered by such scholars as Fiss and Luban seem to depend on this inherent assumption. Yet, while it seems clear that litigation *can* serve these important public interests, it also seems clear that other modes of dispute resolution can also provide similar justice, at least in some types of societies. Let us look, for example, at the Navajo system of peacemaking described by Judge Robert Yazzie.¹⁸⁷ As Yazzie explains, the Navajo rely on a system of justice whereby disputants and their families and friends gather before a tribal elder who helps them reach a mutually acceptable solution. This leader invites the disputants to share their mutual concerns and look for a mutually acceptable solution to the problem that will ensure peace within the society. The leader also uses his or her influence to shape a solution that is consistent with community norms.¹⁸⁸

While the Navajo system of justice is a far cry from our own, and does not use written published precedent, it does achieve many of the same ends as our own formal litigation process. The Navajo dispute resolution process is open to the public, in the sense that interested family and friends are able to participate. Although the process is not focused on “law” as we know it, participating parties no doubt insist on fair treatment. As the results of other peacemaking meetings are known to the community, it is likely that a great deal of consistency will exist between results achieved in various meetings. Further, these informal processes would seem to be extremely effective in shaping the conduct of members of the society. In a small community, results of tribal peacemaking will quickly become public, and will be very important in ensuring that other community members are deterred from similar conduct that is inconsistent with community norms (law). As well, to the extent the community believes that the results of the peacemaking were not proper, steps can be taken to reshape the communal norms. In short, without the formality or written decisions of litigation, many if not all of the norms of public justice can be met.

4. *Then is mandatory arbitration just?*

If a formal litigation system is not the only possible just system of dispute resolution, what happens to the public justice critique of mandatory arbitration? This Part asks not whether mandatory arbitration is ever unjust, but rather whether it can ever be just. The question of whether mandatory arbitration is

187. Yazzie, *supra* note 177.

188. *Id.* at 180-87.

ever *unjust* is too easy. Clearly, mandatory arbitration, indeed like litigation or mediation or any other form of dispute resolution, can be set up in such a way as to be unjust. Where the arbitrators are biased or the remedies are limited, mandatory (or nonmandatory) arbitration can potentially be unjust according to any of the factors set out above. It may potentially generate results that are substantively unfair, prevent participants from adequately participating and expressing their views, prevent disputes from being handled quickly and efficiently, and certainly prevent the public at large from obtaining access to the dispute resolution process or its results.

Thus, the far more interesting question is whether mandatory arbitration can ever be just. It will be examined in light of the various features of justice systems outlined above.

First, can mandatory arbitration be consistent with procedural justice? This is a difficult question. It seems clear that arbitration, when chosen voluntarily, can offer disputants the opportunity to voice their perspectives, to have their views fairly considered, and to be treated with dignity. Indeed, many might argue that the arbitration process potentially offers more voice and more dignity than litigation, in that it can be less formal and less dominated by attorneys.

Yet, does the manner in which arbitration is imposed affect the perceived procedural justice of the process? While I can offer no empirical studies in support of this proposition, I believe that it does. When one party designs a process and then imposes it on another, thereby depriving that party of access to the default dispute resolution mechanism chosen by society (here, litigation), I believe this will naturally, if not inevitably, raise concerns that the imposed process is unfair. Even if the process which is being forced is itself “fair,” the forcing of that process on one side by the other raises the concern, from a procedural justice standpoint, that the process is tainted. This seems to be basic psychology.¹⁸⁹

Second, can mandatory arbitration be consistent with substantive or distributive justice? Here, the picture is again mixed. It is clear that the drafters of mandatory arbitration programs have an incentive to design the process so as to be beneficial to themselves, from a substantive standpoint. As we have seen,

189. Lisa Bingham raises this concern from a somewhat different perspective when she discusses the macrodesign issues relevant to developing dispute resolution processes. A process that is by nature noncoercive, such as mediation, becomes more coercive if imposed involuntarily. Bingham, *supra* note 102. The phenomenon of “reactive devaluation” offers a sort of analogy. Psychologist Lee Ross and others have observed that people tend to devalue proposals that are authored by an adversary. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26 (Kenneth J. Arrow et al. eds., 1995). Here, it is natural that disputants would think less of a procedural process that is mandated by an adversary. Cf. Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1623 (2005) (critiquing the mandatory imposition of ADR processes, and observing that forced ADR “is deeply disturbing to many litigants”).

the drafters may include clauses that eliminate potential forms of relief, shorten statutes of limitations, or eliminate the possibility of class actions.¹⁹⁰ Each of these approaches (and others) is geared to benefit the drafter, substantively, at the expense of the person on whom the clause is imposed. While courts may strike down some of the worst such clauses on unconscionability or other grounds, not all plaintiffs will bring, much less win, such challenges. Thus, as a group, mandatory arbitration schemes may well be substantively unjust as compared to litigation. Yet, while it is evident that a mandatory arbitration scheme can be designed to be unfair, and to lead to skewed results, it seems equally clear that individual arbitrators can be nonbiased and issue substantively fair decisions, even where the arbitration was imposed involuntarily. And, it also must be recognized that litigation poses problems of lack of justice that can lead to significant substantive injustice. Thus, it seems that mandatory arbitration sometimes but certainly not always leads to substantive or distributive injustice.

Third, with respect to what I have identified as the “individual justice” factors, the picture is also complex. In terms of such features as speed, cost, and privacy, arbitration, even the mandatory version, may offer a superior result to many disputants. However, to the extent that autonomy is also considered one of the aspects of “individual justice”—and Menkel-Meadow urges that it should be¹⁹¹—mandatory arbitration’s score with respect to “individual justice” must fall substantially. Individuals who have been forced out of one process (litigation) into another (arbitration) have lost rather than gained autonomy.

Fourth, let us again consider the public justice factors, such as support for rule of law, development of public precedent, and shaping of public conduct. Here, the extent to which mandatory arbitration is consistent with public justice will depend on the manner in which it is structured. If, as is typically the case, the mandatory arbitrations are required to be closed to the public, if the results are usually not reasoned, and if those awards are almost always confidential and rarely published, public justice is not served. In contrast not only to litigation but also to the Navajo peacemaking process, private arbitration does not serve an educative function in society. Private proceedings and private awards offer no opportunity for nondisputants to learn from what happened, nor is there an incentive for arbitrators to follow precedent or develop a body of decisions consistent with the rule of law. That is, in considering whether mandatory arbitration is consistent with public justice we see that the problem is not its mandatory nature but rather its private aspect.

190. See Sternlight, *supra* note 106.

191. Menkel-Meadow, *supra* note 157, at 2684.

CONCLUSION

What, then, has been learned from this lengthy examination of mandatory arbitration? Readers will not be surprised, given both the title of this Article and this author's prior work, that I have concluded that mandatory binding arbitration is unjust in several aspects. Specifically, the mandatory nature of mandatory arbitration impinges on substantive, procedural, and individual justice, and the private nature of mandatory arbitration impinges on the public purposes that ought to be served by a justice system. Yet, I believe several additional key insights can be drawn that may help us as we continually strive to better our system of justice.

First, mandatory arbitration is not unjust simply because it is not litigation, but rather because of its own core features. We have seen that other nonlitigation systems (e.g., Navajo peacemaking) could be just, even though they are far different from litigation. This insight is important, because it means that our society need not remain wedded to adversarial litigation as it exists in the twenty-first century. Rather, as our society develops we can explore other forms of justice that might meet our various concerns, even if in a way quite different from that which we are used to.

Second, we can begin to think about ways to modify mandatory arbitration to make it more just. It is tempting to assert that the problem with mandatory arbitration is that it is mandatory. Yet, I think this is too simple. A brief consideration of a couple of thought experiments may help us see why it is so important to be specific about the problems that underlie mandatory arbitration.

For our first thought experiment, suppose Congress imposed a dispute resolution system less formal than litigation, but under which the decisionmakers were picked and paid by the government.¹⁹² I believe such a process would be far more "just" than privately imposed mandatory arbitration as considered under many of the types of justice outlined above. Perhaps it might even compare favorably to litigation.

From a procedural justice standpoint, although the arbitration/administrative process would be imposed, it would be imposed by the society as a whole rather than by an opposing party. Thus, just as we don't complain that litigation is inherently unjust because it is "forced," so too would this complaint about governmentally mandated arbitration fade away.

With respect to substantive or distributive justice, if such arbitration or administrative process were governmentally rather than privately mandated, private parties would lose much, if not most, of the opportunity they now have to skew the process in their own favor. While they might influence appointments informally, through lobbying, private parties would not have the direct power to appoint decisionmakers nor to devise the criteria for their

192. That is, Congress might send all disputes to a process that looks like what we call administrative law or what some other countries call "arbitration."

selection. Thus, there seems no reason to believe that substantive justice would necessarily be served less well than it is currently served by litigation. Indeed, perhaps decreased costs and formality would actually improve access to substantive justice.

Considering private justice factors, such as speed and cost but also autonomy, the governmentally mandated arbitration might pass muster as well. Although parties would be mandated to arbitrate, rather than litigate, this seems no worse than our current system, which mandates litigation as the default process. Parties would still have the autonomy to choose to settle or mediate their disputes, if they preferred. To the extent that this arbitration would be a less formal version of litigation, akin to an administrative hearing perhaps, it might offer greater speed, cost, and access than is currently available through litigation.

As for public justice factors, such as precedent, rule of law, and so forth, the legitimacy of this hypothetical governmentally imposed arbitration would depend on whether the hearings were open and whether the results were published. Private "justice" is truly problematic, for the secret proceedings inherently threaten a society's ability to enforce its norms and ensure that equally situated persons are treated equally. On the other hand, it is not clear to this author that *all* kinds of decisions must be made and decided publicly. Rather, to the extent that our various visions of justice are in tension with one another, we must devise an array of processes to meet our various concerns. Perhaps some kinds of disputes are better made privately, in order to promote various aspects of individual justice.

As a second thought experiment, what if arbitration, much as we know it today, were imposed "mandatorily," but by Congress rather than by private parties? That is, what if Congress eliminated publicly appointed judges and required some or all disputes to be brought to privately appointed and paid arbitrators? Although the arbitrators would be privately selected, all disputants would presumably have at least a formal, equal, and fair say in selecting the arbitrator.¹⁹³ Clearly, if this process were purely private and confidential, it would be problematic in terms of a public justice analysis, but what if the hearings or results were public? Could these privately appointed arbitrators provide substantive and procedural justice? Does this come down to an empirical rather than a philosophical question? We can speculate that the privately appointed arbitrators might favor more powerful or more knowledgeable parties, thereby undercutting substantive and procedural justice, but perhaps this favoritism would not occur.

The bottom line: Mandatory private arbitration as we know it today in the United States is indeed unjust, both because it is imposed by a single private

193. Of course, the repeat player phenomenon, discussed *supra* notes 100-01 and accompanying text, might still give certain disputants an edge in picking their decisionmakers.

party and because it is private. However, in rejecting mandatory private arbitration we must not endorse our current mode of public litigation as the only just form of dispute resolution. Rather, we must continue to search for an array of dispute resolution processes that, together, will best help us achieve justice.
