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MANDATING MINIMUM QUALITY IN MASS ARBITRATION

*Jeffrey W. Stempel**

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INTRODUCTION

The world of arbitration has changed dramatically since the Supreme Court's watershed decision in *Shearson/American Express, Inc. v. McMahon*.¹ This conference not only provides a valuable vantage point for assessing arbitration of securities and investment claims but also for assessing the larger modern world of "new" or "mass" standardized arbitration that has emerged in the wake of the Supreme Court's pro-arbitration jurisprudence that began in earnest during the 1980s. This Article advocates government-mandated imposition of procedural and substantive ground rules to ensure the fair and effective operation of what I term "new" or "mass" arbitration. Mass arbitration is effectively imposed upon investors, consumers, and workers as a default private dispute resolution system supplanting judicial adjudication. Although it remains rational and probably preferable for society and law to maintain only limited oversight of traditional, commercial, or "customized" arbitration, the case for ensuring minimal quality in mass arbitration is compelling.

This Article first describes the post-*McMahon* distinctions between the new mass arbitration and old customized arbitration and outlines the efficiency and fairness concerns applicable to mass arbitration, including securities arbitration. It then briefly summarizes the development of the modern era of mass arbitration. This development has largely been fueled by the judiciary's excessive enthusiasm for arbitration and its failure to consider the distinctions between traditional and mass arbitral systems. In order to correct the problems presented by inadequate oversight of mass arbitration, this Article proposes a number of mandated minimum procedural and substantive requirements.

1. 482 U.S. 220 (1987).

Many of this Article's suggestions overlap with those set forth in "due process protocols" and arbitration organization rules already applicable to many arbitrations. However, the instant proposals attempt not only to strengthen protections beyond those in the protocols but also to mandate these protections with the force of law. In addition, my proposed minimum criteria for ensuring the quality of mass arbitration addresses applicable legal standards and substantive appellate review directed toward the merits of arbitration decisions.

I. THE POST-McMAHON WORLD OF MASS PRIVATIZED DISPUTE RESOLUTION AND THE NEED FOR ADEQUATE LEGAL SUPERVISION

A. Distinguishing Mass Arbitration from Custom Arbitration

The distinction between what I have previously termed "old" and "new" arbitration (and alternative dispute resolution generally) is a critical but often overlooked factor in assessing the legal system's appropriate stance toward mandatory arbitration. In brief, old arbitration

- a) "is confined to a subset of industry" or social activity;
- b) "involves a system of relationships in which the participants form virtually their own miniature society or fraternity and are likely to have repeated contact with one another;"
- c) "involves commercial matters and commercial actors;" and
- d) "focuses on issues of contractual interpretation or performance, often with recurring issues regarding quality, excuse of performance, adequacy of tender, or mitigation and amount of damages."²

By contrast, new arbitration

- a) is "mass produced [arbitration] that affects large classes of persons or entities;"
- b) involves a disputant that is a "'one-shot' player who is a stranger to the [arbitration] forum while the other disputant is a 'repeat player;'"³

2. Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 334-35 (1996) [hereinafter *Multi-Door Courthouse*]. See also 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, 107-08 (arguing that collective contracting of the type taking place in mass arbitration systematically undermines traditional notions of contract consent and favors commercial entities drafting self-serving contract provisions, including arbitration clauses).

3. *Multi-Door Courthouse*, *supra* note 2, at 336. This aspect of American civil litigation is now so widely established that it seems not to require citation. However, the concept was not well defined and described until Marc Galanter's now-classic article *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Today, analysis of legal

- c) "is far more likely than old [arbitration] to involve personal rather than commercial matters;" and
- d) "is far more likely [than old arbitration, which usually centers on questions of contract interpretation and obligation,] to involve statutory questions and a range of legal issues."⁴

In addition, of course, old and new arbitration are distinguished by the structure through which disputes become subject to arbitration. In the traditional world of guild or trade arbitration, similarly situated members of the guild or merchant group arbitrated because group laws or norms required arbitration. Although members may have signed contracts containing arbitration clauses, these contract provisions were to some extent an afterthought or merely a confirmation of their longstanding expectation that arbitration would be their default form of dispute resolution. Consequently, even where commercial arbitration is done on a large-scale basis, memorialized in standardized forms, and a non-negotiable part of a business transaction, these arbitrations remain part of old arbitration.

By contrast, in new arbitration, at least one of the disputants is outside the circle of the guild, trade group, or industry and frequently has no prior understanding or expectation about arbitration. These disputants, typically investors, consumers, or employees, may sign contracts containing arbitration clauses. However, they sign with little or no affirmative desire to establish a system of privatized dispute resolution. Rather, they sign the form because it is required to engage in the activity offered by the vender who designed the standardized form containing an arbitration clause.

Old arbitration has existed in some form since at least the Middle Ages, when guild members and merchants routinely specified that their disputes would be handled through arbitration.⁵ In particular industries,

rules and systems according to their respective impact on institutional or "repeat" disputants versus impact upon "one-shot" players is widespread. See, e.g., Catherine A. Rogers, *The Arrival of the Have Nots' in International Arbitration*, 8 NEV. L.J. 341 (2007).

4. *Multi-Door Courthouse*, *supra* note 2, at 336-37.

5. See Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990) [hereinafter *Pitfalls of Public Policy*] (reproducing arbitration clause used in Renaissance Italy); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193; Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961) (discussing use of arbitration by English merchants as early as the thirteenth century). See also Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459 (2007) (noting use of arbitration as industry dispute resolution system by more than one thousand trade associations during first quarter of the twentieth century). See also Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984); John R. Van Winkle, *An Analysis of the Arbitration Rule of the Indiana Rules of Alternative Dispute Resolution*, 27 IND. L. REV. 735 (1994) (noting use of arbitration and statute dating from mid-nineteenth century).

where specialized norms of custom and practice dominated, arbitration of member or community disputes was often required, at least as a practical matter. These arbitrations largely involved specialized, industry-specific commercial disputes regarding product quality or other aspects of the guild member's contract performance. The arbitration applied specialized expertise particular to the group or task rather than general default legal rules.⁶

B. The Stronger Need for Mandated Minimum Fairness and Quality Control in Mass Arbitration

Writing in this Symposium, Edward Brunet and Jennifer Johnson have correctly observed that traditional arbitration is largely unproblematic for the legal system.⁷ Traditional arbitrations involve similarly situated disputants in terms of their background, wealth, bargaining power, and expectations. In addition, because arbitration is so widely accepted as the understood, preferred means of dispute resolution, the voluntariness of the guild members' participation in arbitration is not seriously questioned. To be, for example, a commodity

6. See, e.g., Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–91 (1999); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter *Cotton Industry*]; Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter *Merchant Law*] (discussing arbitration as core means of dispute resolution advocated by National Feed and Grain Association); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter *Diamond Industry*]; See also Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Act*, 12 VA. L. REV. 265 (1926). See generally 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 1.1.3 (1994) (describing background and history of FAA).

In addition, of course, arbitration has long been the common means of resolving disputes arising under a union's collective bargaining agreement. See STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 14 (2d ed. 2006); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557 (1983). Although labor arbitration differs substantially from commercial arbitration, both involve specialized forms of traditionally recognized arbitration in which decisionmaking is guided by the specialized expertise and expectations of the activity under review. As discussed herein, these sorts of traditional "old" forms of arbitration differ quite dramatically from the "new" mass arbitration that has grown substantially since the U.S. Supreme Court expanded the enforceability of arbitration clauses in the 1980s.

7. See Brunet & Johnson, *supra* note 5, at 459. See also Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (advocating ability to arbitrate default legal rules but not mandatory or immutable legal rules); *Pitfalls of Public Policy*, *supra* note 5 (arguing against judicial intervention to preclude enforcement of arbitration clauses on public policy grounds in commercial contracts or contracts where agreement to arbitrate not significantly in doubt).

trader operating in a given exchange is to have constructively embraced its arbitration provisions. When members of a jewelry exchange, a grain exchange, or a textile bourse resolve disputes pursuant to their systems and shared predispute understandings, society and the legal system are rightly rather indifferent to the methods of arbitration and the outcomes of the disputes. The judicial system is likely to care about these proceedings only in cases where a corrupt faction of the guild misuses the arbitration system to the disadvantage of weaker guild members, consumers, or the public.⁸

Like Brunet and Johnson, I agree that old, traditional, expertise-driven arbitration in special sectors of the economy does not need particularly stringent government or judicial regulation. Most commercial arbitration fits the old model, which is designed to provide a relatively streamlined method by which persons with commercial expertise can resolve disputes over contract construction and performance. The commercial actors involved in these arbitrations ordinarily can be said to have "freely" "chosen" arbitration as a preferred method of dispute resolution.⁹ Under these circumstances, commercial arbitration generally, as well as guild or trade arbitration—all old arbitration according to my lexicon—can largely be lightly and deferentially supervised by the courts.

In these types of arbitrations, the judiciary generally "adds value" by enforcing arbitration provisions and affirming arbitral decisions that obviously are neither wrong nor oppressive. Thus the courts prevent nonperforming commercial or trade entities from shirking their contractual commitments by enlisting the procedural tools of the litigation system.¹⁰ The Federal Arbitration Act (FAA) corrected the

8. To illustrate, the judicial system really has no stake in the amount of product grain merchants consider to constitute an acceptable "bushel" in sales contracts. Society and the legal system might take an interest, however, if the norm at a given grain exchange was that wheat adulterated with vermin body parts or pesticide was merchantable and thus qualified to satisfy supply contracts for wheat used to make bread that would be eaten by members of the public.

9. At an academic level, there is serious philosophical and psychological debate about whether any human actor is really "free" in making decisions and taking action in view of substantial biological, social, and economic constraints on decisionmaking and behavior. Although the argument that there is "no such thing" (or little) free will may be correct at some core fundamental level, the operating premise of society and the legal system remains that individuals and entities are presumptively responsible for their actions and accountable for their choices. Although I am quite sympathetic to the argument that in many cases employees and consumers (including securities investors) often have insufficient knowledge or choices to have truly "agreed" to mandated arbitration, I am considerably less sympathetic regarding commercial actors, including small businesses. In contrast to consumers, investors, and employees, these entities generally have an adequate understanding of arbitration as well as adequate means to avoid arbitration.

10. In a related article in a Symposium examining the Federal Arbitration Act, I noted that the paradigmatic arbitration case during the time of FAA enactment was that of a shirking vendor that had

judicial common law's undue resistance to commercial arbitration agreements.¹¹ What remains uncorrected is undue judicial solicitude for arbitration enforcement and arbitration regimes that fail to provide adequate fairness, particularly to the disputing party that was uninvolved in both designing the arbitration regime and deciding to institutionalize new, mass arbitration.

Securities arbitration appears without question to fit my concept of the new, mass standardized arbitration. This should be unsurprising since two securities arbitration cases (*McMahon*¹² and *Rodriguez de Quijas v. Shearson/American Express, Inc.*¹³) were critical in ushering in the new era of more aggressive judicial enforcement of boilerplate arbitration clauses in consumer transactions and rejection of statutory defenses to arbitrability. Securities arbitration is imposed on an industry-wide basis through the rules of the securities exchanges and standard form contracts used when investors enter into a brokerage or trading relationship. The contracts all contain essentially the same written arbitration provisions that normally are nonnegotiable for investors. Because these are industry-wide requirements, the arbitration agreements used in the securities field are classic contracts of adhesion from which there is no escape.¹⁴

In addition, securities arbitration easily meets the outlined criteria for

failed to perform on a contract and was also shirking its obligation to be quickly called to account by a reasonably swift arbitration of the dispute. See Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007) [hereinafter *Kangaroo Courts*].

The entire focus of discussion during enactment of the FAA was commercial arbitration and the need to end judicial hostility to specific enforcement of predispute commercial arbitration agreements. Expansive application of the FAA by the U.S. Supreme Court, discussed *infra* Part II, thus ironically produced a new variety of mass arbitration for which the FAA had not been designed.

11. See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 21 (1925) (observing that business groups supporting FAA were concerned about judicial resistance to enforcing arbitration clauses in commercial contracts and the attendant difficulty for merchants to settle contract disputes and to take swift and efficient action against breaching parties); Note, *Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445-46 (1937) (same).

12. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

13. 490 U.S. 477 (1989).

14. See Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1 (2004) (noting comprehensive system of arbitration as core means of securities dispute resolution is sufficient to raise substantial fairness concerns); Barbara Black & Jill I. Gross, *Economic Suicide: The Collision of Ethics and Risk in Securities Law*, 64 U. PITT. L. REV. 483 (2003) (noting pervasiveness of arbitration as mode of dispute resolution in securities and other areas of economy); Brunet & Johnson, *supra* note 5 (describing securities arbitration); Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73 (2005) (noting pervasive, public nature of securities arbitration is sufficient to raise due process concerns); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123 (2005) (describing securities arbitration and raising concerns that although pervasive it is too far outside the scope of substantive legal control).

falling within the category of the new, mass arbitration in that the investor disputant is ordinarily at a pronounced disadvantage relative to the brokerage house in terms of knowledge, wealth, sophistication, and bargaining power. In essence, arbitration regarding securities is a privatized means of dispute resolution that supplants litigation as the default means of dispute resolution. As a result, securities arbitration is not the type of old, traditional, freely chosen, expertise-driven form of dispute resolution about which law and society are largely indifferent. These characteristics of the new, mass arbitration model of securities arbitration require substantial legal regulation to ensure that this world of dispute resolution outside the courts is sufficiently fair to merit enforcement by the courts.

For these reasons, the Brunet and Johnson position—that the legal system should act reasonably aggressively to require that securities arbitration be substantively fair—is unassailable. Like the metaphorical ships in the night, we have come to the same port, as have other authors, at least implicitly, when viewing securities arbitration.¹⁵ To some degree, this Article's position—and the argument it advocates—merely extends the analysis and prescription of Brunet and Johnson, and the concerns of others, that the status of securities arbitration as a *de facto* national dispute resolution policy requires that securities disputes be decided in accord with substantive law.

In addition, my concept of minimum quality in arbitration expressly includes procedural fairness guarantees and judicial policing for substantive fairness (which Brunet and Johnson largely distill to the requirement that securities arbitrations follow the law). Further, I would apply the same fairness analysis and prescription for all forms of new, mass arbitration, which essentially requires greater policing of arbitration agreements involving consumers and employees. Although substantial strides have been made in these areas since the early years of the explosive growth of new, mass arbitration, more effort and attention are required to ensure that mass arbitration displays quality and fairness roughly equivalent to the litigation system for which it substitutes.

Investors, consumers, employees, and other less empowered parties forced to adhere to mass arbitration agreements obviously benefit from the assurance of adequate arbitral quality. Adequate quality implies fairness. Assurance of adequate arbitral quality is also in the interest of the more empowered, largely institutional disputants erecting mass arbitration dispute resolution systems. Capital and investment markets depend to a large degree on trust. Without the sufficient trust and

15. See, e.g., Cole, *supra* note 14; Black, *supra* note 14.

confidence of investors, markets will not enjoy adequate investment and much potential for economic growth and wealth creation is lost. This by now conventional wisdom underlaid the Roosevelt Administration's push for comprehensive securities regulation, including creation of the Securities Exchange Commission (SEC). Even among business groups generally resistant to regulation, nearly everyone now agrees that at least a modest amount of regulation is necessary to ensure the effective functioning of securities markets.

C. Arbitration as Adjudication as Regulation: Instrumental and Moral Imperatives

The role of dispute resolution is often overlooked as a major form of regulating securities and other markets.¹⁶ Investors—or anyone participating in a private contract—expect that contracts will be fairly performed and that, in the event of breach or similar wrongdoing, a fair and effective dispute resolution mechanism will provide an adequate compensatory remedy. In the absence of such confidence in the prevailing mode of dispute resolution, the rational investor (indeed, the rational contract-maker of any type) would be willing to enter into transactions only with highly trusted entities or where market discipline would be so overwhelmingly strong as to virtually preclude cheating or breach. Alternatively, contracting parties would establish inefficient and socially undesirable self-help methods to police contracts (e.g., private use of force). Realistically, this means that markets of all sorts, from securities to confections, work well only when disputes are subject to a dispute resolution regime that is at least widely perceived as fair, accurate, and effective. For lack of a better description, this may be called the “Instrumental/Functional Efficiency Imperative” for minimum quality in dispute resolution.

In addition, there also exists what I shall call the “Normative” or “Moral” Fairness Imperative for fair and effective dispute resolution. Most in the legal profession want the quality of dispute resolution not only to be adequate to facilitate market function but also to reflect

16. Regarding government-initiated litigation, this point has been well made—and criticized—by a prominent scholar and former SEC Commissioner. See ROBERTA S. KARMEI, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA (1982) (arguing that SEC focused too much on adversarial civil and criminal prosecution rather than on administrative regulation through rulemaking in seeking to regulate securities markets). Criminal prosecution and government-initiated proceedings such as those seeking civil penalties or licensing restrictions can of course be considered a form of dispute resolution. However, this Article focuses only on civil dispute resolution between “private” parties such as investors, other consumers, employees, and the commercial or trade entities with which they do business.

procedural fairness and substantively accurate, consistent, and unbiased outcomes. This normative/moral fairness imperative holds irrespective of whether the dispute resolution mechanism is primarily public or private, although most observers are willing to grant substantial deference to the dispute resolution regimes chosen by private entities. For example, the legal system permits a particular trade to adopt rules of rough justice in the trade or workplace but would intervene (one hopes) if a guild provided for dispute resolution through trial by ordeal or permitted beheading as a trade association-enforced remedy for breach of contract.

This Symposium examines the status of investor dispute resolution and remedies in light of *McMahon*, which found no statutory bar to wholesale use of arbitration by the securities industry.¹⁷ Implicitly, it asks whether the post-*McMahon* world of securities arbitration satisfies the Instrumental/Functional Efficiency Imperative and the Normative/Moral Fairness Imperative established by our prevailing notions of efficiency, personal choice, right, wrong, and justice. In this Article, I take the liberty of enlarging the Symposium topic somewhat to consider the state of consumer contract dispute resolution generally, positing that the same analysis should apply to securities and consumer transactions and to all mass arbitrations.

This Article proposes that the same legal, social, and economic concerns applicable to investment are similarly applicable to other consumer contracts. Arbitration imposed on an industry-wide or company-wide basis to all customers or investors—the new or mass arbitration that has grown in the wake of *McMahon* and other arbitration-promoting U.S. Supreme Court decisions of the 1980s—differs substantially from old, individual, or customized arbitration. Because current U.S. Supreme Court jurisprudence not only favors aggressive enforcement of arbitration clauses but also fails to distinguish between old and new, custom and mass arbitration, lower federal courts, state courts, state legislatures, and administrative agencies—both federal and state—must take appropriate steps to enhance and enforce fairness considerations for securities and other mass arbitrations.

17. 482 U.S. 220 at 238. Specifically, *McMahon* held that a plaintiff seeking to avoid application of an arbitration agreement contained in an investment agreement could not invoke the Securities Exchange Act of 1934 as a ground for vitiating an otherwise enforceable arbitration clause. *Id.* In *Wilko v. Swan*, 346 U.S. 427, 438 (1953), the Court had held that the Securities Act of 1933 precluded enforcement of arbitration agreements in the initial sale of securities. *Id.* Because of similarity between the 1933 Act and the 1934 Act, most observers 1953–1986 had assumed that the *Wilko* rule applied to arbitration agreements in 1934 Act cases as well. In light of *McMahon*, it was not surprising that the Court overruled *Wilko* relatively shortly thereafter. See *Rodriguez de Quijas*, 490 U.S. at 485.

II. ARBITRATION IN THE COURTS: A CONDENSED RECENT HISTORY OF EXCESSIVE JUDICIAL INFATUATION AND RECALIBRATION OF REVIEW

A. The Swooning Supreme Court

A decade ago, I described the U.S. Supreme Court as "infatuated" with the concept of arbitration as a modern streamlined, efficient form of alternative dispute resolution that would reduce court caseloads at a time when the American adjudicatory system was viewed as buckling under the swell of excessive litigation.¹⁸ As a consequence of this infatuation, the Court took a major turn in favor of enforcing arbitration clauses in a series of cases, including *McMahon*, decided in the 1980s.¹⁹ Court

18. See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996) [hereinafter *Gomorrah*].

19. See, e.g., *Rodriguez de Quijas*, 490 U.S. at 481 (overruling *Wilko* and finding no statutory or public policy bar to mandatory arbitration of claims made pursuant to Securities Act of 1933); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (rejecting contention that antitrust claims, being statutorily based, are consequently too public to be resolved through arbitration); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 216-17 (1985) (rejecting "doctrine of intertwining" of some lower courts which prevented arbitration of claim concededly subject to arbitration agreement when claim was intertwined with one outside scope of arbitration clause or claim subject to statutory or public policy exception to arbitration; noting "strong federal policy in favor of enforcing arbitration agreements"); *Southland Corp. v. Keating*, 465 U.S. 1, 25-33 (1984) (holding that FAA creates body of substantive federal law that must be applied in either state or federal court; state laws creating different treatment for certain arbitration contracts trumped by FAA; arguably overruling *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), which most observers read as applying FAA only to federal court proceedings and viewing FAA as federal procedural statute rather than one setting forth substantive national law applicable in state courts as well); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (requiring arbitration of construction and commercial dispute; applying FAA to require stay of litigation while question of arbitrability decided; stating that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). But see *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (refusing to order arbitration of labor dispute seemingly within scope of arbitration clause in collective bargaining agreement). See also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-77 (1989) (permitting parties, by choosing particular state's law as substantive law governing the contract, to avoid some applications of the FAA); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (FAA preempts California Labor Code provision stating that wage collection actions may be maintained in court notwithstanding arbitration clause in contract).

This is not to suggest that the Supreme Court's arbitration revolution of the 1980s emerged without any foreshadowing. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513 (1974) (refusing to apply statutory/public policy arbitration of *Wilko* to international arbitration involving foreign investment); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972) (enforcing arbitration clause in towing agreement for salvage of ship in international waters notwithstanding nontrivial argument that agreement was signed under duress by marooned ship owner); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (holding that defense of fraud in the inducement to contract directed at the contract as a whole must be first presented to the arbitrator and was not exempt from arbitration). But see *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (holding that court should decide whether arbitration agreement survived corporate merger and bound resulting corporate entity).

In addition, the Court in the *Steelworkers Trilogy* had taken a supportive and expansive view

decisions of the 1990s²⁰ and early twenty-first century²¹ have not been as far reaching but have maintained an almost slavish commitment to

of labor arbitration some twenty years prior to its arbitration revolution of the 1980s. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

20. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that FAA preempts and precludes application of Montana statute requiring that arbitration clause be typed in underlined capital letters on first page of agreement if clause is to be enforceable); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (giving FAA provision applicability to any "contract evidencing a transaction involving commerce" a broad reading to the limits of the federal Commerce Clause power (quoting 9 U.S.C. § 2)); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (enforcing arbitration clause; rejecting argument that arbitration provision constitutes limitation on liability forbidden under Carriage of Goods at Sea Act (COGSA)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 38 (1991) (rejecting argument that claims pursuant to the Age Discrimination in Employment Act (ADEA) may not be arbitrated; implicitly rejecting argument that section 1 of the FAA, 9 U.S.C. § 1, precludes arbitration of employment disputes. Section 1 specifically states that the Act does not apply to arbitration agreements in a "contract of employment;" Court avoids conflict with this seemingly clear textual bar to arbitration enforceability by treating arbitration agreement of broker as not being part of his "contract of employment" because of standard securities industry practice of requiring arbitration in employer-employee disputes). But see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-49 (1995) (ruling that court must grant some deference, rather than de novo review, to arbitrator's determination of arbitrability of dispute but holding in this particular case that scope of arbitration clause was sufficiently narrow to require judicial scrutiny of whether arbitration clause encompassed dispute between the parties); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-61 (1995) (permitting arbitrators to award punitive damages in securities arbitration notwithstanding the brokerage contract contained New York choice of law clause and New York state law prohibits punitive damages awards in arbitration).

21. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding that defense to arbitration based on contract illegality is for the arbitrator in first instance, "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 450-53 (2003) (asking whether arbitration agreement "silent" on question of class actions permitted classwide arbitration was initially for arbitrator rather than court; asking whether contract forbids class treatment of claims not question of "arbitrability" that must first be decided by court); *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 405-07 (2003) (asking whether contract provision restricting punitive and other damages prohibited treble damages pursuant to plaintiff physicians' claim under Racketeer Influenced and Corrupt Organizations Act (RICO) was for arbitrator rather than court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (applicability of NASD six-year time limit for bringing securities claim is matter "presumptively for the arbitrator, not for the judge."); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000) (arbitration clause silence regarding costs not sufficient to preclude compelled arbitration on grounds that proceeding may be prohibitively expensive for consumer); *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 195 (2000) (construing the venue provisions of the FAA, 9 U.S.C. §§ 9-11 (2000), regarding confirmation, vacation, or modification of arbitration to permit proceedings in either district where award made or in any federal district available under general venue statute, 28 U.S.C. § 1404).

See generally HUBER & WESTON, *supra* note 6 (collecting and reviewing caselaw regarding arbitration); CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* (2d ed. 2006) (same). See also Stephen J. Ware, *The Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007); William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135 (2007); Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169 (2007); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819 (2003).

favoring arbitration against almost any challenge.

The Court's embrace of arbitration—and contract formalism—is out of touch with the actual reality of dispute resolution and human contracting behavior. Many of the premises underlying the supposed “litigation explosion” and “crisis” were mistaken or overstated.²² But the Court has pursued the privileging of arbitration without a backward glance at the actual operation of arbitration or at the transactions in which contract documents contain arbitration agreements. With an almost “don’t bother me with the facts” attitude, the U.S. Supreme Court, for a quarter-century or more, has proceeded under the presumption that litigation is highly problematic and excessive while arbitration is far less problematic and should be encouraged. In particular, the Court seems oblivious to the differences between traditional, commercial arbitration and the new, mass arbitration.

Former Chief Justice Warren Burger, who presided over the Court during the key years of the turn toward arbitration, was perhaps the leading cheerleader for alternative dispute resolution as a means of addressing “excessive” litigation.²³ During roughly the same time period, the Court also embraced a highly formal and textual approach to contract issues.²⁴ These combined factors prompted the Court to look uncritically at arbitration both as an institution and at agreements generally, with the Court tending to decree arbitration clauses binding and unassailable merely for being on the face of contract documents.²⁵ In doing so, the Court largely glossed over the matter of whether a party adhering to a standardized contract with an imbedded arbitration clause had in fact consented to arbitration or whether mandated arbitration was

22. See Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). For a more recent but less scholarly, polemic (but nonetheless interesting and useful) review of the issue of misinformation regarding the legal system and litigation, see STEPHANIE MENCIMER, *BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE* (2006). See also Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (finding that widespread perception of punitive damages to be incorrect and that punitive awards are comparatively rare and modest in amount); Anthony J. Sebok, *From Myth to Theory in Punitive Damages*, 92 IOWA L. REV. 957 (2007) (reviewing major empirical studies of punitive damages and concluding that popular perception of punitive damages as commonly awarded in large amounts is incorrect; punitive awards are infrequent and generally track amount of compensatory damages).

23. See *Multi-Door Courthouse*, *supra* note 2, at 309–18; Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156–58 (1993).

24. See Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107 (1995); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433 (1993).

25. See *Gomorra*, *supra* note 18; *Multi-Door Courthouse*, *supra* note 2.

consistent with other legal norms and social values.²⁶

The dramatic expansion of private arbitration of disputes during the past three decades has been one of the important legal trends of modern law. For an entire generation of lawyers (like me) who entered law school on the cusp of this development and began practice within months of the *Mose H. Cone Memorial Hospital* decision, it is one of the important legal developments of their professional careers. Prior to the 1970s, arbitration was relatively common but largely confined to particular business and professional spheres.²⁷ Then the legal constraints cabinng arbitration in those spheres were rapidly rolled back by the courts, particularly the U.S. Supreme Court, during the last quarter of the twentieth century.

The 1960s presaged some of these developments with the *Steelworkers Trilogy*²⁸ and *Prima Paint* decisions.²⁹ The 1970s saw the rise of the alternative dispute resolution (ADR) movement, in which arbitration was heralded as an effective means of streamlining adjudicative dispute resolution to save time and reduce costs.³⁰ Arbitration decisions in this decade stopped short of overturning anti-arbitration precedents but displayed a more favorable judicial attitude toward enforcement of predispute arbitration agreements, even in subject matter areas in which arbitration was traditionally absent.³¹

The 1980s saw full flowering of "arbitral infatuation" by the Supreme Court and the modification or reversal of several precedents that restricted arbitration.³² Judicial support for arbitration spanned the

26. See *Gomorrhah*, *supra* note 18.

27. See HUBER & WESTON, *supra* note 6, at 1-14; DRAHOZAL, *supra* note 21, at §1.06; Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991) [hereinafter *A Better Approach to Arbitrability*] (all describing history of arbitration, its confined but established use among merchants, and judicial hostility to enforcement of arbitration clauses prior to enactment of the Federal Arbitration Act of 1926). See also *Diamond Industry*, *supra* note 6 (describing arbitration in the diamond industry); *Cotton Industry*, *supra* note 6 (describing arbitration in the cotton industry); *Merchant Law*, *supra* note 6 (describing arbitration in the commodities industry).

28. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960). See also Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

29. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

30. See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 250-55 (describing the rise of both community-based and business-based ADR movements during the late 1960s and 1970s); Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation from Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 497-500 (1999).

31. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

32. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland*

Court's ideological spectrum³³ with little dissent.³⁴ The 1990s and twenty-first century largely continued this trend, with only a few decisions arguably to the contrary.³⁵

The pro-arbitration trend continues today and is led by a Supreme Court that, at times, uncritically embraces arbitration.³⁶ Despite having decided more than a dozen significant arbitration cases during the Burger and Rehnquist eras, the Court made no pronouncements regarding quality control in arbitration or fairness to arbitration participants. Any significant imposition of oversight upon arbitration is unlikely in view of the limited grounds for review enumerated in the

Corp. v. Keating, 465 U.S. 1 (1984); cases cited *supra* note 17.

33. For example, William Brennan, arguably the Court's most politically liberal Justice, authored the pro-arbitration *Moses H. Cone* case while Chief Justice Warren E. Burger, one of the Court's most conservative Justices, authored the *Southland v. Keating* opinion. The Brennan-Burger relationship was said to be one of tension-cum-antipathy, but both Justices held favorable views toward arbitration. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 23-24 (1979) (describing Burger's purported resentment of Brennan as part of a liberal legal establishment in which Justice Brennan regularly hired law clerks from liberal circuit judges such as David Bazelon of the D.C. Circuit, with their law clerk alumni frequently going on to work for liberal Democratic politicians such as Senator Edward M. Kennedy (D-Mass.)). See also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (regarding the Brennan-authored *Moses H. Cone* as an even more important part of the Court's new era of pro-arbitration jurisprudence than the more oft-cited and criticized *Southland v. Keating*). See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (arguing that *Southland v. Keating* was woefully wrongly decided and is the chief source of arbitration mischief).

34. During the rapid rise of the new arbitration jurisprudence, Justices O'Connor, Stevens, and, somewhat later, Thomas played a dissenting role at the outset but eventually became muted critics or appeared to accept the pro-arbitration jurisprudence on stare decisis grounds.

35. See *supra* notes 20-21 and cases cited therein.

36. See *supra* notes 19-21 and cases cited therein. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding that courts may not review illegality defense to contract containing arbitration clause but that this defense must first be presented to arbitrator).

Notwithstanding the Court's strong stand in favor of initial arbitrator authority to decide most contractually spawned disputes, courts retain significant authority to regulate enforcement of arbitration clauses according to their scope. See, e.g., *Chassereau v. Global-Sun Pools, Inc.*, 644 S.E.2d 718, 720-21 (S.C. 2007) (limiting scope of arbitration clause according to consumer's reasonable expectations in entering transaction; where consumer could not reasonably foresee tortious conduct by creditor, arbitration clause did not apply to claims of outrage, defamation, and intentional infliction of emotional distress); *Aiken v. World Fin. Corp. of S.C.*, 644 S.E.2d 705, 709-10 (S.C. 2007) (same, where lender's employees engaged in identity theft based on information provided lender by consumer); *Smith v. State Farm Ins. Cos.*, 861 N.E.2d 183, 189 (Ill. App. Ct. 2006) (holding that arbitration clause of insurance policy mandated arbitration of underinsured motorist claim but did not bar policyholder from prosecuting statutory claim against insurer related to insurer's treatment of policyholder).

Similarly, lower courts may thwart application of an arbitration clause by finding insufficient proof of the required nexus with interstate commerce and hence inapplicability of the FAA. See, e.g., *Ark. Diagnostic Ctr., P.A. v. Tahiri*, No. 06-667, 2007 Ark. LEXIS 345, at *14-15 (Ark. May 31, 2007). However, this avenue for avoiding arbitration is a narrow one in view of the broad definition of a contract evidencing a transaction in interstate commerce under Supreme Court interpretation of the FAA.

FAA.³⁷

The practical consequences of the new legal era were significant. Arbitration left the province of particular business guilds or commercial environments and shifted to a massive privatization of the adjudicatory function. In addition to the traditional parties and disputes historically found in arbitration, a genre of new arbitration arose, in which arbitration agreements were essentially imposed upon a large, general class of consumers and workers. Established organizations like the American Arbitration Association (AAA) grew substantially, as did emerging organizations such as Judicial and Mediation Services (JAMS) and the National Arbitration Forum (NAF). In addition, an increasing number of vendors provided that disputes with their customers or business partners would be arbitrated through their own "in house" systems.

*B. Counter-Revolutionary Voices on Mandatory Arbitration and
Restoring Some Equilibrium Through a Rejuvenated Doctrine of
Unconscionability*

With the onset of the veneration of arbitration came a counter-movement from consumer groups, civil rights organizations, and (in particular) academics. These groups, particularly the legal academy, objected to or raised serious questions about the new, mass-produced, mass-privatized, mass-standardized regime of expanded arbitration on a variety of grounds.³⁸ Each of these criticisms has its own intellectual

37. See 9 U.S.C. § 10 (2000) (listing as grounds for vacating an arbitration award the following situations: (1) where the award was "procured by corruption, fraud, or undue means;" (2) where there existed "evident partiality or corruption in the arbitrators;" (3) where arbitrators refused to hear relevant evidence or failed to provide opportunity for fair hearing; or (4) where arbitrators "exceeded their powers").

38. See, e.g., Black, *supra* note 14; Cole, *supra* note 14; Johnson, *supra* note 14; Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (2004); 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) [hereinafter *Arbitration, Unconscionability*]; Jean R. Sternlight & Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?, 67 LAW & CONTEMP. PROBS. 75 (2004); Reuben, *supra* note 21; Barbara Black & Jill I. Gross, Making It Up As They Go Along: The Role of Law in Securities Arbitration, 23 CARDOZO L. REV. 991 (2002); Richard M. Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 HOUS. L. REV. 1237 (2001); Carrington & Haagen, *supra* note 33; Schwartz, *supra* note 2; Sternlight, *supra* note 33; Gomorrah, *supra* note 18; Edward Brunet, Arbitration and Constitutional Rights, 71 N.C. L. REV. 81 (1992); A Better Approach to Arbitrability, *supra* note 27; Jeffrey W. Stempel, Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision, 1991 J. DISP. RESOL. 259 [hereinafter *Reconsidering the Employment Contract Exclusion*].

emphasis. But in general, these criticisms express concern that replacing litigation with arbitration produces inferior and potentially unfair case outcomes.

Rightly or wrongly, critics tend to proceed on the assumption that American adjudication is of relatively high quality and that supplanting it with arbitration lowers that quality. A more vociferous version of this critique expresses concern that arbitration not only is inferior to litigation but also actually provides forums in which the deck is unfairly stacked in favor of the contracting party that drafts the arbitration provision. In short, the arbitration boom of the past thirty years raised concerns that arbitral forums might function as “kangaroo courts” preordained to favor business, employers, and sellers over consumers, employees, and buyers.³⁹

This is not to suggest that legal scholars were uniformly skeptical about the Court’s emerging arbitrability doctrine or the efficacy arbitration itself. Many in the academy both defended the Court’s move to more aggressive enforcement of arbitration clauses and were generally positive about the quality of outcomes in arbitration and critical of judicial intervention. See, e.g., Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89; Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001); Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695; Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998) [hereinafter *Consumer Arbitration*]; Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529 (1994).

See also STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 214 (5th ed. 2007) (noting that “theoretical advantages of arbitration over court adjudication are manifold” but “are not always fully realized;” listing expertise of decision maker, finality of decision, privacy of proceedings, procedural informality, low cost, and speed as theoretical advantages).

For a compendium of views and a de facto “restatement” of areas of scholarly common ground and differences involving four prominent arbitration scholars, see EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006).

39. See *Kangaroo Courts*, *supra* note 10. *Black’s Law Dictionary* defines the term “kangaroo court” more negatively than would I. According to *Black’s*, a kangaroo court is “a self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied” or one “characterized by unauthorized or irregular procedures” that “render a fair proceeding impossible” to the point of making the trial a “sham legal proceeding.” BLACK’S LAW DICTIONARY 382 (8th ed. 2004). For purposes of this Article, a kangaroo court is either a dispute resolution forum in which either the outcome is largely shaped in advance because of biases of the decisionmaker (a “true” kangaroo court in the historical meaning of the term) or a forum in which the structure and operation of

Although arbitration defenders tended to view these critics as melodramatic alarmists, the actions of arbitration proponents soon gave support to the critics' concerns. Following key pro-arbitration decisions like *Southland*⁴⁰ and *McMahon*,⁴¹ employers and businesses began imposing arbitration upon workers, vendors, and customers, and included in the arbitration clauses provisions so favorable to the drafter as to call into question the fairness of the forum. Examples included:

- asymmetric arbitrability specifications providing that other parties to the contract were required to arbitrate (so-called "one-way" arbitration provisions);
- choice of inconvenient venue;
- unreasonably high fees or asymmetric cost-shifting in which the drafter of the arbitration provision was not responsible for disputing costs in the event of a loss but such cost-shifting would be imposed on other contract parties;
- limitations on remedies, including bans or restrictions on punitive damages, consequential damages, or "non-economic" damages such as pain and suffering or mental anguish;
- limitations on procedural prerogatives, such as a bar on class action treatment of disputes (which can also be viewed as a limitation on remedies); and
- limitations on discovery sufficient to make information options inadequate for one or more of the disputants.⁴²

In addition, the neutrality of popular arbitration providers has been

the forum result in an inferior brand of adjudication even if the tribunal is not gripped with intentional bias. See also Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53 (2005) (addressing related concerns regarding impartiality, neutrality, and independence of international commercial arbitrators).

40. 465 U.S. 1 (1984).

41. 482 U.S. 220 (1987).

42. The leading modern case in the area is *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), a widely cited California Supreme Court decision that dealt in particular with an asymmetric, non-mutual arbitration provision but set forth the more comprehensive list of concerns set forth above. See also *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-96 (9th Cir. 2002) (applying California law, on remand from U.S. Supreme Court decisions finding no federal statutory bar to mandatory arbitration imposed on employee as job condition, and concluding that arbitration agreement is unenforceable as unconscionable under state law); *Arbitration, Unconscionability*, *supra* note 38 (noting increase in state court policing of contracts on unconscionability groups as response to more aggressive vendor and employer efforts to impose mandated, mass arbitration).

This is not to suggest that misgivings about arbitral fairness were uniform among courts or commentators or that there existed a consensus as to the core list of problematic arbitration provisions. See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183-84 (3d Cir. 1999) (finding no unconscionability or other bar to enforcing arbitration clause giving consumer lender unilateral option to litigate or arbitrate); Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 541 (2002). However, among arbitration skeptics, the list in text includes the common areas subject to criticism.

called into question on conceptual and empirical grounds.⁴³

To many reasonable observers, the prospect of arbitration tribunals as inferior forums cannot be summarily rejected—at least for the new or mass arbitration that arose in the wake of the Supreme Court's 1980s arbitration decisions. The very actions of contract parties seeking to uniformly impose arbitration according to self-serving ground rules often strongly suggested that they were interested in arbitration for all the wrong reasons. They did not impose arbitration for its streamlined procedure, faster pace, or reduced cost. Rather, they expected the weaker parties with which they contracted to do less well in arbitration than in litigation. Lower courts tacitly recognized the problem and breathed new vitality into the venerable but atrophied contract doctrine of unconscionability.⁴⁴

The judicial revival of the unconscionability doctrine is a welcome development,⁴⁵ but it hardly solves the problem of arbitration's potential

43. See *Arbitration, Unconscionability*, *supra* note 38, at 846 n.289 (noting California Research Bureau Study finding health care organizations appear to "blackball" any arbitrator that has ruled against them and noting contention by National Association of Consumer Advocates that First USA Bank's 99.6% success rate in arbitrations conducted by the National Arbitration Forum (NAF) suggests lack of neutrality).

44. By "lower courts," I mean those other than the U.S. Supreme Court. See, e.g., *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (applying California law); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005) (applying Tennessee law); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (applying California law); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997) (applying Illinois law); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002); *Armendiraz*, 6 P.3d at 669; *Showmethemoney Check Cashers v. Williams*, 27 S.W. 3d 361 (Ark. 2000). But see *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) (recognizing unconscionability as potential defense to arbitration clause enforcement but holding that decision regarding unconscionability was for arbitrator). See generally *Arbitration, Unconscionability*, *supra* note 38.

45. See *Arbitration, Unconscionability*, *supra* note 38. Accord Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1424–25 (2005) (noting role of Professor Farnsworth as Reporter of ALI *Restatement* in defending *Restatement* section 211 provisions approving of judicial policing of contracts through unconscionability doctrine); Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940 (1986) (advocating increased use of unconscionability as contract-policing device); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (noting degree to which bounded rationality and cognitive errors of contracting parties logically supports some form of unconscionability intervention); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 306–07, 318–19 (1995) (endorsing unconscionability as a tool in policing contracts provided it is not excessively invoked); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (refuting contentions that unconscionability doctrine is excessively vague or inefficient). But see Burton, *supra* note 38 (regarding renewed use of unconscionability by courts as driven by undue judicial hostility toward arbitration); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (criticizing use of unconscionability doctrine to police arbitration agreements); *Consumer Arbitration*, *supra* note 38;

to shunt a substantial portion of disputes into unfair forums. Many elements of the business community recognized that the benefits of arbitration were oversold while its detriments overlooked, tending to cool some of the raging arbitration fever that marked the late 1980s and 1990s.⁴⁶ But the problem of ensuring fairness in arbitration—fairness at least roughly equivalent to that found in litigation—endures.

Although adjudicatory systems and devices can be—and should be—evaluated upon a number of dimensions (e.g., cost, time, defense and protection of social values, transparency, accessibility, ease of use, finality, etc.) this Article largely limits its focus to the question of substantive quality, in particular fairness and compliance with applicable law. My operational test for arbitration quality turns on the degree to which arbitration provides a forum for resolving the dispute that is comparable to the judicial process in terms of substantive outcome and treatment of the litigants.⁴⁷

This concept of fairness encompasses accuracy and accord with the law and prevailing social norms. An inaccurate decision at great variance from substantive rules of law cannot be fair, no matter how unbiased the decisionmaker. For example, if an arbitrator ruled that a purchased product was defective when the product in fact performed perfectly and presented no danger, the ruling would be unfair as well as inaccurate. Similarly, an arbitral award of punitive damages to a consumer over a business's isolated, negligent billing error would be unfair because of its inconsistency with punitive damages law, its logical incoherence, and its potential for financial and behavioral mischief. An arbitration award to a patron because a salesperson rejected a social

Drahozal, *supra* note 42 (same).

46. The business community's emerging skepticism about arbitration stems from the streamlined procedure of arbitration that was once one of its biggest selling points. As one manager told me when during an informal discussion, "you can't get summary judgment in arbitration." Experienced business litigants become legally savvy and may prefer the arsenal of formal litigation procedure where they can "win on the law" in swifter and more consistent fashion than they can prevail after an arbitral hearing. This also presents the opportunity for businesses to benefit from emerging legal doctrine favoring employers or retail defendants. Conversely, where proceedings are informal and less bound by law, claimants may in some cases do better in arbitration than initially expected. When procedural devices mandating a strictly legal decision are absent from a dispute resolution forum, the adjudicatory results of the forum may produce a sort of rough justice that provides some relief in situations where the claim might be foreclosed as a matter of law in court and eliminated by pretrial motion. See also Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001); Van Wezel Stone, *supra* note 6. But see *Vento v. Quick & Reilly, Inc.*, No. 04-1413, 2005 U.S. App. LEXIS 6986 (10th Cir. Apr. 20, 2005) (affirming trial court's approval of arbitration panel deciding dispute as a matter of law and dismissing investor's claim with prejudice); *Sheldon v. Vermonty*, 269 F.3d 1202 (10th Cir. 2001) (same).

47. Presumably, this is not a controversial goal. See John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985).

request would be similarly unfair because of its variance both with substantive law and with the societal norm that social rejection is generally not legally actionable and that personal and commercial spheres of life are generally best kept separate.

Like other critics, I remain dismayed by the Court's textually myopic contract formalism, arbitral infatuation, underappreciation of consent issues, and Pollyannish view of arbitration, particularly the Court's uncritical view that mass arbitration is freely chosen and almost irrebuttably presumed to have quality equivalent to adjudication. The Court's embrace of arbitration seems particularly unfounded for mass arbitration. In effect, the Court has erected and promoted a privatized parallel world of dispute resolution supplanting a substantial portion of litigation, but it has done so without any searching examination of the new system's quality and fairness. This may correctly be described as a "legal process nightmare,"⁴⁸ and it is now clear that the Court's decisionmaking is unlikely to improve matters in this realm. With the appointments of Chief Justice John Roberts and Justice Samuel Alito, two pro-business formalists with little empathy for consumers or workers,⁴⁹ the Court's jurisprudence of arbitration enforceability is unlikely to change in the foreseeable future.

But even if critiques of the Court's modern jurisprudence of arbitration enforcement are correct, the expanded arbitration produced by this legal tilt could nonetheless become a net social plus,⁵⁰ provided that arbitral forums and outcomes match up reasonably well when compared to litigation outcomes. In other words, if the new, mass arbitration so unthinkingly endorsed and fostered by the Supreme Court

48. See Richard C. Reuben, *Process Purity and Innovation: A Response to Professor Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271 (2007).

49. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165–77 (2007) (Justice Alito authors and Justice Roberts joins five to four majority opinion severely truncating worker's time for bringing equal pay act claim); *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060–68 (2007) (Justices Roberts and Alito join five to four majority opinion restricting punitive damages award against cigarette manufacturer because jury considered harm inflicted on non-parties without appropriate instruction as to relevance to defendant reprehensibility).

50. Although perhaps initially appearing counterintuitive, it is possible that the intellectual and legal bases for expanded arbitration are unsound but that the resulting dispute resolution reality is not only acceptable but actually an improvement over litigation. For example, a consumer who was unaware of an arbitration clause hidden in the fine print of an invoice mailed weeks after a product's initial purchase may be improperly forced to arbitrate the dispute. But if thereafter, the arbitration proceeds faster than the breach of warranty litigation the buyer initially sought, at lower cost, and results in the same resolution that would have been provided in court, the new regime of arbitration encouragement was superior to litigation, at least for this consumer. (I have taken the liberty of discounting from the equation any disputing costs and lost social wealth that could have been spent litigating the arbitrability of the dispute.) If this happy "bottom line" result generally occurs in arbitration, the greater imposition of arbitration may be a net gain for society even if the rationale underlying pro-arbitration jurisprudence is suspect.

is of sufficiently high quality—i.e., roughly as fair as the default system of litigation dispute resolution it replaces—it may work as well or better than litigation as a default means of resolving investor, consumer, and employment disputes.

This inquiry does not attempt to compare mass arbitration to a theoretical Nirvana of dispute resolution. Rather, it compares mass arbitration with actual adjudication, a process with more than a few warts of its own. However, even this relative comparison suggests that mass arbitration—the new imposed privatized dispute resolution of the modern era—suffers when compared even to imperfect litigation. The current system of mass arbitration lacks sufficient guarantees of such minimal fairness. Mass arbitration as currently over-enforced and under-regulated holds too much potential for producing inferior or biased outcomes. It consequently follows that the primary task of the legal system's supervision of the mass arbitration system should entail ensuring that mass arbitrations are unbiased, fair, and roughly comparable to courts in adjudicative quality.

The Supreme Court's excessively pro-arbitration jurisprudence appears to be wrong in its construction of the FAA, wrong about the realities of coercion and consent in the world of mass standardized contracts, wrong about the proper allocation of interpretative power between arbitrator and judge, and wrong about the posited benefits of arbitration. Nonetheless, the resulting privatization of whole categories of disputes through mass arbitration can still be socially tolerable (and perhaps even improve upon litigation) so long as the legal system refuses to permit mass arbitration forums to become an institutionalized inferior form of dispute resolution. However, if minimal guarantees of procedural and substantive quality are absent in mass arbitration, the result will likely be judicial endorsement and enforcement of a large scale movement toward inferior justice that benefits securities professionals, vendors, and employers at the expense of the remainder of society.

III. QUALITY CONCERNS SURROUNDING MASS ARBITRATION AND SOME PRESCRIPTIONS FOR IMPROVEMENT

Unfortunately, the legal system, led by the detached and reductionist Supreme Court, has paid insufficient attention to the issues of quality, accuracy, and fairness in mass arbitration. Imposing the relatively simple, nonburdensome requirements discussed below would substantially improve the situation and still permit extensive use of mass arbitration. Among the suggestions in this Part are providing greater

scrutiny of the competence, neutrality, and independence of arbitrators; adopting minimally adequate procedure; requiring remedial options in mass arbitration equal to those available in litigation; and having broader, more stringent judicial review of mass arbitration outcomes. Although the “due process protocols” recommended for employment arbitration and similar consumer arbitration protocols are a solid step in the right direction, they currently fall short of establishing the minimum procedural fairness required to make mass arbitration acceptable.

A. Systemic Minimization of Genuine Concerns About Mass Arbitration

If all disputes were inevitably destined for trial or hearing, arbitration’s streamlined procedure and limited discovery might result in significant cost savings, even if it came at the cost of more accurate adjudication based on more information. But in other cases, the relative absence of prehearing procedural devices in arbitration may increase costs. It precludes the prospect of eliminating trial or hearing in whole or in part through pretrial motions, motions that often depend on the quantum of information unearthed through the broader discovery afforded in litigation. In similar fashion, the reduced discovery available in arbitration may impede settlement by depriving the disputants of information that would facilitate negotiation and resolution.

In addition, arbitration proponents traditionally have minimized the potential social costs of arbitration. For example, if the new arbitration era dramatically reduces use of class actions for small stakes consumer disputes, some defendants may realize immediate cost savings or reduced liability. But these gains may come at the substantial social cost of preventing vindication of small claims and reducing the degree of deterrence and fidelity to law that can be fostered when small claims are given voice by the legal system.

Regarding the key matter of quality, arbitration proponents proceed on the essentially unchallenged assumption that arbitration results are of at least equivalent quality as litigation results. The assumption should be scrutinized and tested empirically.⁵¹ In particular, any evaluation of

51. The empirical evidence to date is mixed. See, e.g., Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44, 50 (arbitration involving employment claims of highly paid employees roughly equivalent to court results but lower paid employees tended to achieve better results in litigation); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003) (finding employment arbitration results roughly comparable to employment litigation results); Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISP. RESOL. MAG., Fall 1999, at 23 (finding arbitration employee claimants to achieve 25% of amount demanded as compared to 70% of

the quality of arbitration must take pains to distinguish the two disparate worlds of old and new arbitration.

Although available empirical data can be read as suggesting that arbitral forums are not “kangaroo courts,” studies tend to examine case results for established and respected arbitration organizations. These “upscale” arbitration providers are logically likely to conduct fairer, more accurate arbitrations as well as to have accessible data that the organization is willing to share with researchers or the public. Put another way, AAA likely has nothing to hide and appears to provide a high quality, fair arbitration experience, at least for the commercial and construction cases.

But “high end” providers such as AAA or JAMS dealing with commercial disputes or those involving high salaried executives challenging adverse employment action do not represent the whole of mass arbitration. Consumers and middle-to-low-end employees are more likely to suffer in arbitration when the tribunal is created by the employer or vendor, or has specifically marketed itself to employers and vendors as an alternative forum friendlier than the courts.

These problematic arbitration tribunals exist, and employers and vendors are frequently attempting to direct disputes en masse to arbitration forums other than AAA or JAMS. They sometimes employ lopsided arbitration agreements imposed under questionable circumstances that many courts have deemed unconscionable in procedure, substance, or both.⁵² “In-house,” “customized,” or “contract drafter friendly” arbitration providers, many essentially created by and administered by employers or vendors, may well offer arbitration that—compared to courts—is significantly less fair and less substantively sound under the law.

My own experience-based impression is that the claim of substantial

amount demanded for litigation plaintiffs but finding statistic misleading because of settlement rates in litigation; Maltby’s bottom line is that arbitration employee claimants as a whole do nearly twice as well as litigation plaintiffs); Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, 50 INDUS. REL. RES. ASS’N ANN. PROC. 33, 39 (1999) (finding repeat-player employers to do better in arbitration than in litigation); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 220 (1997) (same).

52. See *supra* text accompanying notes 44–45. See, e.g., *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992); *HUBER & WESTON*, *supra* note 6, at 129–64. See also *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1070–71 (9th Cir. 2007) (finding law firm’s custom-made dispute resolution system sufficiently unconscionable to bar arbitration notwithstanding broadly worded arbitration clause). Particularly sorrowful is that a group of lawyers—professionals who should have some commitment to the fairness and quality goals of the justice system—chose to construct a self-serving arbitration system rather than simply electing to use a well-regarded arbitration provider such as AAA or JAMS.

arbitrator expertise and strong overall arbitration quality has considerable merit as applied to traditional commercial arbitration involving two sophisticated parties in a large-stakes commercial dispute.⁵³ Ordinarily, these parties not only will have contracted for arbitration with full knowledge of the implications but also will have top flight legal representation, with the arbitration conducted before a panel of “star” arbitrators. Commercial panels in multi-million dollar disputes frequently include respected former judges, senior partners in elite law firms, highly regarded business executives, former highly ranked government officials, leading scholars, and veteran arbitrators. The ability of these panels to assess complex civil disputes often exceeds that of most judges and of even the best judge acting alone.⁵⁴

53. See, e.g., *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983) (finding no bar to decision by arbitrator with substantial industry ties to one of the disputants). According to the court:

The ethical obligations of arbitrators can be understood only by reference to the fundamental differences between adjudication by arbitrators and adjudication by judges and jurors. No one is forced to arbitrate a commercial dispute unless he has consented by contract to arbitrate. The voluntary nature of commercial arbitration is an important safeguard for the parties that is missing in the case of the courts. Courts are coercive, not voluntary, agencies, and the American people's traditional fear of government oppression has resulted in a judicial system in which impartiality is prized above expertise. Thus, people who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter. . . .

There is a tradeoff between impartiality and expertise. The expert adjudicator is more likely than a judge or juror not only to be precommitted to a particular substantive position but to know or have heard of the parties (or if the parties are organizations, their key people). “Expertise in an industry is accompanied by exposure, in ways large and small, to those engaged in it. . . .” The different weighting of impartiality and expertise in arbitration compared to adjudication is dramatically illustrated by the practice whereby each party appoints one of the arbitrators to be his representative rather than a genuine umpire. No one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties, but that is the standard [insurance or reinsurance coverage] arbitration panel, the panel *Leatherby* chose—presumably because it preferred a more expert to a more impartial tribunal—when it wrote an arbitration clause into its reinsurance contract with *Merit*.

Id. at 679 (citations omitted).

Judge Posner's analysis in *Merit v. Leatherby* is instructive on the differences between old style commercial arbitration and adjudication and why this augers for a somewhat different approach to the questions of neutrality and impartiality. However, this assessment loses much of its force if transferred to the arena of mass arbitration imposed unilaterally via standard form contracts with non-expert consumers, workers, or small vendors outside the industry of the contract drafter.

54. See generally WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* (2006); Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 *ARB. INT'L* 291 (2006) (finding further research necessary, but suggesting international commercial arbitration does not present serious problems of fairness or rationality of outcome). As previously discussed, my own experience with commercial arbitration by AAA and JAMS is consistent with the view that arbitration procedure and

But the world of mass contract arbitration is different. In these lower stakes cases, there only will be a single arbitrator, who is more likely to be a junior attorney, manager, or independent contractor than a respected retired judge. If this type of arbitrator is underemployed, arbitration fees may create some incentive to keep receiving cases from the arbitration service. The arbitrator may refrain from any ruling that might too greatly displease the arbitration service, which is trying hard to please its mass contractor business clients. The opportunities for bias, conscious or unconscious, are great.

In addition, single arbitrators presiding over small consumer or employment disputes are less likely than their commercial arbitration colleagues to have the assistance of well-paid, experienced counsel presenting the case. For consumers, employees, and other individual plaintiffs, the economics of the dispute often result in a less experienced attorney or an underprepared case. The repeat player in mass arbitration is likely to have more experienced counsel, although it may place significant constraints on the lawyer through low, prenegotiated flat fees, case management guidelines, and a general reluctance to invest much in one of many low stakes disputes to be processed by the mass contractor.

In short, the quality of arbitrators, arbitration proceedings, and arbitration results is likely to vary considerably according to the circumstances discussed above. Consequently, both arbitration proponents and critics err in making sweeping claims of arbitration's superiority or inferiority on this dimension. Because mass arbitration lacks the legitimating consensus, expertise, and acceptability associated with customized, trade association, or commercial arbitration, it arguably fails to qualify for the rousing support it has received from the Supreme Court and other proponents.

Under these circumstances, an effective American arbitration policy is one that more self-consciously addresses issues of arbitration quality and gives greater consideration to consumer protection, public policy, enforcement of the law, fairness, neutrality, and competence.

B. Arbitrator Competence, Neutrality, and Independence

To address these concerns, the public sector—i.e., the legal system—must insist on adequate arbitrator quality in mass arbitrations. Although expecting that small stakes brokerage account or consumer purchase disputes will be decided by an arbitration panel of Sandra Day

arbitrator acumen provide evenhanded, substantively rational justices in the types of significant commercial disputes processed by these forums. See *supra* text accompanying notes 51–53.

O'Connor, Kenneth Feinberg, and Laurence Tribe is unrealistic, it is reasonable to insist that the decisionmaker in small stakes mass arbitrations be competent, neutral, and independent. Yet little or no government mechanism currently exists to foster neutral, competent arbitrators and to police arbitration decisions to ensure competence, neutrality, and independence. In response to this gap in the quality control of mass arbitration, the legal system should act to require minimal arbitrator competence, neutrality, and independence as a condition of enforcing mass arbitration clauses.

Although the Revised Uniform Arbitration Act (RUAA) and arbitration best practice protocols make substantial steps in this direction, they are insufficient to adequately address the quality concerns surrounding mass arbitration. RUAA, promulgated by the Uniform Law Commissioners in 2000, has been enacted in only a handful of states. In addition, the legal force of RUAA is unclear in cases involving interstate commerce and the FAA because of preemption issues. In effect, RUAA may be viewed by many courts in many cases as only a suggestion rather than a statutory directive. Similarly, voluntary protocols are just that—voluntary and nonbinding. Because arbitration is a substitute for adjudication by litigation, the logical default rule for assessing an arbitrator's neutrality should be the set of neutrality and impartiality norms found in the litigation system. Years of experience and a few embarrassments have led to the development of a system of judicial disqualification and recusal that, although imperfect, provides a rational, effective structure. Absent countervailing considerations, the same norms and requirements of neutrality should be imposed—at least as a default matter—upon mass arbitration tribunals.

In operation, this means that, at a minimum, an arbitrator should not sit on a case where the same arbitrator would be prohibited from sitting as a judge or a juror.⁵⁵ Because arbitrators generally are private actors rather than public officials and hear far fewer disputes than do judges, applying this principle should be simple. However, application will be more complicated when the arbitrator is chosen by an arbitration services provider and when the litigants are provided little background information about the arbitrator. Particularly in smaller stakes disputes, disputants are unlikely to invest substantial resources for investigating arbitrators and challenging arbitrator assignments. The "repeat player" or "insider" problem is of particular concern because arbitration clauses

55. Regarding judicial disqualification, see 28 U.S.C. § 455 (2000); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987) [hereinafter *Rehnquist, Recusal & Reform*] (reviewing history and operation of judicial recusal; criticizing status quo of individual U.S. Supreme Court justices making unreviewable individual decisions regarding their participation in cases).

are normally drafted and imposed by particular disputants (e.g., sellers, manufacturers, employers) who have an economy of scale, greater bargaining power, greater disputing expertise, and potential leverage over individual arbitrators or arbitral organizations.⁵⁶

Entities using mass arbitration are unlikely to have adequate incentives to promote the neutrality and quality of arbitrations when structuring their arbitration programs. They are far more likely to be attracted to arbitration services that may look acceptable but, on average, render decisions favorable to the repeat player. In particular, the repeat player will likely establish an arbitration system (and use of an arbitration service) that will provide more favorable results than can generally be obtained in the litigation system.

Forum shopping should not be forbidden if parties prefer the forum because it moves faster, costs less, renders better decisions, or because it provides other "benign" benefits. However, to the extent the repeat player seeks arbitration because the arbitrators are more favorable than the courts regarding substantive outcomes, the legal and political system should impose some constraints upon the identity of acceptable mass arbitrators. Businesses may use industry arbitrators or individual lawyer-arbitrators to avoid the sometimes erratic or irrational behavior of juries; businesses may not pursue arbitration to avoid obligations imposed by law.

One potential model worth implementing as a default means of attempting to ensure adequate arbitrator quality and fairness is the traditional AAA method of arbitrator selection. After a claim is filed and a dispute accepted for processing, AAA generally provides the disputants with a list of potential arbitrators and a short background profile of the arbitrators. Parties are permitted to reject unacceptable prospects and AAA subsequently makes the arbitrator (or panel) selection among the prospects left in the pool.⁵⁷ In addition,

Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.⁵⁸

The AAA Rules further provide that

[a]ny arbitrator shall be impartial and independent and shall perform his

56. See Galanter, *supra* note 3.

57. See AAA COMMERCIAL ARBITRATION RULES, R. 11 (Am. Arbitration Ass'n 2007).

58. See AAA COMMERCIAL ARBITRATION RULES, R. 16. In addition, the obligation of disclosure "shall remain in effect throughout the arbitration." *Id.*

or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law. . . .

Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.⁵⁹

This method permits the parties to both investigate potential arbitrators and strike potential arbitrators who appear even slightly partisan. Although this system can be abused—disputants striking so many arbitrator candidates that second, third, and even fourth lists of prospects are required—the system provides substantial protection against imposition of a biased arbitrator. In the internet age, even disputants of modest resources can normally learn some information about potential arbitrators that can be used to avoid certain potential arbitrators suspected of partiality. Thereafter, the party retains some right to challenge a selected arbitrator “for cause” based on the arbitrator’s disclosures.

A drawback of the AAA selection method, or similar systems, is that it only works if the lists of prospective arbitrators are relatively free of biased candidates and if arbitrators make sufficient disclosure. If an arbitration service serves up lists containing only prospects partial to the mass contractor that provides business to the arbitration provider, all the strikes in the world are of little use to the one-time disputant. This problem, of course, should be attacked by regulations requiring applicants with sufficient independence from mass contractors and prospects drawn from a sufficiently broad range of backgrounds. For example, even where the pool of arbitrators is confined to attorneys, lists of prospective arbitrators can be required to include attorneys with different educational, employment, practice, and social backgrounds.

In addition, codified and enforceable rules of ethics for arbitrators could assist in prompting potential arbitrators to disclose arguable conflicts and to avoid presiding in conflict situations.⁶⁰ To be most effective, ethics standards must have the force of law. Violation of conflicts rules should result in vacating of a tainted arbitration award

59. AAA COMMERCIAL ARBITRATION RULES, R. 17(a)–(b). Rule 17(a) also permits use of interested arbitrators, providing, that “[t]he parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.” AAA COMMERCIAL ARBITRATION RULES, R. 17(a).

60. See HUBER & WESTON, *supra* note 6, at 377–414 (reviewing arbitration organization codes of professional responsibility and California ethics standards for arbitrators).

and perhaps other consequences.⁶¹ For example, the general rule of arbitrator immunity, similar to judicial immunity, should be abolished or at least revised into a qualified immunity. This would create incentives for prospective arbitrators to take neutrality seriously and to refrain from involvement where their participation might reasonably be questioned.⁶²

C. Minimally Adequate Procedure

An additional long-standing criticism of arbitration is that it provides neither the procedural devices (e.g., joinder, pretrial motions) nor the broad discovery available in litigation.⁶³ The traditional response to this criticism has been to note that parties may prefer streamlined procedures that move a dispute toward a hearing before expert arbitrators without the economic and temporal drag of formal discovery. Where reasonably sophisticated business equals have agreed to arbitrate, disputants appear to have "voted with their feet" for a system that lacks many of the features of litigation, perhaps in large part because it lacks those features.⁶⁴

However persuasive this argument for traditional commercial arbitration, it loses much of its force when applied to mass arbitration. First, the weaker party often does not make an informed decision to opt into a system with fewer procedural prerogatives and reduced discovery.

61. See Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 458 (2004) ("While codes for arbitrator and provider ethics provide important guidelines, their impact is questionable if true enforcement is unavailable. Ensuring the enforcement of standards and providing meaningful remedies to those injured by arbitral misconduct is equally as important as articulating standards of conduct and professional ethics for arbitrators and provider institutions.").

62. See *id.* at 460 (opposing per se arbitrator immunity and any "broad and uncritical expansion of arbitral immunity" because "[s]ignificant differences exist between public judges operating in an open judicial process and the private judging world of arbitration;" arguing for a "standard of qualified immunity [that] appropriately balances the competing policy concerns of protecting arbitrators in their decisional roles, while also holding the arbitration industry accountable to parties and the public").

63. See ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* § 1.8 (6th ed. 2007) (noting that procedural limitations of arbitration may be either good or bad for particular disputants depending on importance of joinder, legal rules, fact development and other aspects of the case); HUBER & WESTON, *supra* note 6, at 611-72; GOLDBERG, SANDER, ROGERS & COLE, *supra* note 38, at 216-19 (hypothetical dialogue of counsel regarding pros and cons of arbitration).

64. See, e.g., Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996) (taking critical view of intrusion of more "legalistic" procedures into arbitration in manner thought to undermine the advantages of informality and speed previously considered core benefit of arbitration). Criticisms like those of Professor Carbonneau have considerable force as applied to old, customized, guild or commercial arbitration. For mass arbitration of consumer, employee, and small vendor disputes, however, some degree of greater legalization may be the necessary price to ensure that mass arbitration possesses adequate quality and fairness.

Second, the streamlined procedure may have disparate impact providing greater advantage to the repeat player while disadvantaging the investor, consumer, or employee, who is more likely to be a one-shot player. By contrast, the repeat player crafting a mass arbitration system gains an economy of scale while simultaneously holding an informational and expertise advantage over most of those adhering to mass arbitration clauses.

Consumers, employees, and smaller vendors may or may not want Rule 12(b) motions and summary judgment motions. One can reasonably argue that these disputants are better off without pretrial dismissal devices that may permit defendants to win as a matter of law, often on narrow and technical legal grounds. By contrast, a disputant with a legally weak but empathy-invoking case may succeed in obtaining at least partial relief before an arbitrator.

But even if this speculation is correct, many “small fry” disputants would continue to have reasons to prefer litigation to arbitration. According to conventional wisdom, disputants of this type would prefer a lay jury to an arbitrator, both for assessing factual disputes and awarding damages. Further, the litigation system provides far more appellate scrutiny than arbitration.⁶⁵ Almost certainly, these disputants would prefer to have more discovery rather than little or no discovery. More important, the “little guy” or one-shot disputants will almost uniformly desire that any system of mass arbitration in which they are forced to participate be roughly equivalent to litigation regarding procedure, information gathering, fairness, and substantive quality of outcomes.

In almost all “David versus Goliath” cases (e.g., between a merchant and consumer, employer and employee, large company and small vendor), the weaker party has less information than the larger party that drafted the mass arbitration contract. A consumer may know a lot about the mishap with a product and resulting injury, but the manufacturer will know considerably more about the product, its design, its history, its record of use, other claims by consumers, and so on. In the vast majority of cases, more discovery will benefit the “David” disputant by narrowing the information gap. Even in small stakes cases where the costs of broad discovery may be prohibitive, the less knowledgeable party benefits by having available a large array of discovery tools that may be selectively used. A contrary argument is that broad discovery

65. See 9 U.S.C. §§ 10, 11 (2000) (articulating only limited grounds for vacating or modifying arbitration award under the FAA); UNIF. ARBITRATION ACT §§ 23, 24 (2000), 7 U.L.A. 73–74, 83–84 (2005) (providing similarly limited grounds for vacation or alteration of award under the Uniform Arbitration Act).

permits the Goliaths to wear down the Davids through a war of attrition. But the availability of protective orders and judicial supervision arguably reduces this danger to a manageable level.

Similar procedural concerns surround potentially oppressive choice of law, choice of forum, and choice of venue clauses found in arbitration agreements or the contract in which the arbitration clause is contained. These same concerns also are present in contracts providing for litigation of disputes. However, they are more worrisome when applied to large classes of disputants who are in essence required to adhere to written contracts containing arbitration clauses. Such mass contracts may strip consumers, employees, or small vendors of procedural and substantive rights.

The unconscionability litigation of the past decade has highlighted particularly problematic contract provisions that may impose too heavy a burden on weaker disputants. For example, the California Supreme Court's *Armendariz* opinion and other decisions have identified the following provisions, most of which are best classified as procedural, as troublesome:

- imposing costs on the weaker party but not the mass contracting party;
- high tribunal fees/percentage fees;
- high arbitrator fees;
- lack of mutuality regarding remedial options;
- lack of mutuality of obligation
- limitations on damages or other elements of remedy;
- asymmetric fee-shifting rules;
- selection of a seriously inconvenient forum;
- unduly tight deadlines for filing claims;
- pressure tactics to induce signing of the contract containing an arbitration agreement;
- insufficient neutrality in the arbitration mechanism; and
- fraudulent aspects of the arbitration term or its implementation.⁶⁶

D. The Importance of Equivalent Remedial Options

Particularly troubling are arbitration clauses or systems that limit the remedies that would be available to the prevailing party, like contract provisions taking a narrow approach to consequential damages or banning punitive damages. In addition, many think arbitration places de facto limitations on the recovery of non-economic damages in that an arbitrator is less likely than a lay jury to be moved to award large non-

66. See *Arbitration, Unconscionability*, *supra* note 38, at 804-07 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) and other cases).

economic damages.

Some arbitration clauses limit disputant's representation, including restrictions on the use and compensation of lawyers. Arbitration may also present more of an economic burden on the litigants because arbitration generally requires as a prerequisite to the arbitration payment of filing and other fees. By contrast, court filing fees are more modest. Arbitration clauses may also provide for fee shifting in favor of the prevailing party. This departure from the traditional "American Rule" is thought to disadvantage weaker parties and one-shot players, as contrasted to mass contractors, who by definition appear to be repeat players in disputing. But these disadvantages are not peculiar to arbitration and may exist in litigation subject to contracts specifying such changes.

Restrictions on class treatment in arbitration are an additional concern. Even when an arbitrator is willing to hear class claims, most arbitration providers do not offer users the range of procedural and evidentiary devices available in class action litigation. Arbitration is also private, which may disadvantage the weaker party seeking to expose the mass contractor's practices. The provisions of an arbitration clause or the rules of an arbitration organization may also impose time limits that are stricter than that found in the litigation system.

As with the questions of arbitrator competence, neutrality, and independence, questions of procedural fairness—access to information, ability to present a case, economic disincentives, limits on joinder, class treatment, and remedial options—all justify legal regulation of mass arbitration. As discussed below, there may be serious questions over whether this regulation is best accomplished by legislatures, agencies, or the courts, but minimal regulation on these fronts is unquestionably justified in light of mass arbitration's emerging status as a "parallel universe" of dispute resolution supplanting litigation as the default means of dispute resolution.

Legislation effectuating these goals should require that arbitrators be able to order all of the following remedies normally available in court: compensatory damages; injunctive or other equitable relief; punitive damages; prejudgment interest and postjudgment interest; costs and counsel fees where justified; and liberal joinder of claims and parties (to the extent not precluded because other prospective parties have not signed arbitration agreements). Class action treatment also should be available in arbitration, both for its procedural efficiency in bundling claims that might otherwise be uneconomical to decide separately and for its greater ability to grant remedial relief to persons who might not otherwise pursue their legal rights.

In addition to ensuring that arbitrations are not impoverished because they provide fewer remedies than courts, legislation should prohibit arbitration agreements that impose procedural requirements that are one-sided or unfair. Provisions that should be proscribed include the following: asymmetric, nonmutual procedural provisions of any type; choice of law clauses that are unrelated to the situs of contract performance or that select a body of law outside the mainstream of American jurisdictions; and venue selection clauses that impose an unreasonably inconvenient or expensive venue on the non-drafting party.

E. The Incomplete Adequacy of Due Process Protocols and Consumer-Oriented Provider Rules

In response to concerns over the procedural fairness of mass arbitration, arbitration users and providers have made efforts to improve arbitration procedures so that disputants, particularly the non-institutional disputants, can have a fair hearing. I refer to these efforts generally as "due process protocols," a name taken from the formal title of the most prominent, and initial, effort in this regard, the Employment Due Process protocol drafted by a government task force.⁶⁷ These due

67. As summarized by Professor Bales:

In 1995, a task force representing employers, employees, and arbitration service providers drafted *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (the "Employment Protocol"). This Protocol set minimum procedural safeguards for inclusion in all employment arbitration agreements. For example, participants agreed that employment arbitrators should be qualified to decide statutory disputes, that employees should have a right to counsel in arbitration proceedings, and that arbitrators should be empowered to award the full panoply of damages permitted by law.

The Employment Protocol has been extremely influential. It has been adopted by the major arbitration service providers, members of which will refuse to arbitrate cases under rules inconsistent with the Protocol. It has inspired two additional Protocols, both adopted in 1998: the Due Process Protocol for Consumer Disputes (the "Consumer Protocol") and the Health Care Due Process Protocol (the "Health Care Protocol"). The Employment Protocol has provided scrupulous employers with a model for drafting fair, ethical, and enforceable arbitration agreements. It has guided courts in their decisions of whether to enforce particular employment agreements.

Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 165-66 (2005) (footnotes omitted). The *Employment Protocol* is published at *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 9A LAB. REL. REP. (BNA) No. 142, at 534:401 (May 9, 1995) and reproduced in LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* app. E (2d ed. 2005) and JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* app. B (1997).

The *Consumer Protocol* and *Health Care Protocol* are published in Program Books issued by

process protocols are useful developments that have helped to curb some of the most self-serving behavior of entities seeking to impose mass arbitration on consumers and employees.

These protocols and similar "private" or "industry" efforts to improve arbitration have not been extensive enough in protecting investors, consumers (including health care patients and insurance policyholders), and employees. The due process protocols have made a substantial step toward greater fairness in mass arbitration but are insufficiently clear and directive. Stronger procedural protections could be given to consumers, patients, and employees without sacrificing the logistical advantages of arbitration.

Most important, fairness efforts of this sort have been inconsistently mandated by government regulatory authorities and courts. Although embrace of the protocols by major arbitration providers is important, many mass arbitrations are conducted outside the realm of major providers such as AAA, JAMS, and the CPR Institute for Dispute Resolution. Further, even when a major provider insists that arbitration proceed under its auspices and conform with a due process protocol, courts have on occasion refused to consider the provider's codification of the protocol as part of the arbitration agreement.⁶⁸ Concern also exists over whether merely including due process protocol language in the text of provider organization rules effectively implements the protocol "on the ground" in the actual conduct of arbitrations.⁶⁹

the ABA Section on Dispute Resolution and have been incorporated to a large degree in the rules of major arbitration providers such as AAA, JAMS, CPR, and NAF. See Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831 (2001). See, e.g., AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL (1998) [hereinafter CONSUMER PROTOCOL]; JAMS POLICY ON CONSUMER ARBITRATION PURSUANT TO PRE-DISPUTE CLAUSES, MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (Judicial Arbitration & Mediation Servs. 2007); NAF CODE OF PROCEDURE (Nat'l Arbitration Forum 2007). The Uniform Arbitration Act also has elements consistent with the *Consumer Due Process Protocol*, which perhaps should not be surprising in that Professor Stipanowich was heavily involved in the creation and authorship of both documents. See Thomas J. Stipanowich, *Resolving Consumer Disputes*, DISP. RESOL. J., Aug. 1998 at 8, 9.

See also Bales, *supra*, at 171-73 (describing background of development of Protocol); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 384-409 (2004) (describing background and content of due process protocols); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002); Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467 (2001).

68. See, e.g., *Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409, 417 (Ala. 1999) (finding AAA protocol not binding in lender's mass arbitration of customer dispute).

69. See Harding, *supra* note 67, at 455-56 (due process protocols "contain two weaknesses that seriously undermine their effectiveness: (i) the lack of any mechanism for monitoring compliance therewith, and (ii) the failure to provide for sanctions for those who fail to abide by their agreement to follow the due process standards contained in the protocols. . . . The protocols have not . . . eliminated the need for legislation governing arbitration").

Collaboration between affected interest groups, including some degree of "horse-trading" and compromise, can be a useful means of crafting rules and regulations. There always lurks, however, the concern that the collaboration will be one-sided, or become one-sided during the sharp-elbowed legislative or administrative process of enacting task force or commission recommendations. But even if this type of "neg-reg"—regulation negotiated by affected party representatives—produces a substantively "good" product, the product can only be completely effective if it becomes enforceable law or is otherwise sufficiently encouraged and supplemented by the legal system.⁷⁰

For example, if a mythical coalition of ranchers, meat packers, consumers, and the U.S. Department of Agriculture (USDA) agrees upon standards for beef quality and inspection, the resulting regulation is then expected to be formally adopted and adequately enforced in the field by the USDA. If this does not occur and the proposed standards are only precatory guidelines, most observers would correctly deem the neg-reg effort to be only a limited success. In the same vein, this Article regards voluntary or privately adopted standards of fairness such as the due process protocols as an incomplete response to the problem of ensuring adequate quality of mass arbitration.

Although private and voluntary efforts are better than nothing, they are not an acceptable substitute for government-mandated and guaranteed (to the extent the realities of enforcement permit) protection of the mass arbitration process. The fairness and quality initiatives proposed in this Article should be officially adopted and enforced by the legal system to improve the overall quality of mass arbitration. Even if legislatures, regulators, and courts merely adopted wholesale the "best" combination of private due process protocols, this would be an improvement because it would bring private proponents of mass arbitration—contracting parties and providers—that have refused to voluntarily abide by the protocols within the scope of the protocols.

In addition, this Article's substantive proposals go significantly

70. See Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 LAW & POL'Y 363, 394 (1997) (asserting that government intervention may be required to assist self-regulatory efforts by "curb[ing] the activities of non-participants"). In addition, self-regulation may be an industry effort to "avoid a common threat" of more stringent government regulation. See Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000). See also Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Last Year's Trend Has Become This Year's Mainstay*, 54 BUS. LAW. 1405, 1408 (1999) ("The protocols and standards adopted by the AAA, JAMS, and the NAF exemplify the adage that it is better to regulate oneself than to be regulated by others."); Roberta S. Karmel, *Securities Industry Self-Regulation—Tested by The Crash*, 45 WASH. & LEE L. REV. 1297, 1300 (1988) (self-regulation "generally falls into three categories: promotional, standard setting, and disciplinary").

beyond the due process protocols in scope and content. For example, the Employment Protocol has no position on the question of whether employers can require signing of an arbitration agreement as a condition of employment, a failing one commentator describes as a “major weakness” of the Protocol.⁷¹ In a long critique of the Employment Protocol, Professor Bales notes that it does not address “contract formation” issues at all and that it does not speak to the degree of notice an employee should receive prior to being asked to sign an arbitration agreement.⁷²

I am not suggesting prohibiting mandatory mass arbitration for non-unionized employees. (I have already suggested that this result is required by the clear language of the FAA, but the Supreme Court disagrees and is unlikely to change its view).⁷³ However, a court using an unconscionability or a public policy analysis could determine that, in certain circumstances, imposition of such mass arbitration upon employees results in an unconscionably unenforceable arbitration agreement. Additionally, federal agencies or Congress could, pursuant to this Article’s suggestions, limit mandatory mass arbitration for unorganized employees. State agencies and legislatures might be able to do something similar, provided their efforts do not run afoul of the preemptive scope of the FAA.

Although the protocols are not much different from this Article’s proposals regarding procedural matters such as access to information and ability to be fully heard on issues, they neither address the scope and adequacy of judicial review of arbitration awards nor consistently require that arbitration outcomes be consistent with the substantive law.⁷⁴ The Employment Protocol specifically states that the scope of review “shall be limited” and the Consumer Protocol indirectly takes

71. See Bales, *supra* note 67, at 172.

72. See *id.* at 185. However, the *Consumer Protocol* and its adoption by major arbitration providers does address the matter of notice, recommending that consumers receive adequate notice of an arbitration clause. See, e.g., CONSUMER PROTOCOL, *supra* note 67, at princ. 11 (“Consumers should be given: . . . clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character; . . . reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters . . .”).

73. See *Reconsidering the Employment Contract Exclusion*, *supra* note 38; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (rejecting section 1 defense to arbitrability of employment claims).

74. See Bales, *supra* note 67, at 173–80; Harding, *supra* note 67. But see CONSUMER PROTOCOL, *supra* note 67, at princ. 14 (“The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.”).

this view.⁷⁵ Consequently, even if the Employment Protocol and other due process protocols were “perfect”—and mandatory for all mass arbitrations—in their codification of appropriate arbitration procedure, they would nonetheless be an incomplete solution to the overarching problem of the quality control of the mass arbitration system.

Focusing only on the procedural aspects of the due process protocols, there remains room for improvement. For example, the Employment Protocol and similar efforts to improve arbitration procedure do not address “whether an employer may retain the unilateral right to modify an employment arbitration agreement.”⁷⁶ As discussed above, this sort of one-sidedness in mass arbitration is precisely the type of unfairness that would be prohibited under the general implementation of unconscionability norms proposed in this Article and currently applied on an ad hoc basis by many courts.⁷⁷

In related fashion, the due process protocols and major provider rules do not directly address the problem of one-sided arbitration clauses that provide for arbitration of claims initiated by the employee but not to employer-initiated claims.⁷⁸ Such clauses are, frankly, abominations

75. See CONSUMER PROTOCOL, *supra* note 67, at princ. 15(1) (“Final and Binding Award; Limited Scope of Review” with arbitration “subject to review in accordance with applicable statutes governing arbitration awards.”). Review under either the FAA or the RUAA is considerably more limited than review in the courts. See 9 U.S.C. § 10 (2000); UNIF. ARBITRATION ACT § 23 (2000), 7 U.L.A. 73–74 (2005).

76. Bales, *supra* note 67, at 186. By “similar efforts” to improve arbitration procedure, I include not only the consumer and health care protocols but also the general Rules and Regulations of the major arbitration providers such as the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), the National Association of Securities Dealers (NASD), the American Arbitration Association (AAA), Judicial and Mediation Services (JAMS), and the National Arbitration Forum (NAF) and the CPR Institute for Dispute Resolution (CPR). Although there are some exceptions to the observations set forth below, see *supra* text accompanying notes 67–75, these other efforts at codifying fair arbitration procedure tend to have many of the same procedural shortcomings found in the Employment Protocol.

77. See, e.g., *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (holding that arbitration agreement that gives employer power to alter scope is an illusory contract and unenforceable); *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (finding that arbitration clause that gave employer right to change forum is unenforceable); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939–40 (4th Cir. 1999) (same). However, not all courts can be expected to consistently render enlightened decisions on this sort of issue in the absence of a legislative or administrative directive. See, e.g., *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002) (finding arbitration clause enforceable even though it gave employer unilateral right to modify arbitration procedures). This factor counsels in favor of greater government intervention on behalf of consumers and employees subject to mass arbitration. See also *Bank of Am., N.A. v. Dahlquist*, 152 P.3d 718, 720–22 (Mont. 2007) (holding that an arbitration award issued by provider that was not mutually agreed upon by disputants is void and not subject to FAA requirement that party objecting to award must contest it within ninety days of award). *Accord Danner v. MBNA Am. Bank, N.A.*, No. 06-1429, 2007 Ark. LEXIS 273, at *12 (Ark. April 26, 2007).

78. See Bales, *supra* note 67, at 186–87. See also Harding, *supra* note 67, at 410–16; CONSUMER PROTOCOL, *supra* note 67; AM. ARBITRATION ASS’N ET AL., COMMISSION ON HEALTH CARE DISPUTE RESOLUTION (1998); AAA COMMERCIAL ARBITRATION RULES (Am. Arbitration Ass’n 2007),

that strongly suggest that parties using them are interested not in adopting a streamlined, efficient, or expert means of dispute resolution but instead are seeking to construct a parallel world of dispute resolution in which the employer, vendor, or brokerage house holds a strong institutional advantage over consumers and employees.

The rhetorical question prompted by this situation that should be posed to all drafters of arbitration agreements is a powerful one: "If arbitration—in particular, the arbitration system you have—is so great, why are you imposing it on your customers/employees while reserving to yourself the option of avoiding that arbitration system and pursuing litigation?" As with most rhetorical questions, the answer suggests itself: vendors and employers are often more interested in gaining advantage over their customers and employees rather than establishing a better means of dispute resolution.⁷⁹ The Employment Protocol and similar model procedural codes also do not address the role of consideration in cases where the employer or other vendor retains the option of choosing forums or altering arbitration procedure.⁸⁰

available at <http://www.adr.org/sp.asp?id=22440>. However, the rules of the NYSE, AMEX, and NASD mandate that between exchange members and customers be arbitrated, instituting a de facto mutuality as least as regards arbitration versus litigation. Courts usually recognize asymmetric agreements giving employers and vendors the option of litigating or arbitrating that is unavailable to employees and consumers as an unconscionable arrangement. See, e.g., *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078–84 (9th Cir. 2007) (finding lack of mutuality regarding confidentiality and administrative review to be unconscionable); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003) (requiring symmetry in arbitration clause for enforceability); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (finding that a clause mandating arbitration of borrower claims but giving lender option of litigation or arbitration was unenforceable); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130–32 (7th Cir. 1997) (same, regarding employer–employee arbitration clause). But see *Ignazio v. Clear Channel Broad., Inc.*, 865 N.E.2d 18, 21–22 (Ohio 2007) (prohibiting arbitration clause from establishing expanded grounds for judicial review but severing offending provision to enforce arbitration clause generally); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001) (upholding arbitration clause in consumer contract that applied to consumer claims but not company claims).

79. One can make a strong case that if there is to be asymmetry regarding the ability to choose the dispute resolution forum, it should run in favor of the consumer or employee. See Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (if Imposed on the Corporation)*, 8 NEV. L.J. 82 (2007).

80. See Bales, *supra* note 67, at 187. See also AAA COMMERCIAL ARBITRATION RULES; NAF CODE OF PROCEDURE (Nat'l Arbitration Forum 2007); NYSE RULES, R. 600A–634 (New York Stock Exch. 2007), available at http://rules.nyse.com/NYSE/NYSE_Rules/ (follow "Arbitration Rules" hyperlink); NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES (Nat'l Ass'n Sec. Dealers, Inc. 2007). Courts are divided on the issue but the "consideration defense" to lopsided arbitration appears to have failed more than it has succeeded. Compare *Harmon v. Philip Morris, Inc.*, 697 N.E.2d 270, 272 (Ohio Ct. App. 1997) (finding no consideration for unilateral changes), with *Batory v. Sears, Roebuck & Co.*, 124 F. App'x 530, 533 (9th Cir. 2005) (opining that consideration is present if employer agrees to be bound by any arbitration that takes place), *Obliv, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (finding worker salary sufficient consideration for arbitration agreement despite its one-sidedness in favor of employer), and *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734–35 (7th Cir. 2002) (holding that continued employment is sufficient consideration to support arbitration agreement giving

On another procedural front, the Employment Protocol and similar models do not address arbitration agreements that shorten the otherwise applicable statute of limitations available at law.⁸¹ Courts divide on the issue.⁸² Such provisions should be unenforceable because they do not conform to the legal regime. If mass arbitration is to act as a near-wholesale substitute system of dispute resolution, it must, absent customized consent to the contrary, provide disputants with the same length of time for raising a dispute that is provided by the litigation system.

The Employment Protocol does not address the issue of costs and fees (including counsel fees) imposed on employees as a condition of disputing within mass arbitration systems, and the Consumer Protocol and major provider rules provide only general guidance on forum fees with little or no discussion of fee sharing or shifting.⁸³ Similarly, the Employment Protocol does not address questions of venue, and the Consumer Protocol and similar efforts address venue in only general terms.⁸⁴ Once again, this area of concern requires modest regulation to ensure that mass arbitration is comparable to the litigation system it

employer unilateral change or choice of forum options).

81. See Bales, *supra* note 67, at 188. See also AAA COMMERCIAL ARBITRATION RULES; NAT'L ARBITRATION FORUM, *supra* note 67; NYSE RULES, R. 600A-634; NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES.

82. Compare *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (one-year period in arbitration clause unenforceable), with *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-32 (3d Cir. 1997) (one-year limitations period permissible).

83. See Bales, *supra* note 67, at 187-88. See also Harding, *supra* note 67. See generally NYSE RULES, R. 600A-634; AMEX RULES, R. 600-624 (Am. Stock Exch. 2007), available at <http://wallstreet.cch.com/AMEX/Rules/> (follow "Arbitration Rules" hyperlink); NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES; AAA COMMERCIAL ARBITRATION RULES; JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES (Judicial Arbitration & Mediation Servs. 2007), available at <http://www.jamsadr.com/rules/comprehensive.asp>; NAT'L ARBITRATION FORUM, *supra* note 67.

84. See Bales, *supra* note 67, at 188, 191; CONSUMER PROTOCOL, *supra* note 67, at princ. 7 ("proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances"). See also Harding, *supra* note 67, at 405-08; NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES, R. 12213(a) (NASD will generally "select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute" but does not address issue of force of choice of venue provisions in mass arbitration clauses); AAA COMMERCIAL ARBITRATION RULES, R. 10 (disputants "may mutually agree on the locale where the arbitration is to be held" and AAA may order arbitration at particular location in absence of party agreement and choice of venue clause). Anything less than a codification of the consumer's right to an arbitration hearing convenient to her residence can be a significant problem for consumers, investors, and employees as courts will in many cases permit imposition of some rather oppressive choice of venue clauses. See, e.g., *Domingo v. Ameriquest Mortgage Co.*, 70 F. App'x 919, 920 (9th Cir. 2003) (upholding provision requiring Hawaii-based employee to arbitration claim in California); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (expressing no problem with Chicago as chosen venue irrespective of residence of computer purchaser of machines sold nationally and internationally).

replaces in terms of quality and disputant access.

Although the Employment Protocol and others provide for at least some amount of "adequate but limited" discovery in arbitration, they can be faulted for being insufficiently specific or articulating too limited a view.⁸⁵ For the most part, reduced discovery benefits larger, more powerful repeat players with greater institutional information as a matter of course and greater resources for acquiring additional information. Although most observers would not want mass arbitration to become as discovery-heavy as litigation, one can make a strong case that mass arbitration should be equivalent to litigation discovery if mass arbitration is to be a fair substitute.

The protocols also generally do not speak to confidentiality.⁸⁶ Historically, one of the main attractions of traditional commercial arbitration has been its private nature, which allows participants to air their disputational dirty laundry out of the public eye. Mass arbitration has embraced confidentiality and largely attempts to keep proceedings out of the public eye. This presents the problem of whether a "repeat offender" employer may avoid being identified as such and also avoid the practical sanctions that ordinarily would follow in the litigation system, e.g., additional claims, shared discovery, issue preclusion, increased settlement value for consumer/employee claimants.⁸⁷

85. See Bales, *supra* note 67, at 190; CONSUMER PROTOCOL, *supra* note 67, at princ. 13 ("No party should ever be denied the right to a fundamentally fair process due to an inability to obtain information material to a dispute. Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration."); NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES, R. 12505-12514 (providing for document exchange and requests for identification of specific information but not generally permitting "standard interrogatories"; depositions "are strongly discouraged" but may be permitted "under very limited circumstances" to preserve testimony, to "expedite large or complex cases," or if "extraordinary circumstances exist."); NYSE RULES, R. 619 (requiring voluntary exchange of documents and permitting additional information requests and further production as may be ordered by arbitration panel); JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS No. 4 cmt. (Judicial Arbitration & Mediation Servs. 2005), available at http://www.jamsadr.com/rules/employment_arbitration_min_stds.asp (generally permitting one deposition per party as a matter of right; additional depositions require showing of need and arbitrator approval).

86. See Bales, *supra* note 67, at 189. See, e.g., CONSUMER PROTOCOL, *supra* note 67 (no mention of confidentiality boundaries); NYSE RULES, R. 600A-634 (same); NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES (same).

87. See Bales, *supra* note 67, at 189. Accord Harding, *supra* note 67, at 435-36; Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 704 (2004); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y 189, 190-91 (1997); Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 656; Cameron L. Sabin, Note, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1354 (2002) (stating that industry or

For arbitration, as with mediation and settlement, sound reasons underlie the confidentiality tradition: facilitating resolution, limiting public posturing, and limiting trial by publicity. However, the value of confidentiality appears much more salient regarding settlement through negotiation and mediation. Similarly, the value of confidentiality as a choice is relatively high in customized, trade association, and traditional commercial litigation. For mass arbitration systems, however, the confidentiality value loses much of its luster. Because mass arbitration substitutes en masse for litigation and involves "the public" to a greater degree than these other situations, one can make a strong argument that mass arbitration files and outcomes should be presumptively public, or should at least be readily available to disputants in preparing and evaluating their cases.

A more substantive failing of the Employment Protocol and similar ventures is that they either do not address remedial issues such as the availability of class actions or expressly limit or exclude standard litigation remedies from mass arbitration. For example, the Employment Protocol does not address whether class action waivers in a mass arbitration clause are enforceable.⁸⁸ Other protocols or procedural codes exclude class action treatment of issues or claims, or are silent on the issue of class actions.⁸⁹ This type of restriction fails the essential test

provider codes of ethics are "ineffective" because "enforcement of ethics codes is discretionary and the arbitration industry is reluctant to enforce its codes"); Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18 (arbitration providers come to see companies insisting on mass arbitration in contracts as their "clients" and "direct most of their marketing activities toward them because of the ability of these companies to deliver significant volumes of cases through the imposition of adhesion contracts on consumers and employees. [As a result, the] ability of the parties and free market to regulate the neutrality and ethics of the providers has been eliminated.").

88. See Bales, *supra* note 67, at 188.

89. See Harding, *supra* note 67, at 405–09. See, e.g., NYSE RULES, R. 600(d) (class action "shall not be eligible for arbitration" under NYSE Rules; disputant must opt out of or forgo class action in order to arbitration under Exchange Rules); AMEX RULES, R. 600(d) (Am. Stock Exch. 2007) (same); NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES, R. 12204 (same); NYSE RULES, R. 636(e) ("All agreements shall include a statement that 'No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action'"). But see CONSUMER PROTOCOL, *supra* note 67, at princ. 14 ("The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.").

A recent article by two attorneys representing corporate clients captures a bit of the flavor of the unpopularity of class actions among proponents of mass arbitration as well as reflecting the economic power of the community of mass arbitration proponents. See Alan S. Kaplinsky & Mark J. Levin, *Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 BUS. LAW. 923, 924–25 (2006) ("In November 2004, JAMS shocked the financial services industry by announcing that it had adopted an 'unequivocal' policy that class action waivers in consumer arbitration agreements are 'unfair' to consumers and will not be enforced. This highly controversial partisan policy ignited a firestorm of controversy, so much so that JAMS rescinded it just a

of a sound system of mass arbitration as it allows mass arbitration to supplant litigation without providing an equivalent means of dispute resolution for these less empowered groups.⁹⁰

Similarly, the protocols tend not to address the issue of damages, particularly punitive damages, or they attempt to preclude or limit such damages.⁹¹ To the extent that hortatory due process protocols or mass arbitration provider rules and policies fail to guarantee to disputants the full range of remedies available in litigation, these private efforts fail to provide a level of dispute resolution quality commensurate with litigation.

The Employment Protocol and similar efforts also tend to be less aggressive regarding conflict of interest, arbitrator neutrality, and arbitrator independence in seeking to protect decisionmaker neutrality, at least compared to judicial regulation.⁹² The Employment Protocol

few months later, in March 2005.”)

Irrespective of the merits of the debate over class actions in arbitration (I find the term “partisan” a bit excessive for describing the JAMS effort to provide a fair and level playing field for arbitration disputants), the episode demonstrates the difficulty of any private sector effort to arrive at a fair position on procedural devices that are viewed by the business community as inordinately pro-consumer.

90. See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000). See also Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127 (2005) (noting value of class treatment generally in equalizing disputing situation between defendants and claimants; advocating greater use of issue-specific classes in cases where individuation of some aspects of dispute precludes complete class treatment).

91. See Bales, *supra* note 67, at 191; Harding, *supra* note 67, at 399–405. But see CONSUMER PROTOCOL, *supra* note 67, at princ. 15 (arbitration should have full range of remedies available in litigation). See, e.g., NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES (not addressing forms of relief available); NYSE RULES, R. 600A–639 (same); AMEX RULES, R. 600–624 (same).

The Revised UAA avoids some of these problems by providing that an arbitrator “may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.” UNIF. ARBITRATION ACT § 21(a) (2000), 7 U.L.A. 69 (2005). RUAA similarly makes award of fees and costs available and generally endorses arbitral remedies on a par with those of courts. See *id.* RUAA also supports significant procedural prerogatives for arbitration disputants. See *id.* § 17. However, RUAA has yet to become widely adopted by the states and has not been seriously advanced as an amendment to the FAA. To a large extent, my proposal for mandating minimum quality in mass arbitration can be achieved in significant part if RUAA is enacted in somewhat strengthened form at both the federal and state level.

92. See Bales, *supra* note 67, at 193–94; Harding, *supra* note 67, at 455–56. See, e.g., NYSE RULES, R. 610 (requiring disclosure of “[a]ny direct or indirect financial or personal interest in the outcome of the arbitration” and empowering Director to remove an arbitrator because of information disclosed by providing no set standard or test for determining when personal or business ties create conflict of interest or require disqualification); AMEX RULES, R. 610 (same); NASD CODE OF ARBITRATION PROCEDURE FOR CONSUMER DISPUTES, R. 12408, 12410 (requiring similar disclosure and

requires disclosures of conflicts of interest but permits the arbitration to proceed if the affected parties consent,⁹³ a regime followed by other protocols and most arbitration provider rules. This approach to decisionmaker disqualification is considered problematic by many commentators.⁹⁴

It also certainly falls short of the litigation system's standards for judge and jury impartiality. For several types of conflicts, judges are prohibited from extracting consent from the parties to the judge's continued participation.⁹⁵ This type of "velvet blackjack" made famous by Learned Hand (evidence that even great decisionmakers behave badly on occasion) has been outlawed in the federal system since 1974, and most state courts have followed suit.⁹⁶ In addition, litigation

permitting disqualification but only when arbitrator has "interest or bias" that is "direct, definite, and capable of reasonable demonstration, rather than remote or speculative" with "[c]lose questions regarding challenges to an arbitrator by a customer" to be "resolved in favor of the customer"). Although these recusal rules are not toothless (particularly the directive of resolving close cases in favor of the customer), neither are they as extensive as the ABA Code of Judicial Conduct or federal statutes, see 28 U.S.C. § 455 (2000), regarding disqualification.

93. See Bales, *supra* note 67, at 193.

94. See *id.* at 193–98; Daylian M. Cain, George Loewenstein & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005); Harding, *supra* note 67, at 454; Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 189–99 (2004); Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 JAMA 252, 252–54 (2003); Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949 (2002).

95. See 28 U.S.C. § 455(b) (listing as non-waivable pursuant to section 455(e), enumerated grounds for recusal such as personal bias or prejudice concerning a party, personal knowledge of disputed facts prior legal work in private practice concerning the controversy or the parties, prior status as a material witness, prior government service in connection with the matter, family financial interest that "could be substantially affected by the outcome of the proceeding," personal or family relation to the case as a party, officer, director, or trustee, as a lawyer, or with substantial interest). In addition, 28 U.S.C. § 455(a) provides the very broad "catchall" basis for recusal in that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

96. See *Rehnquist, Recusal and Reform*, *supra* note 55, at 667. Judge Hand was reported to regularly disclose to litigants at the time of oral argument (not exactly ample notice to give counsel time to reflect or confer with a client) that he owned purportedly modest amounts of stock in companies with interests implicated in pending litigation. Counsel almost always "waived" this conflict in the face of the "velvet blackjack" wielded by Judge Hand.

To be sure, this may often have been because counsel preferred to have the case heard by a conflicted Learned Hand rather than any generic judge that might be substituted. (In the Second Circuit, there was always the possibility that one could have Judge Jerome Frank, a brilliant but eccentric judge substituted for a disqualified Hand.) But in many cases, it was just as likely that the lawyer on the spot was too cowed to object, feared that Hand would determine nonetheless to sit on the case notwithstanding the lack of waiver (a real possibility under the recusal standards of the era)—which would arguably leave counsel worse off for having angered the judge by refusing to agree that the judge would not be swayed by his financial interests—or both.

The 1974 amendments to the judicial recusal statute, 28 U.S.C. § 455(a), made financial conflicts of the type involved in the velvet blackjack per se disqualifying and do not permit the parties or

stringently restricts jurors from sitting on cases where their self-interest is implicated or where they may be biased or prejudiced.⁹⁷ To further minimize the prospect that conflicted jurors will slip through the system of challenges “for cause,” litigation gives counsel “peremptory” challenges by which a juror may be excluded without question simply because the situation raises concern.⁹⁸

By contrast, the system governing arbitrator conflict of interest is substantially less vigilant in terms of both rules and practice. The due process protocols, provider rules, the Uniform Arbitration Act (UAA), and RUAA all tend to take decisionmaker impartiality a bit less seriously than does the litigation system. For example, Section 12 of RUAA requires arbitrator disclosure, but only of “known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator . . . including . . . a financial or personal interest . . . [or] an existing or past relationship.”⁹⁹ Under RUAA, potential neutral arbitrators are disqualified if they have “a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party.”¹⁰⁰

By contrast, Section 455(a) of the Judicial Code requires disqualification whenever the judge’s impartiality is subject to “reasonable question,” a broader category of concern than whether the arbitrator is “likely” to be affected by financial or personal interests.¹⁰¹ To satisfy the quality and fairness concerns raised by mass arbitration as a substitute for litigation, mass arbitration should be subject to an arbitrator recusal environment closer to that of litigation. As discussed below, the overall level of review of arbitration decisions, including the mass arbitration awards that substitute for investor, consumer, and employee litigation is highly deferential, leaving little prospect that a mass arbitration decision will be vacated on grounds of arbitrator partiality.

F. The Need for More Stringent Judicial Review of Mass Arbitration

A pronounced problem surrounding arbitration—one unaddressed by due process protocols or similar efforts to improve the procedural

counsel to waive such financial conflicts.

97. See 28 U.S.C. §§ 1866, 1870 (2000).

98. See 28 U.S.C. § 1870.

99. UNIF. ARBITRATION ACT § 12(a) (2000), 7 U.L.A. 42–43 (2005).

100. *Id.* § 11(b) (2000).

101. *But see id.* § 12(e) (creating presumption of evidence partiality where arbitrator fails to make required disclosure).

functioning of mass arbitration—is the limited appellate review of arbitration decisions. The FAA and the UAA both provide only limited review of arbitration awards and create strong presumptions in favor of confirming and enforcing arbitration decisions with relatively little scrutiny as to the correctness of the decision, particularly its application of the law.¹⁰² RUAA does not provide significantly greater scope of review and, despite its generally admirable reformist tendencies, stops short of requiring that arbitration follow applicable substantive law.¹⁰³

In general, arbitration awards are set aside only if arbitrators exceed the scope of their authority, act with bias, or refuse to hear key evidence. Arbitrators' decisions need not be in accord with the prevailing law so long as they demonstrate no "manifest disregard" of the law, an odd and awkward yardstick for review used by some courts to inject some legal rigor in the review of arbitration decisions.¹⁰⁴ Labor arbitrations, like commercial arbitrations, also need not follow the law so long as the arbitrator's ruling on a grievance "draws its essence from the collective bargaining agreement."¹⁰⁵

Adjudication includes the right of appeal, including full review of the trial court's application of the law, and limited review of the trial court's factual determinations. Trial court decisions on review can involve challenges to fact-finding (evaluated under a "clearly erroneous" standard), exercises of judicial discretion (evaluated under an "abuse of discretion" standard), and application of the law (evaluated under a "de novo" standard).¹⁰⁶ Review of arbitration awards is considerably more limited. Arbitration would be improved by replacement of the current

102. See Federal Arbitration Act, 9 U.S.C. § 10 (2000); UNIF. ARBITRATION ACT § 13 (2000), 7 U.L.A. 48 (2005).

103. See UNIF. ARBITRATION ACT § 23–24 (2000), 7 U.L.A. 73–74, 83–84 (2005).

104. See Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234 (2007) (expressing reservations about manifest disregard as ground for review but advocating that it be better defined, restrained, and consistently applied); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998) (criticizing manifest disregard of law standard of review as inadequate and advocating expanded review); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385 (2007) (largely defending manifest disregard as grounds for reversal but advocating expanded judicial power to modify defective arbitration awards under review). See also Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007) (advocating greater freedom of disputing parties to agree upon expanded judicial review of arbitration awards).

105. *United Steelworkers v. Enter. Wheel & Car Co.*, 363 U.S. 593, 597 (1960) (establishing "essence of the agreement" test). See also Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998) (reviewing grounds for vacating commercial and labor arbitration awards).

106. See generally STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (3d ed. 1999).

deferential “manifest disregard of law” standard with appellate review similar to that accorded trial court decisions.

The dispute resolution system has gotten things completely backwards regarding the level of respective scrutiny appropriate to litigation and mass arbitration. If anything, the level of review of mass arbitration decisions should logically be more searching than that applied to review trial and jury outcomes. Unfortunately, attempts to contract for expanded judicial review generally have been rejected by courts as an improper private attempt to expand the court’s jurisdiction beyond that conferred by the FAA.

Federal trial court judges are appointed by the President and confirmed by the Senate, often after intense scrutiny from interest groups and interested Senators. State trial judges attain their positions because of merit selection by a blue ribbon commission, appointment by the governor, direct election, or a combination of the three, all of which are often accompanied by substantial media coverage. Although not all trial judges are Learned Hand, the system itself is quite selective and arguably builds in a large measure of quality control. Further, trial judges act under the constraints of formal legal training, judicial precedent, and detailed codes of civil procedure and evidence. But when these trial judges, alone or in combination with lay jurors, act, their rulings are subject to comprehensive review by at least three other judges that survived the same selection process.

By contrast, arbitrators are chosen by private entities. Little information exists about how arbitrators are selected. These adjudicative actors operate in private, away from media scrutiny, and apply only rules imposed by their provider organizations. They are not bound by the law or precedent and may not even be lawyers. But when these trial adjudicators act and render an arbitration award, their rulings are subject to only the most cursory review. Something is wrong with this picture—at least in cases of mass arbitration where it cannot be said that parties “freely chose” such constricted review.

The reasons for the different systems of review are largely historical. When the FAA was passed in 1926, it responded to the perception that courts were jealous of their jurisdiction, reluctant to share it with arbitrators, and generally hostile to arbitration. In response, the Act required courts to enforce predispute arbitration agreements specifically and imposed a deferential standard of review for arbitration awards.¹⁰⁷ Section 10 of the Act required courts to confirm arbitration awards absent certain problems with the award, including an arbitrators’

107. See *supra* text and accompanying notes 1–5 (regarding background and purpose of FAA).

exceeding the scope of their authority or arbitrators displaying evident partiality.

The system of commercial arbitration (and the FAA was concerned only about commercial arbitration, another indication the Act is dated) thus greatly constrained appellate judicial review not only to expedite commercial dispute resolution but also to prevent hostile courts from unduly meddling in arbitration decisions. For labor arbitration, which became legally protected years later from legislation and judicial receptivity, the standard of review was even more deferential.¹⁰⁸

Today's world of mass arbitration is substantially different. Courts no longer resist arbitration but embrace it. Arbitration has spread widely beyond its original specialized merchant-to-specialized merchant core and has become the new, mass-arbitration of consumer and other mass contract disputes. Arbitration organizations and the number of disputes have mushroomed. Arbitrators are no longer drawn almost exclusively from the ranks of a trade or industry's "wise men" knowledgeable in the unwritten norms of the trade. They may be drawn from lawyers or businesspersons with only passing experience in the subject matter of the dispute. And, of course, some of the arbitration providers and arbitrators may be unduly oriented toward pleasing the mass contractors that create much of the arbitration business.

Under these circumstances, modern arbitration awards—particularly in areas of mass arbitration such as consumer matters—should be subjected to a level of scrutiny at least roughly comparable to that applied to litigation outcomes. Appellate review is quality control. Unless proponents of mass arbitration can marshal evidence to suggest mass arbitration outcomes are more frequently correct than trial court outcomes, both means of dispute resolution logically should be subject to equivalent levels of quality control.¹⁰⁹ In application, this would mean that appellate courts reviewing arbitration results use a clearly erroneous standard of review of the factual determinations of the arbitrator, use an abuse of discretion standard of arbitrator rulings on conduct of the hearing, and use a *de novo* standard of the arbitrator's

108. As previously discussed, a labor arbitration award was to be confirmed and enforced by the courts so long as the award "drew its essence from the agreement," no matter how badly the arbitrator may have construed the collective bargaining agreement and the grievance at hand. *See supra* note 89.

109. To a degree, the "market" of dispute resolution is speaking on this issue in that many parties to arbitration agreements appear to wish to receive expanded judicial review akin to that accorded trial court decisions rather than the truncated review provided by the FAA. *See, e.g.,* *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (refusing to abide by arbitration clause provision for expanded judicial review); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) (same); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991) (same).

pure legal rulings.

Applying the traditional standards of appellate review to arbitrations would not be an expensive or cumbersome process. Most arbitrations' records are thin and would not require extensive judicial resources for factual review. Applying a clearly erroneous standard, the court would upset arbitrations for factual error only where the party challenging the arbitration could demonstrate that the arbitrator made a material mistake. In addition, the party seeking to set aside an arbitration award must pay for a hearing transcript and identify portions of the record demonstrating a fact-finding mistake by the arbitrator.

An arbitration that makes an obvious and important error of law should not stand. Under the current system of arbitration review, many courts see themselves as powerless to vacate an arbitration award even where legal error is apparent. Other courts will intervene if they find "manifest disregard of the law," but this standard is far weaker than the traditional *de novo* review applied in litigation. Under the manifest disregard standard, the arbitrator must be clearly apprised of the law and, more or less, expressly and self-consciously enter an award at variance with this known law.¹¹⁰ Full scale *de novo* review of an arbitrator's legal decisions would provide a more rational means of quality control.¹¹¹ In England, a country with a legal system hospitable to arbitration, awards may be reviewed on grounds of legal error.¹¹²

Much can be gained from expanding appellate review of arbitration awards to something more closely resembling judicial review of trial court outcomes. To some extent, a gradual movement has favored making arbitration proceedings and outcomes less opaque. Until the last twenty years, most arbitration awards were mere statements of who won, who lost, and the amount of any monetary award. In reaction to the sudden expansion of mass contract arbitration and criticism of the lack

110. See *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389–90 (2d Cir. 2003); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 379, 381–82 (5th Cir. 2004) (stating that to constitute "manifest disregard of the law," the arbitrators must have "appreciated[d] the existence of a clearly governing principle but decided to ignore or pay no attention to it" and the law in question must have been "well defined, explicit, and clearly applicable" (quoting *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003)) (citations omitted); Drahozal, *supra* note 104 (collecting variant definitions and applications of manifest disregard standard).

111. See Poser, *supra* note 104. See also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

112. See Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 5 (Eng.); Arbitration Act, 1889, 52 & 53 Vict., c. 49, § 7 (Eng.); Arbitration Act, 1996, c. 23, §§ 45 (preliminary issues), 69 (post-award appeal) (Eng.). See also HUBER & WESTON, *supra* note 6, at 595 (noting that in permitting reversal of an arbitration decision that is "obviously wrong" or that poses "serious doubt" about its correctness, "the English Arbitration Act certainly does not make general provision for review of questions of law, but the possibilities for review for claimed errors of law is far greater than under the FAA or the UAA").

of transparency in arbitration, many arbitral organizations began requiring the issuance of "reasoned" awards akin to the findings of fact and conclusions of law issued by courts rendering decision after a bench trial.

Arbitration organizations hoped the discipline of explaining the decision would encourage more reflective, carefully considered decisions by arbitrators. In addition, the explanation contained in the reasoned award would provide greater transparency and inspire greater confidence in the results reached in arbitration. However, one cannot help but note the incongruity between the movement toward reasoned awards and the extremely limited review of the award, particularly its application of the law. Put another way: what good is a reasoned award that does not follow the law? Under the current system, an arbitrator can issue a reasoned award that conclusively demonstrates legal error and the reviewing court is required to confirm and enforce the award even though it would never do so if the opinion were issued by a court of law.

IV. MAINTAINING THE STATUS QUO IN TRADITIONAL COMMERCIAL ARBITRATION WHILE ACTING TO GUARANTEE SUBSTANTIVE FAIRNESS IN MASS ARBITRATION

Appreciating the differences between old and new arbitration provides a principled means of distinguishing in their treatment by the legal and political system. For the most part, traditional arbitration, including labor arbitration pursuant to a collective bargaining agreement, should be permitted to continue largely as it has in the past. However, the system should take some pains to ensure that new, mass arbitration is governed by the more regulatory regime proposed in this Article. This would ensure that specialized arbitration among sophisticated parties would not be unduly stifled, leaving room for these parties to act with informality and achieve contextual rough justice. At the same time, impoverished legal outcomes can be avoided in mass contract arbitrations through the greater efforts by the legal system to guaranty neutrality, competence, and fairness.

Validly consenting parties should be permitted to avoid the default rules of the regulatory system proposed for mass arbitration. This is a simple corollary of the established rule that parties can generally contract around default rules so long as this is done clearly, knowingly, and voluntarily. This ability to contract around the default regulations applicable to mass arbitrations should be available in both "guild" and commercial contract arbitration. In this way, parties who find the regulatory regime too constraining can exit the system and tailor

arbitration to their particular needs.

For example, a private equity firm may wish to hire a CEO. Assuming that both have requisite expertise and bargaining power, their choices of an arbitration scheme for resolving future disputes should be accepted by the courts. The parties may agree that compensation disputes will be arbitrated by a particularly knowledgeable person trusted by both to be fair. The arbitration agreement should not be set aside because the chosen arbitrator is not licensed as an arbitration service provider.

Similarly, if these sophisticated parties wish to stipulate to a limited "record" or limited discovery for deciding a compensation dispute, this should be permitted, provided that the contracting process between the private equity firm and the CEO is not tainted. In like fashion, parties analogous to these should be permitted to agree that there will be no awards of punitive damages, provide that counsel fees will automatically be awarded to the prevailing party, or even prohibit review of the arbitrator's decision. In cases like this hypothetical, the "freedom of contract" model of arbitration makes sense.

But in the bulk of mass contract arbitrations, the realities of the contracting process are inherently unlikely to present a situation in which the parties knowledgeably and freely chose to escape or modify the default rules imposed by the legal-political system. Consumers at a big-box retail outlet are not realistically able to conclude that their interests are best served by arbitrating all disputes before a select arbitration provider subject to limited remedies and to voluntarily form an agreement to that effect with the retailer. If anything, sounder contractual analysis suggests that consumers in this situation do not validly consent to such arrangements even when they sign papers containing text purporting to consent. The problem gets worse when any text requiring arbitration is found on the back of a ticket stub, in a package invoice, or interposed as something that must be clicked to reach the next section of a website order form.

Where more sophisticated parties with individual needs wish to customize any arbitration between them, this should be permitted, but only upon a showing of actual agreement by the parties under circumstances that do not justify paternalistic intervention to protect the weaker party. Under the proposals of this Article, the private equity firm and the CEO, diamond dealers, cotton merchants, large manufacturers and shipping magnets, team owners and star athletes, and other non-mass public entities would be allowed to continue to contract into specialized arbitration. But for consumers, employees, and others subject to adhesive mass contracts containing boilerplate arbitration

clauses, the arbitration of their disputes would be surrounded by a greater system of protections.

V. EVALUATING THE MASS ARBITRATION REGIME AND CONSIDERING THE FUTURE

A. Measuring Mass Arbitration According to Instrumental and Moral Imperatives

1. The Instrumental Examination

Twenty years after *McMahon*, mass arbitration has become an established core of the national dispute resolution system governing securities. Although arbitration's conquest of other portions of consumer dispute resolution is not as complete, mass arbitration of consumer disputes has become commonplace. Does this post-*McMahon* world meet the instrumental and normative imperatives necessary to qualify as a "good" default system of dispute resolution? At this juncture in the American arbitration saga, the answer appears mixed.

Securities mass arbitration, whatever its normative imperfections, arguably meets the instrumental criteria. During the twenty years since *McMahon*, investors appear not to have been scared away from securities investment relationships subject to standardize imposition of arbitration clauses. The value of publicly traded companies on U.S. stock exchanges has increased roughly six fold during the twenty years since *McMahon*. The American stock markets are vibrant and continue to perform reasonably well (notwithstanding some downturns during 2007 and a pronounced slump in early 2008 that is almost certainly part of a recession rather than the result of sudden investor concern over arbitral fairness) in spite of the corporate scandals (e.g., Enron) of the early twenty-first century. Perhaps the move from litigation to arbitration is part of this aggregate good performance. Certainly, one would be hard pressed to argue that the post-*McMahon* move toward standardized arbitration enforcement has hurt the economic performance of the markets.

Outside of securities markets, the instrumental question regarding mandatory mass arbitration is considerably less sanguine. Although the overall American economy, like the stock market, has performed well on the whole since *McMahon*, one finds more pronounced criticism of and resistance to arbitration in its non-securities application. The use of

standardized arbitration clauses for basic consumer transactions has produced a steady stream of litigants seeking to avoid application of these clauses. Examples abound regarding health care, credit cards, mobile homes, and other consumer purchases, often purchases of significant magnitude for the average consumer.¹¹³

This suggests that the presence of mandatory mass arbitration clauses generally make a product or service less attractive to the prospective purchaser (or would if the purchaser was aware that the standardized purchase contract documents included a mandatory arbitration clause). However, evidence suggesting that consumers have been less willing to spend for products or services where the vendor employs mass arbitration is sparse. During the time since *McMahon*, industries widely using mandatory arbitration (e.g., credit cards) have seen growth rates equal to or exceeding overall economic growth.

As with securities markets, one can always raise the question of whether growth would have been even more robust in the absence of standardized arbitration. More likely, however, standardized arbitration is sufficiently unknown or its significance underappreciated, and thus, it does not affect consumer purchasing or use decisions. As a practical matter, the average purchaser of a mobile home on credit is unlikely to either know of or care about a standardized arbitration clause contained in the purchase agreement. The purchaser needs housing, has found an affordable dwelling, and wants more than anything to complete the transaction. She is unlikely to be deterred by the presence of even an oppressive arbitration clause, much less one that restricts class action remedies, a concept with which the average consumer is largely unfamiliar.

On balance, one cannot mount a particularly strong instrumental attack on the post-*McMahon* regime of mass standardized arbitration. The vendors adopting mandatory arbitration and seeking to make it the default means of dispute resolution apparently have not suffered in the market. Similarly, economic activity generally does not appear depressed from any dampening of consumer or investor confidence due to the rise of arbitration. Even the presence of one-sided, unconscionable, standard, mass arbitration clauses has not reduced investment or consumption activity with the vendors employing such

113. See generally THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (4th ed. 2007) (leading casebook containing many instances of consumer or employee challenging mandatory mass arbitration); HUBER & WESTON, *supra* note 6 (same); DRAHOZAL, *supra* note 21 (same); GOLDBERG, SANDER, ROGERS & COLE, *supra* note 38, at 213–99 (arbitration chapter of leading dispute resolution casebook focuses on such cases and on problems of consumers and employees facing mass arbitration).

forms.

Much of the apparent instrumental success of standard mass arbitration may be the result of its incomplete conquest of litigation. As discussed above, standard, mass arbitration clauses remain subject to litigation challenge and judicial scrutiny. In response to particularly one-sided arbitration regimes, courts have re-invigorated the doctrine of unconscionability, which had fallen out of favor during the 1970s and 1980s.¹¹⁴ In addition, courts have refused to enforce arbitration clauses with excessive limitations on remedies.¹¹⁵

Further, many arbitration providers and venders have modified their procedures and operations to graft onto arbitration more of the fairness-enhancing traits found in litigation. Although critics have occasionally decried the tendency of arbitration to become too much like the litigation it sought to replace,¹¹⁶ mass arbitration, because it is a default dispute resolution mechanism, must have at least a baseline of fairness found in any generally applicable system of dispute resolution.¹¹⁷

2. Continuing Normative Concerns About Mass Arbitration

Whatever one's conclusion as to whether standardized mass arbitration meets the instrumental imperative, one must also face the normative imperative. No matter how neutral or positive arbitration's

114. See *supra* text accompanying notes 44–45. See, e.g., *Net Global Mktg., Inc. v. Dialtone, Inc.*, 217 F. App'x 598, 601–02 (9th Cir. 2006) (finding arbitration clause unconscionable and unenforceable when “hidden” on page 12 of 17-page contract); *Martin v. TeleTech Holdings, Inc.*, 213 F. App'x 581, 583–84 (9th Cir. 2006) (holding that an arbitration clause which required substantial prepayment of fees by a consumer was unconscionable); *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 344–47 (6th Cir. 2006) (finding expensive arbitration unconscionable). But see *Scaffidi v. Fiserv, Inc.*, 218 F. App'x 519, 520–22 (7th Cir. 2007) (finding arbitration clause in employment contract not unconscionable).

115. See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 53–63 (1st Cir. 2006) (invalidating class action waiver but upholding arbitration clause in other respects); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (striking down class action ban in arbitration clause); *Ignazio v. Clear Channel Broad., Inc.*, 865 N.E.2d 18, 20–22 (Ohio 2007) (finding provision for expanded judicial review impermissible but severing it from arbitration clause and upholding remainder of clause); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100–01 (N.J. 2006) (declaring class action waiver unconscionable in consumer loan contract); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). See also *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”). But see *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877–78 (11th Cir. 2005) (enforcing class action waiver); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) (same); Mary S. Diemer, *Utah to Allow Class Action Waivers in Consumer Credit Agreements*, LITIG. NEWS, Sept. 2006, at 1 (describing Utah legislation, effective March 15, 2006, expressly permitting use of class action waivers in loan and credit card agreements containing arbitration clauses).

116. See, e.g., Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433 (1996).

117. See Brunet & Johnson, *supra* note 5. Accord *Weston*, *supra* note 104.

impact on economic activity, a mass arbitration system should not violate basic fairness and quality principles that society associates with dispute resolution. Consequently, even if the instrumental consequences of mass arbitration are powerfully positive, mass arbitration must logically satisfy the normative imperative if it is to be permitted by the legal system.

A perhaps shocking, but unfortunately not apocryphal, example illustrates this point. Slavery appears to have been an economically successful institution, at least when measured by aggregate creation of wealth and discounting the collateral economic impact of harm to slave families and social unrest generated by opposition to the system (and the psychological cost to society of maintaining an immoral system).¹¹⁸ It may even have been efficient as a matter of wealth maximization even after counting these often-overlooked collateral costs. Crassly put, one can make the case that slavery satisfied the instrumental imperative, at least if reasonable equality in the distribution of wealth is not the society's goal. But even at its most economically successful, slavery could not meet the normative or moral imperative. It had to be abolished whatever its capacity for aggregate wealth creation.

In similar fashion, the American legal system is justified in constantly evaluating mandatory mass arbitration to ensure that it meets prevailing norms of justice and fairness, no matter how much mass arbitration may assist wealth maximization (or at least not impede it). On this count, standardized mass arbitration continues to fall short, and thus, additional regulation and supervision of mass arbitration is justified. The consumer protection protocols adopted by many arbitration providers during the 1990s have generally improved the fairness of mass

118. See generally ROBERT W. FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* (1989); ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: *THE WORLD SLAVES MADE* (1974); Alfred H. Conrad & John R. Meyer, *The Economics of Slavery in the Ante Bellum South*, 66 J. POL. ECON. 95, 121 (1958).

Time on the Cross has been the subject of considerable controversy, not so much for its assertion that slavery created considerable aggregate (but maldistributed) wealth, but because it also suggested that the treatment of slaves was not as harsh as commonly supposed due to the owners' desire to take care of their capital assets. This latter point in *Time on the Cross* prompted substantial criticism. See, e.g., HERBERT G. GUTMAN, *SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS* (1975); PAUL A. DAVID ET AL., *RECKONING WITH SLAVERY: A CRITICAL STUDY IN THE QUANTITATIVE HISTORY OF AMERICAN NEGRO SLAVERY* (1976). One prominent legal historian views these books as "largely demolishing" the Fogel-Engerman thesis that slave life was not so bad. See Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 118 n.114 (2004). However, critics of *Time on the Cross* appear to contest that slavery maximized aggregate wealth in the American South (which perhaps explains why elites fought to keep slavery, conveniently playing upon racism to enlist non-elite whites in the cause).

arbitration,¹¹⁹ as have improved provider organization rules, codes of arbitrator ethics, and increased judicial scrutiny of arbitration on unconscionability grounds.¹²⁰

But the Achilles Heel of even these positive developments is that they rest too strongly, almost exclusively, upon voluntary decisions to adopt and adhere to better standards of conduct. Standardized mass arbitrations continue to violate the fairness imperative or have too much potential to do so. Currently, arbitration lacks legal compulsion for mandating fairness and court-like quality of outcomes in mass arbitration.

B. The Necessary Mandated Minimum for Mass Arbitration

1. Requirements

In order to meet the normative imperative that mass arbitration be fair and just as a default means of privatized dispute resolution, the legal system must insist that it do the following:

- Provide adequately expert, neutral, and independent arbitrators;
- Provide disputants, particularly investors and consumers, with adequate access to information;
- Refuse to enforce oppressive, one-sided forum selection clauses (e.g., contract terms selecting a distant or seriously inconvenient location for the arbitration hearing);
- Refuse to enforce choice of law provisions that lack any factual connection to the transaction or that attempt to select the law of a jurisdiction that fails to provide investors and consumers with at least adequate substantive and procedural rights;
- Provide minimal procedural fairness regarding cost sharing, tribunal and arbitrator fees, time limits, mutuality of procedural prerogatives, and the pleading and prosecution of the dispute;
- Provide remedies commensurate with those available in litigation. In particular mass arbitration systems should not be allowed to preclude class action treatment, restrict consequential damages, cap damages generally, or forbid awards of punitive damages;
- Provide adequate and symmetric access to legal services; and
- Provide a standard of review that ensures that arbitrators adjudicating disputes will follow the law.

A party should be able to avoid being compelled to arbitrate before a

119. See *supra* text and accompanying notes 67–82.

120. See *supra* text and accompanying notes 44–45, 114.

tribunal lacking these indicia of quality and fairness. Where the above minimum traits of quality are missing, the resulting award should be subject to reversal, vacation, or modification by a reviewing court utilizing a sufficiently broad standard of review.

2. Avenues to Implementation

Any mass arbitration provisions or systems that fail to meet these criteria should be subject to modification or should not be enforced. Questions remain regarding the precise boundaries of mass arbitration that will satisfy the normative fairness imperative and regarding the division of labor between legislative, executive, and judiciary in policing mass arbitration. In addition, the Article defers the issue of whether these changes require amendment of the FAA or may be accomplished through state legislation or state regulation.

In general, a federal legislative solution would be preferred because—*theoretically*—it would have fewer issues of legitimacy, would provide greater consistency in application, and would provide greater ability for mass arbitration proponents to efficiently shape their systems and conduct. In practice, I am a bit of a skeptic about legislative competence, particularly in a field where abstract popular perception has painted an excessively rosy picture of arbitration and an excessively dour picture of the civil litigation system.

Legislation implementing minimum fairness and quality in arbitration could become the captive product of powerful interest groups, a situation that could make the normative dimension of mass arbitration even worse. Legislation requires some degree of judicial deference and, in the clear cases, controls adjudication. Consequently, a “bad” piece of national legislation that permits one-sided mass arbitration favoring brokers or vendors could be worse than nothing at all because it would limit courts’ abilities to effectively police oppressive mass arbitration systems.

Unfortunately, the risk (and reality) of “bad” legislation is always with us. Yet our legal system remains committed to the legislative supremacy model. Consequently, wise federal arbitration legislation mandating the fairness protocols set forth in this Article is ideal. It would mandate adequate fairness and quality across-the-board in a manner that would require even the most unthinkingly arbitration-infatuated, docket-clearing judge to provide adequate policing of mass arbitration.

Similarly, regulation of mass arbitration through a properly empowered executive branch agency could satisfy the fairness

imperative. As with legislation, there is the nontrivial risk that executive agency product will be overly influenced by the self-interest proponents of mass arbitration rather than the fairness imperatives of a just legal system. Cynicism aside, this solution has potential. For example, the U.S. Justice Department, the Federal Trade Commission, or subject matter-specific entities such as the Equal Employment Opportunity Commission (EEOC) could set forth mandatory fairness and quality protocols for mass arbitration. Failure to satisfy the agency's fairness requirements would permit a party to argue that the resulting arbitration award is unenforceable.

Regarding securities arbitration and investor disputes, an established government agency of considerable expertise already exists: the Securities Exchange Commission. The SEC has power to promulgate rules on mass arbitration consistent with the fairness proposals in this Article. Certainly, the SEC has already put forth comprehensive regulations affecting all aspects of securities investment, with most of these regulations upheld by judicial and legislative review, which could, at least in theory, reverse any SEC regulatory initiative.¹²¹

For securities arbitration, the presence of the SEC and its role in a federal regulatory model of long standing may provide the optimal means of operationalizing fairness protocols. In addition, the bulk of American securities investment activity is concentrated in a few organizations such as the NYSE, NASDAQ, the American Stock Exchange, and other established exchanges. These organizations embracing the basic fairness protocols suggested in this Article and incorporating them into exchange rules would establish a *de facto* national model for regulating securities mass arbitrations. The exchanges and the SEC could collaborate through negotiation-regulation to achieve on a national basis a minimum fairness standard that would improve investor protection in mass arbitration in a manner acceptable to industry.

By contrast, the substantive legal topics addressed in consumer mass arbitration are often viewed as the domain of state regulation. This raises the question of whether a state-based fairness initiative would violate the preemptive reach of the FAA, which, to oversimplify, prohibits states from treating arbitration agreements less favorably than

121. See LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* (5th ed. 2004 & Supp. 2006). See also Harding, *supra* note 67, at 440 ("Government oversight of an arbitration program is not unprecedented. . . . [A]rbitration rules of [a self-regulatory organization (SRO)], while privately promulgated, must be approved by the SEC. In addition, the SEC has the power to require a SRO to adopt rules with respect to the conduct of arbitrations.") (quoting Securities Exchange Act of 1934 §§ 3(26), 19(c), 15 U.S.C. §§ 78c(a)(26), 78s(c) (2000)).

other contracts. Under the current state of FAA preemption law, this is a difficult question but one that might well be resolved (at least by the current Supreme Court) against state-based efforts to implement guarantees of minimum quality or fairness.¹²²

However, where consumer transactions affect interstate commerce, the Federal Trade Commission (FTC) has authority to promulgate rules and regulations implementing and enforcing the fairness imperative suggested in this Article.¹²³ This would create a concededly legitimate regulatory regime governing many aspects of mass arbitration. Assuming that the FTC did this well, it could be a solution to the problem of unfair mass arbitration imposed on consumers.

Unfortunately, this approach has practical political problems in that most of the impetus for policing mass arbitration today comes from state regulators, who have generally been more solicitous of consumer complaints than their federal counterparts.¹²⁴ The same arbitral infatuation that dominates the U.S. Supreme Court appears to have a hold on the federal government generally. For example, the most recent congressional forays into amendment of the FAA have been designed to strengthen the national arbitration regime rather than to make it more accountable.¹²⁵

Whatever the degree or quality of legislative and judicial activity, the judiciary undoubtedly will continue to play a vital role in policing mass

122. See Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326 (2007) ("the Supreme Court has shaped a Federal Arbitration Act that routinely trumps state laws dealing with arbitration and created a situations in which applications of state law are the exception"); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004).

Professor Brunet views *Southland Corp. v. Keating*, 465 U.S. 1 (1984), *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) as the cases providing the most expansive view of the scope of FAA preemption. Perhaps unsurprisingly, he finds all three weakly reasoned, overly formalist, and excessively simplified. See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-77 (1995) (taking broad view of what constitutes a contract evidencing a transaction in commerce for purposes of invoking the FAA). Conversely, however, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) provide that the parties may elect to apply state arbitration law to their disputes even if the FAA governs the initial question of arbitrability. See Brunet, *supra* at 333 ("*Volt* represents the high water mark" of Supreme Court receptiveness to state law in arbitrations involving interstate commerce). Accord Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 211 (2002).

123. See generally 15 U.S.C. §§ 41-58 (2000) (setting forth FTC authority).

124. See e.g., *Doctor's Assocs.*, 517 U.S. at 688 (Montana statute designed to protect party from imposition of arbitration without sufficient disclosure held preempted by FAA); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1124 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) (requiring greater disclosure of arbitration clauses preempted by FAA under Massachusetts regulations).

125. See, e.g., 9 U.S.C. § 16 (2000) (permitting appeal of orders refusing to stay litigation for arbitration but not for orders staying litigation or directing arbitration to proceed).

arbitration if the fairness imperative is to be met. The "orgy of statute making"¹²⁶ and the proliferation of administrative agencies in the twentieth century, combined with increased litigation, has demonstrated that lawmaking by the legislative and executive branches of government hardly eliminates the need for adjudication. Arguably, such efforts increase the judicial burden, at least in the short term, as new laws, regulations, and agency rulings must be reviewed, interpreted, and applied. In short, courts will be in the business of supervising mass arbitration even if the legislature and executive act aggressively in this realm.

In the absence of legislative or executive action, courts must be more active in developing criteria for policing mass arbitration agreements. In the absence of contrary direction from the other branches of government, this poses no serious problems of judicial legitimacy, although it may raise more difficult questions of preemption. Courts have policed contracts on grounds of illegality, public policy, and unconscionability (both procedural and substantive) for centuries.¹²⁷ In this realm, as in the other traditional common law domains of torts and property, courts have substantial authority as the default means of lawmaking.

Courts have also long policed organizational activities to ensure that they comply with prevailing law. As discussed above, mass arbitration is both contract interpretation and organizational oversight. Although an arbitration clause in an investor or consumer agreement is, of course, an aspect of a contract, mass use of standardized arbitration provisions is a system of privatized dispute resolution that, like any organizational activity, can arguably be regulated by the legal system, by the courts. If a business or trade organization were to adopt a uniform system of refusing to do business with price-cutters or racial minorities, the organization's activities would obviously be subject to legal challenge and judicial scrutiny. Similarly, a business or organization's creation and imposition of a mass arbitration regime for dispute resolution may be reviewed and adjudicated by the courts.

The degree of the FAA's preemptive reach remains to be addressed regarding state efforts to address normative fairness concerns surrounding mass arbitration. This question is a complex and close one

126. The memorable but perhaps unduly critical phrase, of course, originates in GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977). See also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that substantial increase in legislating during twentieth century justifies increased judicial role in updating outdated statutes through flexible application to situations not envisioned when legislation first enacted). Accord WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

127. See 2 E. ALAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* §§ 7.1-7.17 (3d ed. 2004).

in light of Supreme Court and other judicial precedent permitting a wide preemptive scope that has on occasion thwarted state efforts to protect consumers and small businesses.¹²⁸ Well-designed state legislation or agency efforts to ensure minimal fairness and quality in mass arbitration logically should not violate any reasonable preemptive reach of the FAA as long as specific state and federal provisions governing the conduct of arbitration do not clash.¹²⁹ Unfortunately, current Supreme Court precedent takes a broader, more formalist view of preemption that arguably precludes state regulation of any arbitration arising out of a transaction involving interstate commerce.¹³⁰

If the Court took a more enlightened view of FAA preemption, more respectful of the federalism the Court often espouses on other issues, an arbitration subject to the FAA could also be subject to RUAA requirements or this Article's proposals regarding the required impartiality of arbitrators, access to information, or preliminary relief. The FAA has no provisions directly conflicting with such provisions. However, the FAA provides for limited judicial review, which would be in direct conflict with any state legislation mandating the more extensive judicial review and fidelity to substantive law proposed in this Article.

Even under the Court's current broad view of preemption, if the arbitration agreement contained a specific choice of law clause incorporating the law of a state with RUAA-like legislation or other measures designed to protect consumers in arbitration, this would appear to avoid preemption and permit application of any state mandates regarding quality and fairness. In addition, state courts applying traditional contract law defenses of unconscionability, illegality, and public policy may be able to accomplish many of the suggestions set forth in this Article. Unconscionability defenses are applicable to all contracts, not only arbitration clauses. Consequently, a court's aggressive enforcement of unconscionability rules does not violate the FAA's edict that arbitration clauses be treated in the same manner as other contract provisions.

Nonetheless, the optimal means of implementing and operationalizing this Article's proposed fairness and quality protocols for mass arbitration would be through federal efforts in the form of an amended FAA, perhaps including statutory authorization of FTC regulation of

128. See e.g., *Doctor's Assocs.*, 517 U.S. at 681; *Sec. Indus. Ass'n*, 883 F.2d at 1114. See also Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996).

129. See Brunet, *supra* note 122 (urging essentially this approach in that FAA should only preempt state law or regulation that is an "obstacle" to the policy goals of the FAA).

130. See *supra* note 122.

mass arbitration—or all arbitration and non-litigation dispute resolution. The codification of mass arbitration fairness and quality protocols—subject to judicial enforcement—in an amended FAA would be the optimal means. Such a statutory revision need not be extensive and could leave to courts most of the task of specific definition and operationalization. All else being equal, avoiding a federal administrative solution is preferred because it prevents an anti-investor, anti-consumer, anti-employee President from preventing the FTC or any other federal agency from effectively regulating mass arbitration.

CONCLUSION

McMahon and its companion cases of the 1980s ushered in a new world of mass arbitration, creating a dramatically different landscape of arbitration. We have seen the development of new, mass arbitration quite distinct from the old, customized commercial and trade arbitration, which formed the initial basis for arbitration models. This wholesale privatization of major areas of dispute resolution demands improved attention to achieving minimum quality in fairness for this type of mass arbitration.

Mass arbitration has a substantial “dark” side. Its supporters have often attempted not only to avoid the delays and burdens of civil litigation but also to craft a privatized dispute resolution mechanism favorable to the vendor in disputes with consumers, debtors, and investors, as well as favorable results for employers in dispute with employees. Some arbitration proponents have gone beyond seeking streamlined dispute resolution freed of the inconsistencies of lay juries and instead have sought a mass arbitration environment unreasonably favorable to their own interests rather than the interests of sound dispute resolution.

Although this aspect of standardized mass arbitration may not have dampened investor or consumer enthusiasm for contributing to the national economy by entering into transactions subject to mass arbitration, it nonetheless raises substantial normative concerns. These concerns are sufficiently serious to justify imposing on mass arbitration minimum standards of procedural fairness and quality of substantive outcomes.

After some initial excessive enthusiasm for arbitration, fueled by a continuing reluctance to recognize the differences between mass and traditional arbitration, more sophisticated courts and commentators have argued for improved attention to arbitral quality and fairness. Progress in this area has been attained through RUAA, revised and updated

provider organization rules, due process protocols, and judicial review of arbitration agreements for unconscionability.

Despite progress, the deleterious aspects of mass arbitration remain sufficiently serious to warrant heightened policing by the legal system for the procedural and substantive fairness, and for the legal quality of mass arbitration conduct and outcomes. Legislatures, executive agencies, and courts—particularly at the federal level—have authority to regulate mass arbitration in this regard. In the absence of adequate initiatives by other governmental branches, however, courts should fulfill as best they can the task of mandating minimum quality in mass arbitration.