

# PROCESS PURITY AND INNOVATION: A RESPONSE TO PROFESSORS STEMPEL, COLE, AND DRAHOZAL

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## I. INTRODUCTION

Since its onset at the 1976 Pound Conference, the modern dispute resolution movement has been characterized by a spirit of innovation.<sup>1</sup> Different processes. Different applications. Different styles. Different combinations of the above, all in the service of “[f]itting the [f]orum to the [f]uss.”<sup>2</sup> This is a field in which the commitment to “think outside of the box” is more than a mantra. It is a way of being.

This dynamic raises the question of whether there is an outer boundary to this creativity. Shortly after the Pound Conference, often hailed as the beginning of the modern Alternative Dispute Resolution movement, Professor Lon Fuller argued that there is indeed such a limit, that there can be “danger” in mixing processes, and he warned of the need not to stretch dispute resolution processes too far beyond their essential capacities.<sup>3</sup>

In my view, the papers presented at this Symposium on “Rethinking the Federal Arbitration Act” by three distinguished scholars—Professors Jeffrey Stempel, Sarah Cole, and Chris Drahozal—point to the wisdom of Fuller’s admonition.<sup>4</sup> While they come from very different points of underlying political philosophy, Professors Stempel, Cole, and Drahozal collectively argue that

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<sup>1</sup> See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 677-790 (3d ed. 2005) (discussing “mixed processes, adaptations, and other innovations” in dispute resolution).

<sup>2</sup> Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOTIATION J.* 49 (1994).

<sup>3</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 396 (1978) [hereinafter Fuller, *Forms*]; see also Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 *WIS. L. REV.* 3, 23 (noting key distinctions between arbitration and mediation, and expressing skepticism about combining the procedures). For an excellent discussion of Fuller’s views on the various processes of dispute resolution, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 *OHIO ST. J. ON DISP. RESOL.* 1, 13-22 (2000).

<sup>4</sup> Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 *NEV. L.J.* 214 (2007); Christopher R. Drahozal, *Codifying Manifest Disregard*, 8

the Federal Arbitration Act (“FAA”) should be amended to permit a greater role for the courts in binding arbitration by easing the restrictions on finality and either requiring or permitting substantive judicial review of arbitration awards. Professor Stempel makes the broadest argument, contending that all arbitration awards should be subject to substantive judicial review similar to that of public trial courts. Professor Cole argues that substantive review should be permitted when the parties agree to it by contract,<sup>5</sup> which I call “contracted judicial arbitration.” Professor Drahozal takes a narrower approach, arguing that substantive review of arbitration awards should be available for arbitral awards that are in manifest disregard of the law, thus generally codifying a widely held common law view.

While all of the arguments they present are plausible and have their compelling points, they nonetheless miss the mark, and rather widely. In my view, the displacement of finality with substantive judicial review, if codified, will greatly undermine the arbitration process, its attractiveness as an alternative to public adjudication or negotiated settlement, and its utility as an aid to the judiciary as a forum for the expeditious resolution of disputes.<sup>6</sup> Rather than requiring or permitting substantive judicial review, in my view the FAA should maintain its current narrow grounds for substantive review and be amended to resolve a split in the lower courts, to make clear that parties cannot contract for substantive judicial review, and to reaffirm that the arbitration of disputes is to be based on the actual assent of the parties.

The question is important, arousing fire and passion in the arbitration community nearly as great as the ultimate lightning rod of mandatory arbitration. Moreover, the stakes have grown since these scholars raised it at this Symposium. Both the U.S. Supreme Court and the California Supreme Court have announced that they will decide the question raised by Professor Cole: whether parties can contract for substantive review of arbitration awards by the federal courts.<sup>7</sup> In both cases, the lower courts refused to enforce the judicial review provision.

Judicial review of contracted substantive review is long overdue. The question has fractured the lower state and federal courts, and parties are entitled to guidance with respect to the reach of their power to shape their arbitrations. However it is relatively tangential to our inquiry here because the task before us in this Symposium is whether and how the FAA should be amended by Congress. At least in the U.S. Supreme Court case, *Hall Street Associates v. Mattel Inc.*, the statute itself is the primary source of law, and as I discuss further below, the substantive review question is of such magnitude that it should be decided by Congress itself rather than relying on judicial gap-filling.

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NEV. L.J. 234 (2007); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007).

<sup>5</sup> Such review would be available as long as it does not impinge upon the institutional integrity of the courts. See *infra* notes 107-14 and accompanying text.

<sup>6</sup> For a historical and doctrinal assessment of the importance of finality to the arbitration process, see Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 133-77 (2002).

<sup>7</sup> *Hall Street Assocs., L.L.C v. Mattel, Inc.*, 196 F. App'x 476 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 2875 (2007); *Cable Connection, Inc. v. DIRECTV, Inc.*, 49 Cal. Rptr. 3d 187 (Ct. App. 2006), *cert. granted*, 149 P.3d 737 (Cal. 2006).

As I and others have long lamented, the FAA has already seen too much of that.<sup>8</sup> Indeed, the very opportunity here is to discuss how those judicial errors and excesses might be corrected in light of the eighty-plus years since the FAA was enacted, not to square the statute with the legal process nightmare that has been the U.S. Supreme Court's FAA jurisprudence for the last half century.<sup>9</sup> With an important new scholarly work dedicated to the task of identifying issues for a comprehensive revision of the FAA,<sup>10</sup> new legislation to amend the act proposed again in 2007,<sup>11</sup> and a Democratic Congress for the first time in a decade, there is perhaps reason to believe some momentum may actually develop.

In Part II of this Comment, I lay out a "process characteristic and value" approach to the legitimacy of innovation that can be applied generally to variations in dispute resolution processes. Using these process characteristics and values helps define dispute resolution processes so that consumers can more clearly distinguish among them and choose the process that they feel is most appropriate for their dispute. While fussing over labels for processes might seem a bit wooden and formalistic, labels can be important in dispute resolution, both for the legitimacy of the process as well as its legal and ethical consequences. For example, whether a meeting between two parties convened by a state court judge seeking to facilitate settlement is subject to California state mediation confidentiality protections depends upon whether the meeting is classified as a "settlement conference" or a "judicial mediation."<sup>12</sup> Similarly, whether an informal adjudicatory hearing is an "arbitration" for purposes of the Federal Arbitration Act's enforcement powers is another example.

I then apply this analysis to arbitration under the Federal Arbitration Act, and demonstrate how these process characteristics and values are embodied in the Federal Arbitration Act as a holistic, integrated statute intended and designed to preserve and support party choices to use arbitration to resolve commercial disputes. In Part III, I describe the proposed arbitration reforms by Professors Stempel, Cole, and Drahozal and then, in Part IV, demonstrate why

<sup>8</sup> See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333-39; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036-37 (1996) (contending mandatory arbitration agreements are the "yellow dog" contracts of the 1990s because of their potential to limit employment to those workers willing to waive their legal rights as a condition of employment). See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 172-73 (1992) (arguing that judicial policy on ADR is motivated by judicial self-interest in reducing caseloads).

<sup>9</sup> See *infra* Part IV.D. For a proposal to bring the FAA more into line with the case law, see Thomas E. Carbonneau, *The Story of Arbitration Law*, 2 J. AM. ARB. 299, 321-23 (2003).

<sup>10</sup> EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN H. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006) [hereinafter *ARBITRATION LAW IN AMERICA*].

<sup>11</sup> Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007) (barring predispute agreements to arbitrate employment, consumer, and franchisee claims and repealing the federal doctrine of separability).

<sup>12</sup> *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001). For a criticism, see Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 336, 367-78.

they frustrate rather than further the process characteristics and values of arbitration under the FAA, and why adjudicatory hearings conducted according to those proposals should not be considered “arbitrations” for purposes of the protections and supports of the FAA. Contracted substantive review presents additional complexities because of the importance of the freedom of contract, which is vital to arbitration but which I contend is also subject to constraint by the other process characteristics and values of arbitration under the FAA, as well as pragmatic concerns. Finally, I conclude by recommending that the bases for judicial review of arbitration awards be limited to those explicitly specified in section 10 of the original Act<sup>13</sup> and by urging Congress to make clear that arbitrations with expanded review provisions are not arbitrations for purposes of the protections and supports of the Federal Arbitration Act.<sup>14</sup> I also recommend that Congress amend the FAA to make clear that arbitration under the Act must be based on an actual agreement to arbitrate in order to ameliorate some of the underlying concerns that may in part be animating these proposals.

## II. LAYING THE GROUNDWORK: INNOVATION AND ARBITRATION

### A. Core Process Characteristics and Values: A General Approach

Innovation is a cherished tradition within dispute resolution. Indeed, the period after Frank E.A. Sander’s legendary Pound Conference speech<sup>15</sup> is often referred to as the period of experimentation, during which the pioneers of the field tried a number of different approaches to dispute resolution.<sup>16</sup> For example, courts tried several different approaches to promoting settlement, in addition to settlement conferences, such as early neutral evaluation and summary jury trials.<sup>17</sup> In the private sector, too, different techniques were fashioned in the service of settlement, such as the mini-trial and the combination of mediation and arbitration (“med-arb”).<sup>18</sup> Different approaches to mediation emerged, such as what has come to be known as evaluative mediation, facilitative mediation, and transformative mediation.<sup>19</sup> Arbitration, too, was adapted into different forms, such as baseball arbitration and high-low arbitration.<sup>20</sup>

<sup>13</sup> 9 U.S.C. § 10 (2000).

<sup>14</sup> Professor Schmitz first proposed this remedy for arbitrations with expanded review provisions. See Schmitz, *supra* note 6, at 178-202.

<sup>15</sup> Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

<sup>16</sup> See, e.g., STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 9 (5th ed. 2007) (describing how the focus of ADR statutes and commentary shifted from “experimentation to institutionalization”); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 243 (2002).

<sup>17</sup> See RISKIN ET AL., *supra* note 1, at 714-22.

<sup>18</sup> *Id.* at 762-77.

<sup>19</sup> See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (articulating transformative theory of mediation); James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

<sup>20</sup> See, e.g., CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 42-49 (2005); RISKIN ET AL., *supra* note 1, at 658.

This was, and continues to be, an exciting component of the dispute resolution field, with such processes as collaborative and cooperative law coming to the fore.<sup>21</sup> Yet it does not lend itself to clear, bright lines in terms of the distinctions between these processes. The difference between evaluative mediation and early neutral evaluation is fine indeed, and while it may be perceptible to the ultra-sophisticated few, it is easily confusing to consumers and often does not reflect what actually happens in practice.<sup>22</sup> More significantly perhaps, the legal and ethical treatment of a dispute resolution process varies depending upon the name or nature of the process. For example, the Uniform Mediation Act's confidentiality privilege applies only to proceedings that meet the statute's definition of mediation.<sup>23</sup>

This dynamic has also led to bitter conflict within these specialty areas over the right to claim the franchise, especially those that are more consensually oriented—a seemingly formalistic point, but important nonetheless, particularly to new or adaptive processes seeking legitimacy and the protections or obligations of formal law that might be available to the primary process. Facilitative mediators often contend evaluative mediation was not mediation at all, for example,<sup>24</sup> although the heat from that debate has abated in recent years. Similarly, classical ombudsmen often do not view organizational ombudsmen as meriting the title “ombudsman.” And both of them have problems with advocacy ombudsmen calling themselves “ombudsmen”!<sup>25</sup>

The result has been that the very innovative spirit that has led to the process flexibility and adaptation that has been vital to the expansion of the field has also led to confusion and acrimony that has created misunderstanding, dissipated energy, and spoiled professional relationships. Professor Fuller warned of this potential when he encouraged early thinkers about dispute resolution to recognize that each dispute resolution process has its own internal structure,

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<sup>21</sup> For a recent discussion, see David Hoffman, *Colliding Worlds in Dispute Resolution*, 2008 J. DISP. RESOL. (forthcoming) (describing such seemingly odd dispute resolution hybrids as adversarial collaboration, meditative litigation, and medicollab). See also John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007) (decriing tendency toward rules rather than norms for new ADR processes). For the seminal elaboration of collaborative lawyering, see PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001). For a scholarly treatment of ethical and other issues raised by collaborative law, see John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

<sup>22</sup> See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

<sup>23</sup> UNIF. MEDIATION ACT §§ 2(1)-(2), 4(a) (2001).

<sup>24</sup> See, e.g., Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST OF LITIG. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997).

<sup>25</sup> The relatively recent American Bar Association Standards for the Establishment and Operation of Ombuds Offices takes the bold step of explicitly recognizing all of these forms of ombuds, which is one reason they have been controversial within the ombuds field. See AM. BAR ASS'N, *STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES* (2004) [hereinafter ABA STANDARDS]. For a critique, see Kevin Jessar, *The Ombuds' Perspective: A Critical Analysis of the ABA 2004 Ombuds Standards*, DISP. RESOL. J., Aug.–Oct. 2005, at 56.

logic, and morality.<sup>26</sup> Failing to do so, he said, would lead to confusion, ill-fitting processes, and unsatisfactory results.<sup>27</sup>

Drawing on Fuller's prescient insight, or perhaps restating it to some degree, I would like to propose, at the risk of being somewhat formalistic, that at least some of the problem can be eased, if not resolved, by reference to the defining characteristics and process values of the dispute resolution process being adapted, and concomitantly, the clear labeling of adapted processes. That is to say, if a proposed adaptation of a dispute resolution process is so significant that the resulting process no longer substantially shares the core characteristics and values of the original process—or worse yet, undermines them—then it simply would not be appropriate to consider and call the derivative process by the name of the original process.<sup>28</sup>

On the other hand, if the proposed adaptation still substantially shares the core characteristics and values of the original process, then it would be appropriate to consider and call the new process by the name of the other, but perhaps with some distinguishing modifier to provide more information to consumers of the process. For example, it is appropriate, in my view, to consider and call evaluative mediation “mediation” because it shares the essential process values of mediation: a process of confidential dialogue between the parties, party self-determination as to result, and a helping rather than decisional role for the third party neutral. By the same analysis, it is much more difficult to consider an “advocacy ombudsman” an “ombudsman” because the advocacy ombudsman does not share one of the core characteristics and values of an ombudsman: neutrality.<sup>29</sup> The advocacy ombudsman's role is to advocate on behalf of a client or a particular class of clients, not neutrally facilitate process.<sup>30</sup> Perhaps the label “advocate” might be more suitable for that form of dispute resolution professional.

The approach I am suggesting is not absolute—that is to say, I am not contending that all process characteristics of the adapted process need to square precisely with all process characteristics of the initial process. Such a requirement would stifle rather than promote creativity. Rather, I think it is a matter of degree: The more the proposed adaptation departs from or undermines core process values, the less appropriate it is for the new process to carry the mantle of legitimacy, and related legal protections, enjoyed by the old. For this reason, public policy mediation in my view would still be entitled to be considered and called “mediation,” even though many public policy mediations deviate from mediation norms in that they often are not conducted confidentially or their results are made public. In my view, they are still “mediations” because they are structured in such a way as to preserve the other essential characteristics of

<sup>26</sup> See Fuller, *Forms*, *supra* note 3, at 356 (“Our task is to separate the tosh from the essential.”).

<sup>27</sup> See *id.* at 393-409.

<sup>28</sup> For another functional approach, see Schmitz, *supra* note 6, at 157-66.

<sup>29</sup> See INT'L OMBUDSMAN ASS'N, CODE OF ETHICS (2007) (“Neutrality and Impartiality. The Ombudsman, as a designated neutral, remains unaligned and impartial. The Ombudsman does not engage in any situation which could create a conflict of interest.”); ABA STANDARDS, *supra* note 25, § C(2) (“The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest.”).

<sup>30</sup> See ABA STANDARDS, *supra* note 25, § J.

the mediation process in terms of the dialogic nature of the process itself, the structure of the decision-making process, and the role of the third party neutral in facilitating consensus.

This approach, of course, calls initially for the identification of core process characteristics and values. Reasonable minds may differ on the goals or functioning of a dispute resolution process, but my idea of core characteristics and process values is one that should be capable of attracting more consensus, at least in terms of concept if not precise language.<sup>31</sup> In particular, I suggest that the core characteristics and values of a dispute resolution process can be identified and assessed by reference to at least ten different dimensions: level of formality, efficiency, the decision maker, standards for decision, form of decision, enforceability of decision, finality of decision, privacy, party autonomy, and civility.<sup>32</sup> In the next Section, I apply these dimensions to arbitration under the FAA to identify the “core process characteristics and values” of the arbitration process under the FAA.

### *B. The Core Process Characteristics and Values of Commercial Arbitration*

The analysis of FAA arbitration under these criteria reveals many reasons why disputants might elect to choose or reject arbitration as a means to resolve their disputes. Significantly, these characteristics and values often differ markedly from public adjudication, even though arbitration, like public trial, is an adjudicatory process in which a third party neutral decides the outcome of a dispute. It is in this very way that arbitration provides a meaningful and important alternative to trial for disputants who want binding and enforceable adjudication but without some of the obligations of public trial.

#### *1. Preliminary Considerations*

A few caveats are in order before proceeding with the analysis. First, even within the sphere of FAA arbitration, there is a wide range of practices that influence how these process dimensions function in any particular arbitration or industry-specific approach to arbitration. Moreover, the nature of arbitration under the FAA has evolved over time. In some contexts, such as securities<sup>33</sup> and complex commercial cases, arbitration has become highly formalized, with routine discovery and motion practice, the application of substantive legal rules, and written and reasoned awards.<sup>34</sup> Other contexts remain less formal, such as garden-variety consumer and employment claims. Second, parties are

<sup>31</sup> See, e.g., EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 3-5 (1997); GOLDBERG ET AL., *supra* note 16, at 4-5; RISKIN ET AL., *supra* note 1, at 13.

<sup>32</sup> The order here is intended to further analytic goals, not to establish any sense of priority or relative weight.

<sup>33</sup> For a discussion of the formalization, or “judicialization” of arbitration within the securities industry, see generally Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 *BROOK. L. REV.* 1459 (1996).

<sup>34</sup> See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 *TUL. L. REV.* 39, 52-61 (1999); 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, 334-42 (1996) (distinguishing between old and new arbitration).

generally free to structure their arbitration agreements as they see fit,<sup>35</sup> and those preferences can affect the level of formality and other process characteristics and values of arbitration; it is this freedom that in part has led to the innovation previously described. Finally, any potential realization of the virtues of arbitration necessarily depends on the parties themselves. Parties and counsel can be just as obstreperous in arbitration as in public adjudication, thus undermining the virtues of arbitration.<sup>36</sup>

It is therefore hazardous to generalize about the application of these criteria to FAA arbitration in general—and point to the wisdom of Professor Stipanowich's admonition in this Symposium to think discretely about arbitration processes under the FAA, as we should with other dispute resolution processes.<sup>37</sup> Still, there is benefit to a generalized understanding as well, both in terms of conceptualizing a “big picture” through which individual nuance can be identified and appreciated, and in providing at least something of a baseline for comparing arbitration under the FAA to other dispute resolution processes, such as public adjudication.

It is with these caveats in mind that I proceed to describe the application of these process dimensions in the FAA arbitration context. The order is in terms of logical sequencing, not in terms of importance, as the importance of any one of these considerations may be dominant in a particular disputant's decision to choose arbitration.

## 2. *The Process Characteristics and Values of Commercial Arbitration*

### a. *Level of Formality*

One of the most significant ways that arbitration differs from public trial is in the level of formality that attends the proceedings.<sup>38</sup> Public trial is a paradigmatically formal process, in which substantive and procedural rules are strictly observed. The process itself is generally governed by state or federal rules of civil procedure as well as local court rules. State or federal rules of evidence generally govern the admissibility of evidence within the process. Similarly, substantive law standards derived from statutes, constitutions, or the common law provide a basis for decision making, while notions of due process provide a pervasive norm for procedural standards.

When compared to public adjudication, arbitration is generally a more informal process.<sup>39</sup> Unless the parties agree otherwise, the rules of civil proce-

<sup>35</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

<sup>36</sup> *See, e.g., Sawtelle v. Waddell & Reed, Inc.*, 801 N.Y.S.2d 286 (App. Div. 2005) (dispute over the award of punitive damages in arbitration appealed twice, only to have the arbitral award reaffirmed). For a discussion, see Leonard Post, *Case Pits Courts v. Arbitration*, NAT'L L.J., Oct. 17, 2005, at 1.

<sup>37</sup> *See* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427 (2007).

<sup>38</sup> As Grant Gilmore famously observed, “The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.” Grant Gilmore, Editors' Introduction, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1044 (1975).

<sup>39</sup> It should be emphasized that sophisticated commercial arbitrations can be quite formal in their structure and operation.



dure and evidence generally do not apply, thus permitting arbitrators to consider hearsay and other evidence that may not be available in public adjudication. Although discovery is available, it typically is not used as much as in court proceedings.<sup>40</sup> Nor is extensive motion practice generally widespread in arbitration.<sup>41</sup> The limited review of arbitration awards by courts, discussed further below, discourages costly and time-consuming appeals. These and other differences arising from the informal nature of arbitration create the potential for saving time and money.<sup>42</sup>

*b. Efficiency (Time and Money)*

The potential for efficiency has been an important virtue of commercial arbitration throughout its Anglo-American history. Arbitration became formalized in the commercial context with the rise of the craftsmen's guilds and Court Merchant fairs of the twelfth and thirteenth centuries.<sup>43</sup> Efficiency was particularly important in these contexts because of the need of parties to get their dispute resolved and move on with their lives. The Court Merchant fairs, for example, involved itinerant merchants who traveled from town fair to town fair peddling their wares. Speed of resolution and finality of result, discussed further below, were particularly important to these traveling merchants because they were often in a community only for a short period of time.<sup>44</sup>

Today, the potential efficiency advantages of speedy resolution and lower costs continue to be among the more compelling reasons parties have for choosing arbitration. Simply put, arbitration can be faster and cheaper than the courts, in part because it averts the long waiting time for a trial in some jurisdictions, the large legal and expert witness fees generated by extensive pre-trial discovery and long, complex trials, and the delay to the implementation of an adjudicatory decision that can be caused by appeals.<sup>45</sup>

<sup>40</sup> See W. Michael Tupman, *Discovery and Evidence in U.S. Arbitration: The Prevailing Views*, ARB. J., Mar. 1989, at 27.

<sup>41</sup> See RISKIN ET AL., *supra* note 1, at 512-15.

<sup>42</sup> It also has been argued that informality can promote a perception of greater fairness and increase the satisfaction of those who participate in the proceedings. One study, for example, indicated that frustration and dissatisfaction result from constraints placed on witnesses' ability to tell their stories in their own ways and their inability to understand courts' explanations about why their narratives are unacceptable. William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 665-72 (1985).

<sup>43</sup> Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 133-34 (1934).

<sup>44</sup> The readily available literature makes clear that the Law Merchants handled disputes within the community of traveling merchants. See, e.g., one English scholar's assertion that before Lord Coke became Lord Chief Justice in 1609 "you will find the Law Merchant as a special law administered by special Courts for a special class of people." Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7, 9 (1909). See generally JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 71-83 (1918). Less clear, however, is whether they also handled customer complaints. Common sense suggests they may have in some instances as a practical matter, but that those efforts would have been merely incidental to their central role of resolving disputes among merchants.

<sup>45</sup> It is important to note, however, that these alleged advantages are potential rather than guaranteed, and will be fully realized only if the parties cooperate in using their freedom to

*c. The Decision Maker*

Like public trial, arbitration is an adjudicatory process in which the basic function of the third party neutral is to decide the dispute, an important distinction from the more facilitative function of a third party neutral in a consensual process. However, the decision maker in commercial arbitration is distinguished from the decision maker in public adjudication in other important respects. In public adjudication, parties are assigned a judge, for example, while in arbitration the parties select their own arbitrator. This distinction in the method of selecting the adjudicator has important consequences.

Most judges in courts of general jurisdiction have a general legal background and by virtue of many years of training and practice are highly skilled in legal analysis and the art of applying general rules of law to specific factual situations.<sup>46</sup> By contrast, arbitrators are “men of affairs,”<sup>47</sup> and are often selected because of their expertise and experience with respect to the subject matter of the dispute under submission, or because of other characteristics the parties desire in a decision maker, such as a particular educational or professional background, stature within a relevant community, or a reputation for good judgment

*d. Standard for Decision*

The rule of law commands that public courts use the law as the basis for decision making. Moreover, through the doctrine of stare decisis and the principle of precedent, courts are bound by superior judicial interpretations of the law in cases that are similar to the one before them. The failure to apply the law properly is probably the most common basis for the reversal of public judicial decisions.

By contrast, while many do, commercial arbitrators generally are not required to apply the law in rendering their decisions, absent specific instructions by the parties in their submission to arbitration.<sup>48</sup> They need not even be lawyers, although many are.<sup>49</sup> Rather, the arbitrator is empowered to decide the dispute on the basis of his or her best judgment, which can be predicated on other standards that might be appropriate under the circumstances, such as broad principles of equity and justice,<sup>50</sup> industry standards and practices,<sup>51</sup>

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pursue them. For a discussion of ways to expedite the arbitration process, see Robert S. Peckar, *Making Commercial Arbitration Faster and More Efficient*, *ARB. J.*, Dec. 1991, at 5.

<sup>46</sup> Administrative law judges and judges of special jurisdiction courts, such as the U.S. Tax Court, often have more specialized knowledge to bring to public adjudication.

<sup>47</sup> *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring) (gender-specific reference in original).

<sup>48</sup> For a meta-analysis of empirical support for the proposition that arbitration is “lawless,” see Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 *LOYOLA L.A. L. REV.* 187 (2006).

<sup>49</sup> Parties of course are free to instruct arbitrators to apply the law. Moreover, the National Arbitration Forum distinguishes itself in the brokerage services market by claiming that its arbitrators are “former judges and experienced attorneys who hear and decide our cases review the facts and render decisions based on known rules and substantive law.” See National Arbitration Forum, *Mission and Values*, <http://www.arb-forum.com/main.aspx?itemID=4&hideBar=False&navID=18&news=3> (last visited Nov. 26, 2007).

<sup>50</sup> See *Muldrow v. Norris*, 2 Cal. 74, 77 (1852).

community norms, or common sense.<sup>52</sup> While law can be a consideration in an arbitrator's judgment, and frequently is, the commercial arbitrator's decision is at best "rough justice."<sup>53</sup> Some critics of mandatory arbitration suggest it is this process characteristic and value that proponents seize upon, especially arbitration's insulation of the dispute from consideration by a jury.<sup>54</sup>

*e. Form of Decision*

Public court judges are obligated to issue written and reasoned judicial opinions that explain their significant decisions. This is a vital function in the public system of justice because it assures the accountability of public judges and educates the public about rule of law norms.<sup>55</sup> Written opinions compel judges to explain their reasoning, which helps to sharpen their thinking and to assure the decision is based on the proper law rather than other inappropriate or arbitrary factors, such as personal preference or bias. Written and reasoned opinions also help explain and legitimize the work of the court in the eyes of the parties and the public, thus supporting the rule of law that is essential to the exercise of democratic governance.

Commercial arbitrators, however, are generally not required to provide the reasoning for their decisions unless a written and reasoned decision is required by the parties in their submission to arbitration. Indeed, arbitrators historically have been discouraged from providing written and reasoned opinions because of the risk that such opinion might provide a basis for judicial review, thus undermining the goal of finality. In the last decade, though, arbitration service providers have enacted rules directing arbitrators to write opinions unless the parties otherwise agree.<sup>56</sup>

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<sup>51</sup> See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 127 (1992) (Diamond merchant arbitrators decided cases "on the basis of custom and usage, a little common sense, some Jewish law, and, last, common-law legal principles.").

<sup>52</sup> This authority has a rich pedigree. In the medieval Court Merchant Fairs, for example, arbitrators used "fair law," focusing on shared customs rather than formal law to decide disputes, in part because commercial law had not yet developed. See COHEN, *supra* note 44, at 136.

<sup>53</sup> See Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 111 (2002); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 239 (1997); 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, 829 (2004).

<sup>54</sup> See, e.g., David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 563 (2004); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003).

<sup>55</sup> For a discussion, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1082-91 (2000), and sources cited therein.

<sup>56</sup> See, e.g., AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES R. 42(b) (2007) [hereinafter AAA RULES] ("The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."); International Institute for Conflict Prevention and Resolution, Rules for Non-Administered Arbitration R. 14.2 (2005) ("All awards shall be in writing and shall state the reasoning on which the award rests unless

*f. Enforceability of Decision*

Like those of public judges, the decisions of commercial arbitrators are fully enforceable by the public courts when the parties agree that the award is to be binding, as contemplated by the FAA. While straightforward, the point is important because it is the enforceability of the agreement at law that provides parties confidence in the arbitration process and builds efficiency into the process. Without enforceability, arbitrators would only be able to issue what in effect would be advisory opinions. To be sure, this can be beneficial in moving the parties toward settlement, and may be a reason some parties may choose to opt for non-binding arbitration.<sup>57</sup> But if the parties want their dispute adjudicated rather than settled, then enforceability is crucial because many parties can reasonably be expected simply to ignore an adverse award if it is not binding.

*g. Finality*

Finality is a defining difference between commercial arbitration and public adjudication, a structural characteristic that makes other process characteristics and values possible and distinguishes arbitration from other dispute resolution processes. Public civil adjudication provides for an appellate process for the review of trial level rulings. The purpose of this review is to assure the trial judge's proper and accurate application of the law to the facts, not to second-guess judges or juries on factual determinations. Conversely, the decisions of arbitrators are generally not subject to substantive review for correctness or accuracy. Indeed, the notion of substantive "correctness" or "accuracy" historically has had little place in arbitration precisely because arbitration calls for the exercise of worldly judgment that is informed by a variety of considerations that may not lend themselves to an objective notion of correctness or accuracy,<sup>58</sup> such as knowledge of economic considerations in the securities industry or professional standards and practices in the construction industry. Federal and state courts alike have been consistent in their support of the finality of arbitration, even refusing to disturb arbitration awards that are erroneous on their face.<sup>59</sup> This may seem like "rough justice," but as the U.S. Supreme Court has repeatedly noted, "a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"<sup>60</sup>

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the parties agree otherwise."); JAMS, Comprehensive Arbitration Rules and Procedures R. 24(h) (2007) ("Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.").

<sup>57</sup> Arbitrations that are conducted under the authority of state and federal court programs are generally non-binding because of constitutional and other legal concerns. See ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 4-5, 7 (1996).

<sup>58</sup> Even courts can go only so far in assuring accuracy and correctness of judicial determinations. As Justice Jackson once famously said of the Supreme Court itself, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>59</sup> *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992) (and sources cited therein).

<sup>60</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

#### *h. Privacy*

Unlike a public adjudication that is conducted in public sessions, the commercial arbitration hearing is typically conducted in private and on private property, allowing the parties to have some control over who has access to the proceedings and the arbitrator's award.<sup>61</sup> Parties who believe that public access to the hearing or decision might result in competitive or other disadvantages may well consider arbitration's relative privacy one of its significant benefits.

#### *i. Party Autonomy*

Many of the foregoing potential advantages result from the autonomy parties gain when they decide to engage in private ordering and arbitrate their disputes rather than go to court for public ordering.<sup>62</sup> As we have seen, when parties arbitrate, they have power to decide for themselves many substantive and procedural issues over which they would have no control if they used the public court system. The power to choose the neutral decision maker, for example, is an important aspect of party autonomy. The parties also may, within limits, select the substantive standards that govern the arbitrator's decision and the procedure for processing the dispute. Party autonomy is supported by the limited court review of arbitration awards.

#### *j. Civility*

It is no secret that public adjudication is often not for the faint-hearted. It is an adversarial process in which parties frequently engage in deceptive, exploitive, "scorched Earth" tactics in pursuit of the edge that will bring them a favorable settlement or a victory in the form of a favorable decision by the trier of fact based on applicable law.<sup>63</sup> Courts frequently have to admonish counsel

<sup>61</sup> Trespass law would provide an adequate basis for controlling access to the arbitration. The ability of parties to prevent the discoverability and admissibility of communications made within an arbitration is much more constrained. See *United States v. Panhandle E. Corp.*, 118 F.R.D. 346 (D. Del. 1988), *aff'd*, 868 F.2d 1363 (3d Cir. 1989). For a general discussion, see Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

<sup>62</sup> Professor Ware contends that party autonomy is the defining, most important of the process characteristics and values, and that many of the other values I have described as values of the arbitration process are, in fact, values of the people who choose the arbitration process, not the process itself. See *ARBITRATION LAW IN AMERICA*, *supra* note 10, at 339. I generally agree that autonomy is of seminal importance, often providing a rationale for other process values. See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 285-87 (2004).

<sup>63</sup> For general discussions of scorched Earth litigation, see, e.g., ABA COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 3 (1986) (discussing "scorched Earth" civil litigation); Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH L. REV. 811, 812-13 (1998) (noting the "commonplace" scorched Earth tactics in some fields of civil litigation); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (discussing melodramatic performances by trial lawyers). For a case study, see Roger C. Cramton, *Lawyer Conduct in the "Tobacco Wars,"* 51 DEPAUL L. REV. 435, 435 (2001) (discussing how tobacco company lawyers engaged in "strategic and abusive litigation conduct designed to delay trials, obstruct discovery of relevant documents,

in order to preserve a sense of decorum about the proceedings, and sometimes even must resort to their sanction powers to heel the overly zealous.<sup>64</sup>

Commercial arbitrations, on the other hand, are often more civil. While the reasons for this civility have not been given much consideration, at least two possibilities may be supposed, both of which arise out of the previously discussed virtues. One possibility is that civility is a function of the informality of the proceedings. Unlike courts, in which parties struggle mightily over the inclusion or exclusion of evidence, arbitration operates under a general rule of free admissibility of evidence. As a general matter, tendered evidence will be received and considered “for what it is worth.”<sup>65</sup> As a result, there may be a somewhat diminished need for the kind of gamesmanship over evidence that is often seen in public adjudication. A second possibility may lie in the different standards of decision available to courts and arbitrators. In public adjudication, courts are obligated to decide according to the application of the law to the facts, regardless of the impressions the judge may have of counsel or the case. Arbitrators, however, are not bound by legal rules and instead have broad discretion to decide the case as they see fit. One can readily see how the fact of this discretion, bolstered by the norm of finality, could have a tempering effect on the nature of the tactics, discouraging the use of more confrontational tactics for fear of arousing the anger of the decision maker.

### 3. *Choosing Arbitration*

All of these process characteristics and values are mutually reinforcing and provide reasons why parties may choose to arbitrate their commercial disputes rather than have them decided by a court of law if the parties want to have their dispute decided by adjudication. As such, the choice of arbitration represents a trade-off in process characteristics and values, the determination that in a given case one or more of the characteristics and values of arbitration

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and run up the costs of the plaintiffs’ lawyers who finance these cases”). For a discussion of civility in arbitration, see Louis L.C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, DISP. RESOL. J., May-July 2006, at 15, 16. (“Arbitrators can set the tone for the arbitration by stating that they expect civility and cooperation from the parties and their attorneys.”); Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 55 (2006) (“[I]n arbitration, the hyper-aggressive advocate is less effective than the advocate who is civil.”). To be sure, attorneys in arbitration can be just as contentious as in litigation. For a discussion of this problem in the securities industry, see Robert S. Clemente & Karen Kuper-Smith, *Manners—The Return of Emily Post*, in SECURITIES ARBITRATION 2001: HOW DO I DO IT? HOW DO I DO IT BETTER? 35 (PLI Corp. Law & Practice Course, Handbook Series No. B0-0158, 2001), WL 1264 PLI/Corp 35.

<sup>64</sup> FED. R. CIV. P. 11, and related state laws, is one such tool. Courts also claim inherent power to sanction attorneys if necessary to control their dockets, *see, e.g.*, *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (*sua sponte* dismissal for want of prosecution), and to supervise the members of the bar, *see, e.g.*, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (attorney’s fees assessed against counsel for bad faith failure to obey discovery orders).

<sup>65</sup> *See* FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 450 (Martin M. Volz & Edward P. Coggin eds., 5th ed. 1997); *see also* AAA RULES, *supra* note 56, at R. 31(a); *Survey Shows Arbitrators Agree on Thought and Practice of Work*, Gov’t Empl. Rel. Rep. (BNA), Dec. 10, 1984, at 2272 (A survey demonstrated that “the most experienced and the busiest arbitrators have a tendency to admit disputed material into evidence ‘for what it is worth.’”).

are more suitable than the characteristics and values of public adjudication. Crucially, in enacting the FAA, Congress made the determination that society has a strong interest in providing the option of choosing binding arbitration as a judicially enforceable means of resolving disputes,<sup>66</sup> and in the next Section, I demonstrate how the FAA conceived of arbitration in terms of these process characteristics and values.

C. *The Embodiment of Process Characteristics and Values in the FAA*

The primary purpose of the FAA was narrow: to repeal the centuries-old “ouster” or “revocability” doctrine,<sup>67</sup> under which both English and American courts refused to enforce commercial agreements to arbitrate, and to compel the federal courts to support the institution of arbitration according to the process characteristics and values described above.<sup>68</sup>

Space does not permit comprehensive analysis, but even a brief overview of the FAA demonstrates how the statute serves to fulfill this narrow purpose by reinforcing commercial arbitration’s process characteristics and values in a sophisticated, integrated statutory scheme. Section 2, the heart of the act, repeals the ouster doctrine and provides that agreements to arbitrate are enforceable when they are contractually valid.<sup>69</sup> Sections 3<sup>70</sup> and 4<sup>71</sup> require

<sup>66</sup> See, e.g., *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (Because the FAA establishes strong policy favoring arbitration, as a “matter of federal law, any doubts . . . should be resolved in favor of arbitration . . . .”); see also *Perry v. Thomas*, 482 U.S. 483, 486, 490-91 (1987) (Disputes over commissions on securities sales were arbitrable under a contract that provided for arbitration, even though the California Labor Code mandated court litigation of such wage disputes, “despite the existence of an agreement to arbitrate.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 n.10 (1985) (antitrust claims arbitrable, notwithstanding Puerto Rican law requiring judicial resolution).

<sup>67</sup> MACNEIL, *supra* note 8, at 28-30. But see Brunet, *supra* note 34, at 79-80 (arguing that the overriding purpose of the FAA was to advance party intent).

<sup>68</sup> While the courts historically refused to enforce the agreement to arbitrate specifically, they were willing to enforce an arbitration award issued pursuant to an agreement to arbitrate. For a discussion, see Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 598-602 (1997).

<sup>69</sup> 9 U.S.C. § 2 (2000) provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

<sup>70</sup> Section 3 applies to cases that have been filed in court, providing:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

*Id.* § 3.

<sup>71</sup> Section 4 provides, in relevant part: “The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is

the court to send a case to arbitration when it finds that it is subject to a valid agreement to arbitrate. This supports the parties' decision to arbitrate the dispute rather than having it heard by a trial court by affirmatively divesting the court of jurisdiction to decide the merits of the dispute.<sup>72</sup> Section 5 further reaffirms that choice by assuring that the parties' chosen method of selecting the arbitrator will be followed, but permitting the court to appoint an arbitrator(s) if the parties cannot agree on a selection to prevent circumvention of the initial agreement to arbitrate.<sup>73</sup> Similarly, section 7 requires the court to back up efforts by arbitrators to summon witnesses and documents through the availability of the judicial power to compel.<sup>74</sup> Section 9 maintains the enforceability of the arbitrator's award by requiring the court to confirm the award if asked within a year of the decision,<sup>75</sup> while sections 10<sup>76</sup> and 11<sup>77</sup> guarantee the

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not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4.

<sup>72</sup> See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 66-70 (4th ed. 2007).

<sup>73</sup> Section 5 provides, in relevant part:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein . . . .

9 U.S.C. § 5.

<sup>74</sup> Section 7 provides, in relevant part:

[A]rbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance . . . .

*Id.* § 7.

<sup>75</sup> Section 9 provides, in relevant part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

*Id.* § 9.

<sup>76</sup> Section 10(a) provides that an award can be vacated only when "procured by corruption, fraud, or undue means," when there was "evident partiality or corruption in the arbitrators," where the arbitrators were "guilty of misconduct" in the conduct of the hearing, or "exceeded their powers" under the submission to arbitration. *Id.* § 10.

<sup>77</sup> Section 11 permits a court to correct an arbitral award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award," where the arbitrator issued an award "upon a matter not submitted to them," and where the award is "imperfect in matter of form not affecting the merits of the controversy." *Id.* § 11.



finality of the arbitrator's decision by limiting the grounds for review to procedural error and permitting arbitrators to correct minor errors in the award without having to re-open the decision.

#### D. *The Supreme Court's Interpretation of the FAA*

Remarkably, the Federal Arbitration Act has not undergone a major revision, or seen a major amendment, since it was enacted in 1925. It has, however, been heavily litigated.

Again, space does not permit a comprehensive recounting, but the U.S. Supreme Court's expansive view of the statute has been widely acknowledged and frequently criticized.<sup>78</sup> One of the chief veins of criticism has been that the Court has abandoned the voluntariness in the agreement to arbitrate that the statute assumed and instead has permitted the unilateral imposition of arbitration in contracts of adhesion.<sup>79</sup> In so doing, it has expanded the scope of the statute beyond its original business-to-business intent to include the arbitration of statutory claims, such as job discrimination<sup>80</sup> and consumer claims.<sup>81</sup> It has also given the statute nearly unprecedented preemptive power, holding that the act evidences a strong federal policy favoring arbitration,<sup>82</sup> applies in state courts,<sup>83</sup> preempts hostile state law,<sup>84</sup> and applies to transactions as broadly as the federal Commerce Clause permits.<sup>85</sup> The Court has even held that arbitration clauses are valid in contracts that may otherwise be invalid because of

<sup>78</sup> See, e.g., Carrington & Haagen, *supra* note 8; Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOUSTON LAB. L.J. 1 (1996); Cliff Palefsky, *The Civil Rights Struggle Against Mandatory Arbitration—From “Separate But Equal” to “Just Another Forum,”* in ARBITRATION OF EMPLOYMENT DISPUTES 534 (2002); Reuben, *supra* note 62, at 303-07; 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; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Van Wezel Stone, *supra* note 8.

<sup>79</sup> See *supra* note 78; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act claim).

<sup>80</sup> *Gilmer*, 500 U.S. 20.

<sup>81</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (mobile home financing); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (termite extermination services); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477 (1989) (claims by securities investors); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (same).

<sup>82</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (Because FAA establishes strong policy favoring arbitration, “as a matter of federal law, any doubts . . . should be resolved in favor of arbitration.”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05 (1967) (federal law of arbitration is substantive law for *Erie* purposes).

<sup>83</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempts any state law restricting arbitrability).

<sup>84</sup> *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996) (FAA preempts Montana statute that conditioned enforceability of arbitration clause on compliance with special notice requirements).

<sup>85</sup> *Dobson*, 513 U.S. at 273-77 (giving term “commerce” in FAA its broadest possible construction).

fraud or other contract formation defenses,<sup>86</sup> or because they violate public policy.<sup>87</sup>

As a result of this extraordinary judicial support, the use of FAA arbitration has expanded dramatically in the last two decades. While specific numbers are hard to come by, arbitration provisions have become common for employment, consumer, financial services, health care, online retail service, and other disputes. The securities industry is an example of an entire economic sphere that has become dominated by arbitration; virtually all investor-broker and employment disputes are subject to arbitration because of provisions in standard form employment and retainer agreements. Arbitration provisions in standard form agreements have become commonplace; indeed, one study found that they were embedded in fully one-third of all standard-form agreements.<sup>88</sup>

The Supreme Court's jurisprudence has been controversial and often ideologically driven, a contextual factor that is significant in the movement toward substantive legal review. To help resist the sirens of ideology, it is helpful to view the case law in this area through the lens of legal process theory, which is specifically aimed at avoiding such ideology. This approach to law, prevalent in the 1950s and 1960s, generally contended that the legitimacy of the law should be measured by the process by which it was created rather than its substantive results. While its influence has waned in the shadow of other jurisprudential movements, such as law and economics and behavioral psychology, many of its main tenets still border on conventional wisdom. For example, it was legal process theorists such as Herbert Wechsler who argued that legal decisions should be decided by neutral principles rather than by political considerations or the personal preferences of the judges.<sup>89</sup> Similarly, judicial restraint rather than activism was an important value of the legal process school. Alexander Bickel wrote of "the least dangerous branch," envisioning a court that rarely exercised its constitutional power, thus preserving its institutional capital as a "passive virtue."<sup>90</sup> Rather than activism in imposing their value preferences, the legal process theorists generally held that the proper role of the court was to defer to the democratically elected political branches on questions of policy, especially the legislature.

Judged by this standard, the Supreme Court's FAA jurisprudence is a legal process nightmare, as by judicial fiat it has converted the relatively innocuous FAA statute into a sweeping barrier to access to the courts and a bludgeon of

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<sup>86</sup> *Prima Paint*, 388 U.S. at 402-04 (where contract contains arbitration clause, court may consider only defenses relating to the arbitration provision; defenses addressed to the entire contract decided by arbitrator).

<sup>87</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 (2006) (upholding arbitration provision in contract that would violate state usury laws).

<sup>88</sup> See Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 *LAW & CONTEMP. PROBS.* 55, 62-64 (2004).

<sup>89</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 7-9 (1959).

<sup>90</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40, 58-64 (1961).

federal power.<sup>91</sup> Rather than interpreting the FAA narrowly as a procedural rule for federal courts, the court has inflated it into a substantive rule that applies in federal and state courts,<sup>92</sup> trumping any arguably hostile state law,<sup>93</sup> and depriving states of the ability to regulate in an area traditionally reserved for the states: the law of contracts.<sup>94</sup> In so doing, it has given non-lawyers the power to decide the legal validity of contracts containing arbitration provisions and, fantastically, has held that the arbitration clause in a contract is enforceable even if the contract itself is not.<sup>95</sup> And it has held that hard-fought statutory civil rights, such as race and gender discrimination, can be unilaterally compelled into arbitration—extending the act far beyond its business-to-business origins.

It is against this background that the proposals by Professors Stempel, Cole, and Drahozal must be understood.

### III. DISPLACING FINALITY WITH SUBSTANTIVE REVIEW: THE PROPOSALS BY PROFESSORS STEMPEL, COLE, AND DRAHOZAL

The proposals by Professors Stempel, Cole, and Drahozal essentially respond to the Court's jurisprudence and the ensuing evolution of commercial arbitration practice over the last thirty years—the era of what Professor Stempel calls “mass production arbitration.” While they clearly come from different points on the continuum of political philosophy, they have in common a broader, sometimes much broader, role for courts in the arbitration process. In varying degrees, each of them would diminish or eliminate the finality element of arbitration and allow for substantive judicial review of arbitration awards—either because it is necessary to protect consumers in an era of mandatory arbitration, because the parties want it, or because the courts must do so to preserve their own integrity and that of the civil justice system. After briefly describing each of these proposals, I will address some of the troubling issues they raise.

#### A. Professor Stempel: A Classic Liberal Approach

Professor Stempel's proposal is clearly the most far reaching of the three proposals. His approach is classically liberal, with a deep-seated concern for

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<sup>91</sup> For general discussion, see MACNEIL, *supra* note 8; Carrington & Haagen, *supra* note 8; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006).

<sup>92</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempts state laws restricting arbitrability); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05 (1967) (FAA is substantive law for *Erie* purposes).

<sup>93</sup> *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996) (FAA preempts Montana statute that conditioned enforceability of arbitration clause on compliance with special notice requirements).

<sup>94</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (federal rule on separability trumps state law of contract formation).

<sup>95</sup> *Buckeye*, 546 U.S. at 445-46 (federal rule on separability trumps state law of contract formation); *Prima Paint*, 388 U.S. at 402 (articulating “separability” doctrine).

the fairness of the “mass [produced]” arbitration process.<sup>96</sup> He concedes not the correctness, but the fact of mandatory arbitration, and exhorts scholars, judges, and others interested in FAA arbitration to shift their focus toward ensuring the quality and fairness of arbitration.<sup>97</sup> For Stempel, this includes issues of consumer protection, vindication of public policy, enforcement of the law, fairness, neutrality, and competence.<sup>98</sup>

The quality issues he raises are not insignificant. Stempel suggests that “mass produced” arbitrations—basically consumer and employment arbitrations pursuant to mandatory arbitration clauses—are conducted by less experienced single arbitrators rather than a trio of “grand old men” (and today, women) of the profession.<sup>99</sup> At a minimum, this can lead to incompetent or inconsistent decisions, he says, if not outright bias because of the economic incentive arbitrators have to rule in favor of repeat players who can provide more business.<sup>100</sup> Worse yet, Stempel says society cannot count on providers and the marketplace to correct this problem because the incentives of providers go the other way—toward favoring the businesses because providers want to be drafted into their mandatory arbitration clauses.<sup>101</sup>

For Stempel, this problem is compounded by the potential for procedural abuse. The lack of discovery in arbitration already favors the company in employment and consumer cases. But Stempel notes that many institutional players go farther still in drafting one-way arbitration provisions that, among other things, limit remedies, impose costs and fees on the consumer or employee, restrict the availability of counsel, shift fees to the prevailing party, and restrict class treatment.<sup>102</sup> Any fair system of arbitration would need to curtail the potential for this kind of abuse, Stempel insists.

Stempel proposes a three-part solution to this problem. First, license arbitration service providers who broker “mass produced” arbitrations.<sup>103</sup> Second, amend the FAA to guarantee the scope of remedies available to parties in arbitration.<sup>104</sup> Finally, eliminate deferential substantive review for arbitral awards in “manifest disregard of the law” and institute a system of judicial review that parallels that of trial courts: “clearly erroneous” for questions of fact, “abuse of discretion” for the conduct of the proceeding, and “de novo” review for questions of pure law.<sup>105</sup>

#### B. *Professor Cole: A More Libertarian Approach*

Where Stempel makes a classic liberal argument for greater judicial review—to protect the rights of participants, especially low-power partici-

<sup>96</sup> Stempel, *supra* note 4, at 251. For a discussion of liberal political theory, generally aimed at fostering equality among people, see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 53-102 (2d ed. 2002).

<sup>97</sup> Stempel, *supra* note 4, at 270.

<sup>98</sup> *Id.* at 258-59.

<sup>99</sup> *Id.* at 258.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 254-57.

<sup>103</sup> *Id.* at 259.

<sup>104</sup> *Id.* at 264.

<sup>105</sup> *Id.* at 267.

pants—Professor Cole takes a more libertarian approach.<sup>106</sup> She argues that parties should be permitted to contract for greater judicial review than the FAA currently permits as a matter of “freedom of contract,”<sup>107</sup> as long as the parties’ proposed alteration of the standard of review does not threaten the “institutional integrity of the courts.”<sup>108</sup>

Professor Cole predicates her argument on the belief, shared by at least one federal appeals court<sup>109</sup> and some scholars,<sup>110</sup> that certain provisions of the FAA are default rules rather than mandatory rules.<sup>111</sup> In particular, Cole says the FAA’s key judicial review provision, section 10(a), should be viewed as a default provision because such an interpretation better serves the “social policy objectives” of the FAA since “default rules better preserve the concept of freedom of contract by allowing parties to opt out of them in favor of a regime they prefer.”<sup>112</sup> Under this view, parties would not need to comply with a default rule if they agree to deal with the substantive issue it addresses in another way by contract.

Professor Cole contends the courts should construe the current act as permitting such a construction on what she calls a “standard textualist” interpretation of the statute. The drafters, she notes, used the term “may” when they state in section 10(a) that a court “*may* make an order vacating the award upon the application of any party.”<sup>113</sup> Cole says this discretionary language indicates that the section as a whole is a permissive, or default, rule rather than a mandatory rule. She does, however, acknowledge that such an interpretation may be based more on contemporary policies and practices rather than thin legislative history of the FAA, which indicates that the drafters of section 10 were probably just codifying the law at the time: that judicial review in arbitration should be limited to reversal on grounds of procedural irregularity—probably, she contends, rightly I think, because “the drafters simply did not

<sup>106</sup> For a general discussion of libertarian political theory, which generally opposes governmental interference with the market and private rights, see KYMLICKA, *supra* note 96, at 103-66.

<sup>107</sup> Cole, *supra* note 4, at 233.

<sup>108</sup> *Id.* at 214. Other commentators supporting this view include Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151 (2002); and Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157 (2003). For examples of critiques, see Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509 (2002). For a general discussion of the issues, see Christopher Drahozal, *Contracting Around RUA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419 (2003).

<sup>109</sup> See, e.g., *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995).

<sup>110</sup> See Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in *ARBITRATION LAW IN AMERICA*, *supra* note 10, at 63, 79; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

<sup>111</sup> Cole, *supra* note 4, at 222-29.

<sup>112</sup> *Id.* at 223.

<sup>113</sup> *Id.* at 224 (emphasis added).

contemplate that parties would ever be interested in expanding judicial review of arbitration awards.”<sup>114</sup>

*C. Professor Drahozal: An Institutional Approach*

Professor Drahozal takes a narrower view than either Professors Stempel or Cole, seeking only to codify the non-statutory ground of “manifest disregard,” and thus permit the vacatur of arbitration awards that are in manifest disregard of the existing law for institutional reasons. He defines manifest disregard as the “intentional disregard of a well-established mandatory (not default) rule.”<sup>115</sup>

For Drahozal, adding manifest disregard to the short list of statutory grounds for vacatur under section 10(a) is necessary to “ensure the integrity of the judicial process,”<sup>116</sup> not to ensure compliance with mandatory legal rules. Professor Drahozal fears that without manifest disregard review, courts would be in the position of having to confirm awards that on their face “openly refuse[ ] to follow established law.”<sup>117</sup> This would undermine the legitimacy of the judicial system and “could result in a political backlash against the arbitration process,” he contends.<sup>118</sup>

Professor Drahozal acknowledges the possibility of abuse of the manifest disregard standard, and further proposes safeguards to reduce the likelihood of excessive challenges to arbitration awards. One would require the loser of a manifest disregard appeal to pay the winner’s attorneys fees or some other sanction.<sup>119</sup> The other would exempt non-American parties from the rule to not discourage non-American parties from arbitrating in the United States.<sup>120</sup> A third would be an evidentiary constraint, precluding the courts from considering the arbitral record as a whole.<sup>121</sup>

IV. ON SECOND THOUGHT, LET’S NOT: SOME PROBLEMS  
WITH THESE PROPOSALS

These proposals to eliminate finality in favor of substantive judicial review have profound implications for the future of arbitration. Space prohibits a detailed analysis of each component of all three proposals, worthy as that would be. Here in Part III, however, I will address each of these proposals by reference to a few key issues that their arguments and proposals respectively raise: the distortion of arbitration process and characteristics that would result from the enhanced judicial review that Professors Stempel and Cole seek, the feasibility problems in Professor Drahozal’s proposal to codify the “manifest disregard” standard, and finally the ghost of mandatory arbitration that haunts all three proposals.

<sup>114</sup> *Id.* at 226-27.

<sup>115</sup> Drahozal, *supra* note 4, at 247.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 248.

<sup>120</sup> *Id.* at 249.

<sup>121</sup> *Id.* at 248 n.104.

A. *Distorting the Process Characteristics and Values of Commercial Arbitration*

Finality is one of the core process characteristics and values of arbitration under the FAA, and displacing it with substantive judicial review—whether on Stempel’s comprehensive basis or Cole’s contracted basis—would have distortive consequences that would reverberate throughout the rest of commercial arbitration’s process characteristics and values.

1. *Efficiency*

As experience in the public adjudication system itself makes clear, if you give a losing litigant in adjudication an opportunity to appeal, the litigant will often take advantage of it.<sup>122</sup> If required by Congress, as Professor Stempel suggests, appeals of arbitration awards would become routine, and arbitration would become just another step in the costly litigation process. If actually encouraged by congressional authorization to include substantive review provisions, as Professor Cole suggests, many parties—particularly sophisticated users with bargaining power—can reasonably be expected to include judicial review provisions just to preserve the option of appealing an adverse decision; indeed, this may be the real motive behind party interest in contracted judicial review to begin with.<sup>123</sup> Either proposal would emasculate the efficiency of arbitration for both the parties and the courts.

From the perspective of the parties, the exhaustion of appeals can take months, even years, to complete, during which time the disposition of the legal matter at issue is essentially in limbo. Costs, too, can be expected to increase significantly because a reviewing court will need a transcribed copy of the arbitration proceedings, and attorneys will need to be retained to research, write, file, and argue the appeals.

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<sup>122</sup> Empirical researchers looking at federal courts, for example, have found a significant level of appeals, although there is significant variation in the assessment of the federal rate depending upon the data set and other research parameters. Cornell Law School empiricist Theodore Eisenberg found a federal appeal rate of 10.9% for all federal civil cases filed between 1987 and 1996. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 663, 664 tbl.1 (2004). Other researchers have found lower rates. See, e.g., Carol Krafka et al., *Stalking the Increase in the Rate of Federal Civil Appeals*, 18 JUST. SYS. J. 233, 244 (1996) (“[T]he relationship between appeals and district court terminations held steady through the years, with approximately 8.6 appeals filed for every 100 district terminations.”). Others have said it is higher, approximately 13%, see Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 555 (2006), while others place it in the 10.3% to 18.6% range, when high-appeal cases, such as prisoner and federal civil rights appeals, are factored into the analysis. See Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1609 n.38 (2000). One can reasonably expect results that are not too dissimilar for state courts.

<sup>123</sup> It is unclear just how many parties in fact seek to contract for judicial review. Cole indicates that there is significant and growing interest, and that may be true when comparing the current year to a decade ago. However, I am skeptical that the number of arbitration agreements containing judicial review clauses is significant when compared with all arbitrations in the current year, given that finality is one of the reasons why parties might seek to choose arbitration to resolve the dispute. At bottom, this is an empirical question, and one well worth pursuing.

From the perspective of the courts, it is hard to imagine a move more detrimental to judicial efficiency. The introduction of substantive judicial review of arbitration awards opens the courthouse doors to an entire class of cases not currently eligible for consideration by the federal courts, and a relatively large one at that. What's more, those doors are not opened once but twice, at the trial level and then at the appellate levels. While records are not kept on the number of arbitrations conducted every year, and providers jealously guard such information as proprietary, it seems reasonable to assume the total number of cases arbitrated annually in the United States is at least in the hundreds of thousands,<sup>124</sup> if only because of the proliferation of mandatory arbitration provisions in standard form contracts.<sup>125</sup> This will put considerably more pressure on the dockets of the current federal bench and perhaps even require its expansion to accommodate the additional workload.

## 2. *Standard for Decision*

The displacement of finality with substantive judicial review can also be expected to legalize arbitral decision making.<sup>126</sup> Arbitrators who do not base their decisions on legal standards today have the capacity and comfort of doing so precisely because there is no appellate body to "second-guess" their decisions. In an environment of substantive judicial review, however, it is reasonable to expect this to change quite dramatically. Arbitrators can be expected to rely less on equity, justice, industry standards, or other norms that could be interpreted by a reviewing court as erroneous under Professor Stempel's comprehensive review standard, or arbitrary and capricious under Professor Cole's standard. Few neutrals like to be reversed, a dynamic that is only exacerbated by the fact that arbitration is a system that is largely regulated by the free market, where reversal and affirmation rates can easily be exploited in the competition for market share. While only time will tell, one can reasonably expect arbitral decision making to become less adaptive and more closely tethered to pre-existing substantive and procedural norms—i.e., the law.

The institutionalization of this type of formalization would be devastating to arbitration as we know it. Along with finality, the flexibility of decision making and the ability of the arbitrators to ground their rulings in norms other than law go to the heart of arbitration as a dispute resolution process and its distinction from public adjudication. It is this flexibility that allows arbitrators to season their judgment with their experience, their knowledge of the field,

<sup>124</sup> The most recent publication of the AAA's caseload figures appeared in the AAA's *Dispute Resolution Journal* in 2002. *AAA 2001 Case Filings Break Record*, DISP. RESOL. J., May-July 2002, at 4 ("Since 1995, the American Arbitration Association's total caseload has shown consistent annual growth. The number of cases filed in 2001—a total of 218,032—continued the pace, breaking the previous year's record of 198,491 by 19,541—an increase of just about 10%."). *Business Week* reported in 1996 that the American Arbitration Association alone then annually managed a caseload of one-fourth the size of all federal court civil case filings. Eric Schine & Linda Himmelstein, *The Explosion in Private Justice: Demand for Civil Arbitration Fuels the Rise of an Industry*, BUS. WK., June 12, 1995, at 88, 88-89.

<sup>125</sup> Demaine & Hensler, *supra* note 88.

<sup>126</sup> For concerns about a similar phenomenon in mediation, see Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'*, 19 FLA. ST. U. L. REV. 1 (1991).



and practical wisdom. Without it, you simply do not have the kind of commercial arbitration that Congress so strongly endorsed in the Federal Arbitration Act.

### 3. *Form of Decision*

Substantive judicial review will also necessarily change the form of decision. Courts will need to have written and reasoned decisions to review, and arbitrators will be obliged to provide them. This will come at a financial cost to the parties, who likely will have to pay for the arbitrator's time drafting the opinion. One may reasonably expect that it will also result in delay in at least some cases, perhaps many, as arbitrators labor longer and more defensively to produce written and reasoned awards that will withstand the scrutiny of a reviewing court.

### 4. *Decision Makers*

Changes in the standards and form of arbitral decisions may lead risk-averse parties to be more reluctant to select non-lawyers as arbitrators. As a group, lawyer arbitrators will likely be more familiar than non-lawyer arbitrators with the kinds of problems in written decisions that may trigger reversal on review by a court of law, even when the arbitrators are not strictly applying the law or when the law is ambiguous. While this would provide more certainty in an era of substantive judicial review, it would also crimp the ability of parties to choose arbitrators based on their specialized knowledge of industry customs or practices, or other non-legal standards, as a basis for resolving their dispute.

### 5. *Formality and Civility*

Raising the level of judicial review can also be expected to raise the level of formality of arbitration hearings. Legal counsel of course must represent their arbitration clients as diligently and zealously as their clients in public adjudication. In an environment of substantive judicial review, one can reasonably anticipate counsel being compelled to prepare the case for review during the arbitration proceeding itself just as they do during a trial proceeding. This means not only raising more objections but also introducing more defensive evidence aimed at bolstering one's own prospects upon appeal or blunting the force of the other party's appeal. Such a shift in the nature of the process could also affect the civility of the proceedings, causing them to be more adversarial.

### 6. *Privacy*

Finally, the privacy of arbitration would be severely compromised by a regime of substantive review of arbitration awards. As noted above, judicial review would require a record that a court can review, and a federal district court would generally be required to issue a written and reasoned opinion in its review of the award. That opinion would necessarily include information that the parties might have chosen arbitration to avoid making public, such as the identities of the parties, the facts of the dispute, the amount in controversy, and the arguments made by the parties. If the opinion was designated for publication, it could be reported by newspapers, broadcast over the airways, and made

available on commercial reporting services, such as Westlaw and LexisNexis. Moreover, any documents received by the trial court would be freely available as public records. While it is true that one or both of the parties could seek an order sealing the proceedings, the movant bears a high burden of proof and may not succeed.<sup>127</sup>

*B. Some Additional Problems in Contracted Substantive Review*

The forgoing discussion applies generally to the elimination of finality through substantive judicial review of arbitration awards under the FAA, and as such would be implicated by Professor Stempel's proposal for comprehensive substantive review, Professor Cole's proposal for substantive review upon party request, and to a lesser extent Professor Drahozal's proposal to codify the manifest disregard standard. Professor Cole's proposal for opt-in substantive review raises a few additional complications.

*1. The Meaning of "Freedom of Contract"*

Much of Cole's discussion is dedicated to why courts should find that contracted judicial review is permitted under the FAA as presently drafted. The federal courts of appeal have split on this question. Courts that have endorsed contracted judicial review have used a variety of theories, including contract and the interpretation of section 10 as a default rule.<sup>128</sup> Courts have also rejected the proposition on a variety of grounds, either because it would frustrate the purposes of the FAA or because the parties do not have the power to establish federal court jurisdiction by contract.<sup>129</sup>

Congress of course can solve this problem by simply amending the FAA to permit contracted substantive review. This in turn raises the deeper policy question of whether Congress should take such a step. The primary policy argument Cole makes in favor of such an amendment is the promotion of the parties' "freedom of contract." In a democracy predicated in part on the impor-

<sup>127</sup> Protective orders are authorized by FED. R. CIV. P. 26(c). Because of the presumption favoring public access to judicial proceedings, moving parties bear the burden of proof, which often requires a showing of good cause and specific harms that will be incurred by one or more of the parties if the information is disclosed. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing a long-standing tradition of allowing the public "to inspect and copy public records and documents, including judicial records and documents"); *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002) (parties secrecy agreement does not warrant maintaining documents under seal); *United States v. Amodio*, 44 F.3d 141, 146 (2d Cir. 1995) (establishing a presumption of access).

<sup>128</sup> *See Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001) (endorsing substantive review if the statute clearly provides for it); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at \*7 (4th Cir. Aug. 11, 1997) (accepting substantive review for "errors of law or legal reasoning"); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995) (permitting substantive review because section 10 of FAA is a default provision).

<sup>129</sup> *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (reversing circuit panel decision endorsing contracted substantive review because it defeats purpose of arbitration); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (contracted judicial review frustrates purpose of FAA); *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (federal jurisdiction cannot be created by contract). For state decisions, see Cole, *supra* note 4, at 220 n.29.

tance of personal autonomy,<sup>130</sup> this argument has powerful resonance. On the other hand, unless the law is moving back to some form of *Lochnerism*,<sup>131</sup> the freedom of contract is not without constraint, no more so than any other constitutional right. Virtually all of law operates to constrain the freedom of someone or something; this is the price of an organized society operating under the rule of law.<sup>132</sup> The real question is the legitimacy of the constraint.

*a. Process Structure as a Constraint on the "Freedom of Contract"*

A process characteristics and values approach to defining dispute resolution processes would suggest that integrity of process structure is a reasonable constraint upon party freedom in a dispute resolution process. Process labels may seem formalistic, but such labels do have significant impact on the expectations and legal rights of the parties. Through the FAA, the government confers significant benefits on parties to an agreement to arbitrate, including judicial enforcement of the initial agreement to arbitrate, judicial support for the arbitration process in terms of compelling witnesses and documents, and the judicial enforcement of the arbitral award. Given the tension between process purity and innovation discussed above, it is incumbent upon the Congress to be specific about the process that will receive such benefits.

It is further reasonable for Congress to limit these benefits to the traditional model of commercial arbitration and the important role that it ascribes to finality. As previously described at length, finality is a cornerstone of the arbitration process, making possible many of the other process characteristics and values, including efficiency, flexibility in decision making, and informality. Maintaining finality would be consistent with the Anglo-American history of commercial arbitration and its historic practice both domestically and internationally,<sup>133</sup> and therefore accords with the expectations of the public with

<sup>130</sup> See Reuben, *supra* note 62, at 285-87.

<sup>131</sup> The *Lochner* era refers to the period in the early part of the twentieth century when the U.S. Supreme Court embraced private contractual rights over the ability of government to enact laws that protect the safety, health, morals, and general welfare of citizens through its police powers. See *Lochner v. New York*, 198 U.S. 45 (1905). The *Lochner* era ended, and became discredited, when the Court set a new course for its Fourteenth Amendment due process jurisprudence that focused on the political process and the protection of "discrete and insular minorities." See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For a general discussion of the *Lochner* era, see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 614-25 (3d ed. 2006).

<sup>132</sup> See ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 385-500 (1952) (contending that by its very nature, legal regulation benefits one by constraining the freedom of another). For a discussion, see Reuben, *supra* note 62, at 303-07.

<sup>133</sup> There has been recent debate about incorporating substantive review in the international commercial arbitration context, although there certainly is no consensus as to its propriety. Compare David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 *VAND. J. TRANSNAT'L L.* 39 (2006), with Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 *BERKELEY J. INT'L L.* 444 (2006). The International Centre for the Settlement of International Disputes toyed with the idea but ultimately withdrew its proposal for appellate review. See *id.* at 444. There may be greater justification for

regard to commercial arbitration and the path dependence of the law over a period of centuries.<sup>134</sup> From a process characteristics and values perspective, displacing finality with substantive review would have a severely detrimental effect on the other process characteristics and values of commercial arbitration.

This is not to suggest that parties who want substantive review in private adjudication are without options. One possibility, of course, is to stay in the traditional system of public adjudication, which provides both substantive review and established legal rules upon which to base such review. However, they also have the option of private appellate review panels, and the rules of some private arbitration providers accommodate this interest by permitting internal appeals.<sup>135</sup> While such second bites of the arbitration apple do frustrate efficiency goals in individual cases, and perhaps raise questions about the depth of the parties' commitment to arbitral finality, it is certainly plausible that parties in individual cases may value efficiency less than other process virtues.<sup>136</sup> In my view, principles of personal autonomy would suggest that they have this option, and I agree—so long as such appeal is through a private process rather than in the public courts. If a party chooses to opt out of the public court system for purposes of the substantive decision, that party should not be permitted to opt back in to the public court system for purposes of substantive review. One cannot have it both ways.

When a case is within the public adjudication system, evidence upon which a decision may be made is subjected to rigorous testing for relevance, veracity, accuracy, integrity, and other concerns that arise from the search for truth. It is in part for this reason that trial court rulings on questions of fact are typically given great deference by appellate courts and that society can have confidence in public appellate court decisions. Decisions of commercial arbitrators, however, can be based on evidence that has not survived such scrutiny. It makes sense for public policy to support a "lawless" private alternative process as long as the results do not need to be reviewed for accuracy by public courts. However, it would undermine the integrity of the public courts to allow appellate review to proceed on the basis of evidence that has been tainted at the lower level by an evidentiary process that permitted the consideration of unreliable evidence. The legitimacy of appellate outcomes is at least in part predicated on the legitimacy of the record before it. It would also shift to the public

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substantive review in the international context because unlike the domestic U.S. context, there is for the most part no other forum where parties can go if they want formal legal standards applied accurately other than the domestic courts of the country of one of the parties.

<sup>134</sup> For a classic work on path dependence, see DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); for an application, see D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37 (2007). To the extent that Professor Stempel's argument rests on the path dependence created by the U.S. Supreme Court's arbitration jurisprudence, I would suggest that such a departure constitutes path deviation from centuries-long norms, not path dependence. See Stempel, *supra* note 4, at 257.

<sup>135</sup> See, e.g., International Institute for International Conflict Prevention and Resolution, Arbitration Appeal Procedure (2002); National Arbitration Forum, Code of Procedure R. 1(D) (2006).

<sup>136</sup> See *Chi. Typographical Union v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

significant transactional costs associated with appeals, such as courtrooms, judges, court reporters, clerks, and other support staff, and there is no reason why such costs should be born to provide for review of decision by a private neutral, especially when the award is tainted as described above.

By contrast, such private appellate processes likely would not affect the public law process in the same way as a statutory authorization for substantive judicial review in all or some cases arising under the Federal Arbitration Act. Such private review does not implicate society's efficiency interests in the courts and the proper allocation of judicial resources because courts (and the public) are not required to bear the burden of this party choice. The parties alone pay those costs. Nor does the availability of such appellate review in the rules of private arbitration providers broadly encourage losing parties to seek substantive review in the same way as a legislative pronouncement from Congress that such review is now available. Finally, unlike public courts, private substantive review would not compromise the flexibility of standards in arbitral decision making unless the arbitrator was required by the parties to apply the law accurately. Rather than being appeals in the public law sense, such private arbitral appeals are more in the nature of a second round of arbitration—rough review of rough justice—and if they so agree, parties should be permitted to arbitrate their dispute as many times as they would like.

*b. Pragmatism as a Constraint on Party Freedom*

It is unclear precisely what the freedom of contract argument contends in this context, or what its limiting principles might be. One can, for example, view the argument broadly, as endorsing party contracting power over all aspects of arbitration. Or one can view it more narrowly, as endorsing party contracting power over those areas of arbitration not precluded by the statute or process structure as I have described. Both are freedom-of-contract arguments but lead to very different results on an issue like contracted substantive review.

The latter view—that freedom of contract means endorsing party contracting power over those areas of arbitration not precluded by the statute or process structure—raises few questions. It is consistent with the language, structure, and purpose of the FAA, and with the historical, jurisprudential, and practical foundations upon which it was erected, and upon which subsequent case law has developed.<sup>137</sup> Moreover, it provides the parties considerable freedom in establishing the parameters of the arbitration process they will use: to choose the process to begin with, how many decision makers there will be, who those decision makers will be, the issues they may decide, the standards that may be used to make the decision, the evidence that will be considered, and the procedural rules under which it is to be considered, among many other process choices. At the same time, this view provides a reasonable constraint on that freedom, limiting the parties only to staying within the historical definitional confines of the arbitration process, as embodied in the statute.

By contrast, the former view—that the freedom of contract in this context means allowing parties contracting power over all aspects of arbitration—

<sup>137</sup> See William M. Howard, *The Evolution of Contractually Mandated Arbitration*, ARB. J., Sept. 1993, at 27.

would upset centuries of Anglo-American case law, both before and after the adoption of the FAA,<sup>138</sup> and raise a number of challenging pragmatic questions that would have to be addressed by Congress, or, more likely, the courts.<sup>139</sup>

As a procedural matter, for example, it is likely that the parties, in the name of contractual freedom, can agree to have only certain courts decide their dispute.<sup>140</sup> But would the freedom of contract go further and permit the parties to draft an enforceable arbitration provision calling for review by specific judges, such as Seventh Circuit Judge Frank Easterbrook or U.S. District Judge Jack Weinstein? Would it permit the parties to require the reviewing court to use or reject specific substantive rules, even ones that have not yet been adopted by courts?

To her credit, Professor Cole at least offers one limiting principle in her proposal for contracted substantive review: Courts should not enforce such provisions if they “threaten the institutional integrity of the court.”<sup>141</sup> Yet it is unclear from her discussion precisely what this “institutional integrity” proviso means and how it would apply. The term is not defined, nor are its contours delineated with any precision other than by the tender of examples of proposed party standards that courts could “easily reject,” such as “flipping a coin or studying the entrails of a dead fowl,”<sup>142</sup> or that make the court “appear to be an unprincipled decision maker.”<sup>143</sup>

To be sure, one could argue that the selection of a specific judge to perform the substantive review is not such a hard case after all because the courts

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<sup>138</sup> For discussion and cases illustrating the historical significance of finality in commercial arbitration, see JOHN T. MORSE JR., *THE LAW OF ARBITRATION AND AWARD* 383-406 (1872), and WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS* 548-74 (1930).

<sup>139</sup> Pragmatism generally refers to the school of philosophy that holds that the truth of a proposition is measured by its correspondence with practical outcomes, especially ones that can be empirically tested. This school was pioneered by C.S. Peirce and popularized by William James. See A.J. AYER, *THE ORIGINS OF PRAGMATISM* (1968); WILLIAM JAMES, *PRAGMATISM AND OTHER ESSAYS* (R.B. Perry ed., 1965). Federal Circuit Judge Richard Posner reinvigorated legal thinking about pragmatism in his book, RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 354 (2003). For a critique, see David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 *STAN. L. REV.* 1735 (2007) (book review).

<sup>140</sup> See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (holding that “reasonable” forum selection clauses, while not historically favored, are prima facie valid when freely negotiated by commercial parties in an international context). *Bremen* was later followed by *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (extending *Bremen* to consumer cases in upholding a forum selection clause in a standard form cruise line ticket requiring all claims to be decided in Florida). This line of cases is extremely controversial, as evidenced in the Supreme Court's *Carnival Cruise Lines* decision, when Justice John Paul Stevens affixed a copy of the contested standard form contract containing the fine print forum selection clause to his dissenting opinion. See *id.* at 597-605 (Stevens, J., dissenting).

<sup>141</sup> Cole, *supra* note 4, at 230. For a critique of “institutional integrity” review, see Alan Scott Rau, “Arbitrability” and *Judicial Review: A Brief Rejoinder*, 1 *J. AM. ARB.* 159, 173-74 (2002) (“[R]esort to prophylactic rules in the interests of administrative convenience always strikes me as a confession of failure—and as infinitely less satisfying than the adoption of standards calling for ‘narrow and focused inquiry into the actual presence of some feared evil.’”).

<sup>142</sup> Cole, *supra* note 4, at 231.

<sup>143</sup> *Id.*

have an institutional interest in preserving their efficient operation that may not be invaded by party contract. But does that instrumental efficiency interest reflect the “institutional integrity” of the court? Surely no one would suggest that Judges Easterbrook or Weinstein are incompetent to engage in such review or would do so with any kind of bias or arbitrariness that would threaten the institutional integrity of the court as Professor Cole has described.

Beyond such procedural questions, the substantive issues are treacherous. Studying the entrails of a dead fowl may be an easy standard for a court to reject, but how would harder cases be treated under “institutional integrity” review? Would it violate the institutional integrity of the courts to enforce a review provision that precludes the court from applying a particular rule of law if that is what the parties wanted and so agreed? Or suppose the parties wanted to establish a substantive rule for a reviewing court to apply that was unique in that it had not been adopted by any federal court or perhaps by the relevant circuit? Conversely, what if the position had already been affirmatively rejected by the particular circuit? Suppose the rule was completely new, unlike anything yet crafted by a legislature or court?<sup>144</sup> Would enforcing such provisions undermine the “institutional integrity of the court”?

The entrails of Judge Kozinski’s dead fowl may help establish an outer boundary as the type of substantive review that would be well beyond the ken of the public courts. But as these pragmatic questions suggest, there is a vast area of uncertainty between decision by entrail and decision according to the strict rule of law. It also demonstrates that even the well-advised constraint suggested by Professor Cole suffers from questions of scope and ambiguity that would require many new lines of cases to resolve fully. Given the wealth of opportunity that otherwise remains for party autonomy in commercial arbitration as historically constructed, such a radical shift in arbitration law hardly seems justified. Again, to the extent the parties have felt a need for some kind of substantive review, private appellate panels provide such an opportunity.

## 2. *The Mandatory Arbitration Problem*

Much of Cole’s discussion about contracted substantive review seems to be based on a voluntary model of arbitration. However, as we have seen above, many cases come to arbitration from clauses that have been unilaterally imposed in a standard form contract of adhesion. Reasonable minds of course may disagree on whether the agreement to arbitrate in such a situation is consensual. However, there can be little disagreement about the potential for abuse inherent in such situations.<sup>145</sup> The cases are replete with one-sided arbitration

<sup>144</sup> For discussion of a creative ADR structure that began with an arbitration but led to a negotiation that resulted in a contractual agreement by the parties to establish a private system of law, see Robert H. Mnookin & Jonathan D. Greenberg, *Lessons of the IBM-Fujitsu Arbitration: How Disputants Can Work Together to Solve Deeper Conflicts*, DISP. RESOL. MAG., Spring 1998, at 16.

<sup>145</sup> For a similar critique, see Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 189-200 (2003); see also Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 912 (2004) (Empirical analysis of 151 cases in which arbitration awards were appealed demonstrates that expanded review clauses “open broad avenues for employers to escape the arbitrations that they institute.”).

provisions, such as those limiting remedies, imposing costs and fees on the consumer or employee, and restricting the availability of counsel, among others.<sup>146</sup> Expanded review provides yet another avenue in which such abuses can be imposed and in which power imbalances between the parties can be exploited.

### C. *The Elasticity of the Manifest Disregard Standard*

While Professors Stempel and Cole propose fairly sweeping changes to the FAA, Professor Drahozal's proposal to codify the common law "manifest disregard" standard<sup>147</sup> for the vacatur of an arbitral award is intended to be more modest. The idea here is to provide the courts with clear statutory authority to throw out the bizarre arbitration award, in order to preserve the integrity of the court system.

#### 1. *Background of the Doctrine*

As Professor Drahozal notes, the manifest disregard standard is a non-statutory ground<sup>148</sup> that emanates from dicta in the *Wilko v. Swan* case, in which the U.S. Supreme Court said: "In unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."<sup>149</sup> *Wilko* was overruled,<sup>150</sup> thus paving the way for mandatory arbitration. But this particular dictum seems to live on, in part because it was cited with appar-

<sup>146</sup> For examples of particularly one-sided mandatory arbitration clauses, see, e.g., *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (rejecting as unconscionable an arbitration provision that limited remedies and depositions, and bound only the employee, among other abuses); and *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) (arbitration provision requiring only employee to arbitrate, and even then not affording full statutory remedies, was substantively unconscionable).

<sup>147</sup> One state, Georgia, has codified the "manifest disregard" standard. GA. CODE ANN. § 9-9-13(b)(5) (2007). For a critical commentary, see David Boohaker, Note, *The Addition of the "Manifest Disregard of the Law" Defense to Georgia's Arbitration Code and Potential Conflicts with Federal Law*, 21 GA. ST. U. L. REV. 501 (2004).

<sup>148</sup> Drahozal, *supra* note 4, at 249. The authors of a prominent arbitration treatise have tied manifest disregard to section 10(a)(4)'s proscription of awards that exceed the scope of the submission, on the theory that the parties do not have the capacity to empower an arbitrator to issue an award that is in manifest disregard of the law. 4 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.5.1.3 (1994). For cases supporting this proposition, see George Chamberlin, CAUSE OF ACTION TO VACATE ARBITRATION AWARD ON GROUND OF EXCESS OF POWERS BY ARBITRATOR, 27 CAUSES OF ACTION 113, § 9 (2006). I would reject this interpretation in that it is based on the assumption that arbitrators cannot issue a "lawless" decision, a belief that fails to recognize that arbitration awards can be based on non-legal standards. See, e.g., *Baize v. Eastridge Cos.*, 47 Cal. Rptr. 3d 763, 768-69 (Ct. App. 2006); *Marsch v. Williams*, 23 Cal. App. 4th 238, 243-44 (Ct. App. 1994) (review denied June 1, 1994); *Pac. Gas & Elec. Co. v. Superior Court*, 15 Cal. App. 4th 576, 587 (Ct. App. 1993) ("The claim is not persuasive. It confuses the mode of decision with its finality."); *D & E Constr. Co. v. Denley*, No. 02A01-9812-CH-00358, 1999 WL 685883, at \*5 (Tenn. Ct. App. Sept. 3, 1999).

<sup>149</sup> *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

<sup>150</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-81 (1989).



ent approval in a later Supreme Court case, *First Options of Chicago, Inc. v. Kaplan*.<sup>151</sup>

In an important sense, manifest disregard can be seen as a remnant of the old ouster doctrine, when courts believed that the law of the land was paramount to any other type of dispute resolution.<sup>152</sup> While the ouster doctrine was swept away legislatively with the FAA and related state laws, and later judicially by the Supreme Court, suspicion of arbitration has lingered in the minds of many courts, fueled in part by the rise of mandatory arbitration.<sup>153</sup> The prospect of judicial review for manifest disregard has given the courts comfort in moving forward with mandatory arbitration. As the Supreme Court said reassuringly in *Gilmer*, “‘although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.”<sup>154</sup> Even apart from the mandatory context, the continued validity of the “manifest disregard” doctrine at common law preserves at least the judicial threat that an arbitration award can be invalidated because of the sovereignty of the law, hanging over the heads of arbitrators “like a sword of Damocles.”<sup>155</sup>

There are different formulations in the cases, but most courts have concluded that parties seeking vacatur on this ground must show the award was inconsistent with clear controlling law, the arbitrator knew what the controlling law was, and intentionally chose to ignore or disregard it.<sup>156</sup> Yet there is some tension in the cases, as it is also frequently said that a mere error of law or failure to apply the law does not rise to the level of manifest disregard of the law;<sup>157</sup> rather manifest disregard is something more akin to brazen defiance.

While nearly all courts claim the power to set aside an arbitral award on the ground of manifest disregard under these circumstances,<sup>158</sup> few in fact

<sup>151</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (noting that parties can seek vacatur in a narrow set of instances, including *Wilko v. Swan* “(parties bound by arbitrator’s decision not in ‘manifest disregard’ of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)”).

<sup>152</sup> See 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, 471-73 (1998). For a critique of the manifest disregard doctrine as unnecessary in light of the implied obligation of arbitrators to apply the law in good faith, see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2005).

<sup>153</sup> See *infra* notes 173-96 and accompanying text.

<sup>154</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)); see also *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997) (recognizing manifest disregard as a vehicle for enforcing party rights under *Gilmer*).

<sup>155</sup> William W. Park, *The International Currency of Arbitration Awards*, in INTERNATIONAL ARBITRATION 2007, at 309, 342 (PLI Litg. & Admin. Practice Course, Handbook Series No. 10796, 2007), WL 756 PLI/Lit 309.

<sup>156</sup> For a general discussion, see Stephen L. Hayford, *Reining in the ‘Manifest Disregard’ of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 124-25.

<sup>157</sup> See, e.g., *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961). See generally Hayford, *supra* note 152, at 465-76.

<sup>158</sup> See *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-49 (Ala. 2004) (citing cases).

do.<sup>159</sup> One study of vacatur of 336 federal and state employment arbitration awards between 1975 and 2006 found that manifest disregard was the most common ground for seeking relief (30.4% of all appellate cases studied) but was only successful in 8.2% of the cases.<sup>160</sup> Another study, of all state and federal cases in which a party sought vacatur between January 1, 2004, and October 31, 2004, 182 cases reached similar results: Manifest disregard was the second most frequently raised reason cited for vacatur (28.6%) but succeeded in only 3.8% of the cases (two cases).<sup>161</sup>

## 2. Professor Drahozal's Proposal

In his proposal, Professor Drahozal defines manifest disregard as the "intentional disregard of a well-established mandatory (not default) rule."<sup>162</sup> For Drahozal, an award is in disregard of the law (a mandatory rule) when an arbitrator is aware of the rule and disregards it, as with the common law. It is in "manifest disregard" of the law for Drahozal when the rule being disregarded is apparent, or "manifest," on the face of the award itself.<sup>163</sup>

### a. The Conceptual Problem with Manifest Disregard Review

From a process characteristics and values perspective, manifest disregard makes little sense. One of the core defining characteristics of arbitration is that it allows for decisions to be made according to standards other than law, such as industry practices or professional norms, or even common sense. It mixes apples and oranges to have a process with this flexibility in decisional standard, only to have it judged by legal standards upon review. Yet under the manifest disregard standard, this is precisely what can happen. Arbitrators could make decisions on the basis of workplace practices, for example, but would be subject to reversal if those workplace practices were inconsistent with "clear" law. In my view, manifest disregard substantially undermines the utility and desirability of the arbitration process under the FAA, its distinction from the process of public adjudication, and the autonomy of the parties to choose to have their dispute resolved by a third party on a basis other than law. One suspects this is one reason that some courts have rejected the manifest disregard standard<sup>164</sup> and others have applied it so sparingly.

<sup>159</sup> For the highly unusual situation in which a federal appeals court was willing to vacate an award based on a finding of manifest disregard, see *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997) (arbitral panel told the relevant legal standards during the arbitration and was repeatedly exhorted to ignore it by the prevailing counsel, and the facts did not support the finding). See also *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1997) (permitting further proceedings on whether an award is in fact in manifest disregard of the law).

<sup>160</sup> See MICHAEL H. LEROY & PETER FEUILLE, HAPPILY NEVER AFTER: WHEN FINAL AND BINDING ARBITRATION HAS NO FAIRY TALE ENDING 25 (2007), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=michael\\_leroy](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=michael_leroy).

<sup>161</sup> Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23, 25 (2005).

<sup>162</sup> Drahozal, *supra* note 4, at 247.

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., *Moncharsh v. Heily & Blase*, 832 P.2d 899, 904 (Cal. 1992).

*b. The Practicality of Drahozal's Proposal*

While the foregoing is a general critique of the doctrine of manifest disregard, the Drahozal proposal in particular raises significant practical questions.

*1. How Clear Is "Clear"?*

Drahozal's proposal calls for vacatur when an arbitration award disregards "clear" law. This raises the threshold question of whether the law claimed to have been disregarded was sufficiently "clear" to justify the vacatur of an arbitration award. Rarely do we see legal rules incapable of alternative interpretation, either in terms of their substantive meaning or their practical application. Indeed, defining what constitutes "clear" law has bedeviled administrative law cases for more than twenty years, in a situation that is analogous to Drahozal's proposal. The U.S. Supreme Court's *Chevron* doctrine calls for courts to defer to agency judgments on questions of law by an agency charged with the administration of a statute if the law is "clear" and the agency's interpretation of it is "reasonable."<sup>165</sup> The courts have struggled mightily in their attempt to interpret the meaning of "clear" law.<sup>166</sup> As one scholar has observed, *Chevron* "has generated an enormous range of problems—and, of course, an enormous body of case law and academic commentary."<sup>167</sup>

Drahozal's proposal holds similar peril, and further complicates this problem by requiring arbitrators and courts to distinguish between mandatory and default rules, which Drahozal has acknowledged in other work is problematic in the context of the Federal Arbitration Act.<sup>168</sup> The courts can sort this out, but the courts are supposed to be among the beneficiaries of arbitration's efficiency process characteristic and value. The FAA contemplates a minimal role for the court, not an expanding one, and it would take many years and many cases for the courts to define "clear" for purposes of Drahozal's manifest disregard standard.

*2. Odd Results and Perverse Incentives*

The proposal also leads to odd results and perverse incentives, as illustrated by a series of simple hypotheticals.

1. Suppose, for example, an arbitration between a homeowner and a contractor over remodeling and repairs, and that the arbitration submission was silent on the application of legal standards. Assume further that the arbitrator based her decision on norms within the construction industry that lead to a

<sup>165</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-46 (1984).

<sup>166</sup> GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 607 (2d ed. 2001) (determining whether a statute is clear "is perhaps the most important question in the implementation of *Chevron*, and as yet no case has even attempted . . . to provide an answer"). *But see Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990) (using traditional tools of statutory interpretation such as language, purpose, and structure to assess clarity of statute being administered by an agency).

<sup>167</sup> LAWSON, *supra* note 166, at 585. For a discussion of recent cases, see *The U.S. Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 395 (2007). For a fuller recent treatment, see Note, *How Clear is "Clear" in Chevron's Step One?*, 118 HARV. L. REV. 1687 (2005).

<sup>168</sup> Drahozal, *supra* note 108, at 429-30.

result different than the result would have been at law. Would such an award be subject to reversal under Professor Drahozal's proposal for manifest disregard review?

Probably not. The arbitrator was not required to follow the law and relied on industry standards rather than legal standards in reaching her decision. Therefore, there is no intentional disregard of the law. While a different result would have obtained under legal standards, the arbitrator did not indicate she knew what the legal standards were, so the decision was not intentional disregard of the law. So far, so good.

2. But suppose the arbitrator stated she was aware of the law but said it was more appropriate to apply industry standards to resolve the case. The award could be subject to vacatur under Professor Drahozal's proposal because the result is different than the law would have yielded and the arbitrator knew the law and disregarded it.

3. Suppose the arbitrator heard arguments on the law but disagreed with either, or both, sides as to its meaning or application. While it is a closer call, the award would probably stand because the law did not meet the test of clarity.

4. Now suppose the arbitrator knew the law, did not say she knew the law, and proceeded to apply industry standards. In this case, as in the first, there is no possible challenge for manifest disregard—even though the only difference between this and the second hypothetical is that the arbitrator was candid about her basis for decision.

It is nonsensical for these four permutations to lead to different results given that neither the evidence, the facts, nor the decisional standards changed. What did change was the transparency of the arbitrator's decision making. As our tradition of reasoned and written opinions in public adjudication attests, and the recent move toward written and reasoned decisions in arbitration in this context confirms, transparency of decision making with respect to formal disputes is normatively desirable for the reasons described above.<sup>169</sup> Yet it is punished under Professor Drahozal's proposal because it is that candor that provides the basis by which a reviewing court can determine that the arbitrator knew the law and disregarded it.

The possibility of such an absurd result leads to perverse incentives within arbitration. Since Professor Drahozal's standard does not apply to mere errors of law, but rather only upon a showing that the arbitrator knew the law and deliberately disregarded it, arbitrators would have the incentive not to know, or consider, the law as a factor that could influence their judgment in a particular case. Hear no evil, see no evil, do no evil—and at the very least, as the fourth hypothetical suggests, speak no evil. It is difficult to see how public policy could support such an incentive. While decision making in arbitration does not necessarily have to be based on law, there is no reason law cannot be a helpful part of the arbitrator's decision making, and a legal rule that would encourage arbitrators not to consider the law in order to insulate them from possible reversal for manifest disregard of the law seems untenable.

<sup>169</sup> For a discussion of the significance of transparency to democratic governance, see Reuben, *supra* note 62, at 289-90.

### 3. *No Real Problem Exists*

Finally, and perhaps most importantly from the perspective of process characteristics and values, Professor Drahozal's "intentional disregard" would undermine the finality and efficiency of the arbitration process by opening the door to lengthy appeals that would cost parties time and money, and delay the enforcement of the arbitral award. It would also frustrate the prudential and efficiency interests of the courts that Professor Drahozal's proposal seeks to protect. Professor Drahozal cites no evidence to suggest that bizarre arbitration awards are a problem worthy of congressional attention. To the contrary, one may rationally infer quite the opposite from the paucity of judicial decisions accepting claims on this ground, as well as the lack of published media reports highlighting such horrors that so often make grist for the media mill.<sup>170</sup> Nor is there any reason to believe that the courts would, or should, be any more favorably disposed to such claims upon codification than they are with the common law power they already claim. Drahozal rightly recognizes the amenability of manifest disregard review to misuse. Yet despite the procedural safeguards Drahozal's proposal puts in place,<sup>171</sup> legislative endorsement of the "intentional disregard" standard may well encourage abusive challenges. Worse yet, it is unclear that the proposal won't be viewed by at least some courts to lower the bar from "manifest disregard" to "intentional disregard," which would likely lead to the vacatur of more arbitral awards and, ultimately, more judicial involvement in arbitration rather than less.

It is unclear why Congress should divert scarce judicial resources away from real problems and open the federal courthouse doors to address a problem that may exist only rarely, if at all, when many more cases that are unlikely to meet the standard are also likely to blow in while that door is open. Even setting aside the many abusive cases that we can expect to be brought by parties seeking desperately to overturn judgments against them, it would take the courts years of cases to parse out the answers to such legitimate questions as the statutory meaning of "intentional" and "disregard," how much knowledge of the relevant law the arbitrator must have to meet the standard, whether and the degree to which arbitral intent to disregard the law is a factor, and whether and under what conditions the arbitrator has a duty to acquire legal knowledge. Many other questions are almost certain to arise.

### 4. *Tailoring Remedy to Concern*

Such a burden on efficiency, finality, and other arbitration process values can only be justified if they are outweighed by other benefits. Drahozal's concern is with the institutional integrity of the courts, and one cannot help but be at least somewhat sympathetic to the precarious position in which the FAA

<sup>170</sup> In this regard, unreasonable arbitral rulings stand in conspicuous contrast to the many news articles and judicial opinions that have described problems associated with mandatory arbitration. See, e.g., Reynolds Holding, *Judges' Action Cast Shadow on Court's Integrity*, S.F. CHRON., Oct. 9, 2001, at A13; Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration?*, S.F. CHRON., Oct. 8, 2001, at A15; Reynolds Holding, *Private Justice: Millions Are Losing Their Legal Rights*, S.F. CHRON., Oct. 7, 2001, at A1; Margaret A. Jacobs, *Woman Claims Arbiters of Bias Are Biased, Too*, WALL ST. J., Sept. 19, 1994, at B1.

<sup>171</sup> Drahozal, *supra* note 4, at 248-49 (narrow definition and availability of sanctions).

places the courts with respect to the integrity interests that Professor Drahozal raises. Courts have the obligation to enforce arbitral awards with no control whatsoever over the content or integrity of those awards, and bizarre awards can happen.

Professor Drahozal's concern about the institutional integrity of the courts is certainly justified.<sup>172</sup> However, in my view, the remedy he proposes is not well tailored to meet this concern. The threat to the integrity of the courts is much greater on the front end, when the court is making the substantive decision to compel arbitration, than it is on the back end, when the court is merely enforcing an arbitral award (as it must under section 9 when the parties so agree).

As the empirical research on procedural justice has repeatedly demonstrated,<sup>173</sup> trust in the courts is a function of expectations,<sup>174</sup> and the gateway decision of whether to compel arbitration under sections 3 or 4 is the moment at which the expectations of the parties with respect to arbitration are met or breached, much more so than when the arbitral award itself is enforced (which the parties fully expect). At the motion to compel stage, parties may have an expectation of being able to go to court, and it is the breach of that expectation that has the potential to erode public trust in the courts.<sup>175</sup> This dynamic is precisely why it is so important as a matter of policy that arbitration be premised upon actual consent, rather than the constructive or imputed consent seen in the unilateral imposition of arbitration provisions in contracts of adhesion.<sup>176</sup>

As noted above, the choice to arbitrate a dispute is one that involves a number of trade-offs, and when one actually chooses arbitration, one is accepting both the benefits and risks of that trade-off, and agrees to accept the consequences of that choice. One of the critical process choices parties make when they choose arbitration is that the arbitrator's decision will be final and binding, and in most cases that the law will not necessarily be the basis for decision by the arbitrator.<sup>177</sup> Since this choice sets the parties' expectation with respect to the enforceability of the arbitral award, a decision to enforce the award will hardly upset those expectations, even when the award is bizarre. Indeed, one may plausibly argue that a decision not to enforce the award will be more damaging to the public's confidence in the system—certainly from the

<sup>172</sup> I have written of similar concerns myself. See Reuben, *supra* note 62, at 304-318.

<sup>173</sup> See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856-58 (1998). For a concise overview, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817-26 (2001).

<sup>174</sup> See Roy J. Lewicki & Barbara Benedict Bunker, *Trust in Relationships: A Model of Development and Decline*, in *CONFLICT, COOPERATION, AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH* 133, 165-67 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995).

<sup>175</sup> See Reuben, *supra* note 62, at 311.

<sup>176</sup> See 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, 849-50 (2003).

<sup>177</sup> Following this line of reasoning, one might argue that parties should be able to contract in favor of party-contracted judicial review, as Professor Cole suggests. However, for reasons described above, I believe that parties should not be able to contract for judicial review as a matter of policy, absent express statutory authority, which I believe would be unwise.

perspective of the prevailing party—because of the widespread and legitimate expectation of the consuming public that arbitration awards are final and binding. For this reason, the loss of confidence in the courts that can arise from compelling parties into arbitration against their will is of greater concern to the integrity of the courts than those that can arise from making the parties abide by the results of a process to which the parties voluntarily agreed.

*D. The Underlying Problem of Mandatory Arbitration: A Legal Process Perspective on the Proper Role of Congress*

While they differ considerably in orientation and scope, all three proposals are haunted by the unmistakable ghost of mandatory arbitration.<sup>178</sup>

Professor Stempel predicates his argument favoring full-scale judicial review on the proposition that “it is probably far too late to revisit (much less reverse) the arguable judicial errors that propelled the jurisprudential sea change in favor of mass arbitration.”<sup>179</sup> Many have argued that one of those errors is the courts’ willingness to enforce mandatory arbitration clauses. Similarly, Professor Cole tells us that the increased interest that parties have in judicial review may be a response to society’s increased skepticism of arbitration,<sup>180</sup> a skepticism that may in part be born from the arrival of mandatory arbitration and the widespread negative attention it has received in the media.<sup>181</sup> Professor Drahozal’s proposal to codify the manifest disregard standard may appear more attractive when we recognize arbitral excess can come in a proceeding in which one of the parties may have been compelled against their will.

I agree with Professor Stempel with respect to stemming the tide in the judiciary. The U.S. Supreme Court has spoken very clearly about the strength of the federal policy favoring the arbitrability of disputes and just how broadly it reads the congressional mandate of the FAA. Congress itself, however, is quite another matter. At bottom, Professor Stempel’s proposal is a response in part to the rise and institutionalization of mandatory arbitration. If we are going to have such a regime, Stempel argues, then we need to ensure substantive and procedural fairness to the parties, in part so as not to raise the skepticism, or threat of skepticism, that concerns Professors Cole and Drahozal.

In my view, however, Congress should deal with the problem more directly. That is to say, rather than enacting band-aid solutions to deal with the wounds caused by the Supreme Court’s improper exploitation of the FAA, Congress should deal with the underlying problem of mandatory arbitration,

<sup>178</sup> See, e.g., Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105-10 (1996) (explaining the confusion and controversy over the use of the terms “voluntary” and “mandatory” in the employment-arbitration context); see also Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (“I ask Professor Sternlight (and others) to stop calling contractual arbitration—mandatory arbitration.”). For a response and an alternative history of the controversial term, see Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005) (“[T]his Article will continue to call the process ‘mandatory’ arbitration.”).

<sup>179</sup> Stempel, *supra* note 4, at 257.

<sup>180</sup> Cole, *supra* note 4, at 216.

<sup>181</sup> See *supra* note 170.

making clear in commercial contexts characterized by power disparities—such as consumer, employment, and franchisee cases—that arbitrations conducted under the Act will be voluntary and that waivers of trial rights by virtue of an enforceable arbitration clause must be “clear and unmistakable.”<sup>182</sup> From a legal process perspective, this is a decision for the Congress, not the courts, and it is time for the Congress to reclaim its legacy.

A central tenet of legal process theory is that decision making in a legal regime should be allocated to the decision maker most competent to make that decision.<sup>183</sup> At the risk of some oversimplification, courts are generally seen as having a high degree of competence to decide questions of law.<sup>184</sup> Administrative agencies, by contrast, are seen as having greater competence to decide matters that call for technical expertise or sophistication.<sup>185</sup> Finally, as representative bodies, legislatures are seen as having special competence to resolve questions of policy about which reasonable minds will disagree and which can only be resolved in a democracy on majoritarian grounds.<sup>186</sup>

The question of mandatory arbitration represents such a policy choice: that of diverting formalized disputes away from courts and the law, and into arbitral proceedings.<sup>187</sup> To the extent that decision is to authorize the use of mandatory arbitration, it represents the policy conclusion that the institutional efficiency gains realized by mandatory arbitration through the reduction of dispute resolution obligations of the judiciary outweigh the rights of individuals to access the law and the courts. Regardless of one’s views on the merits, this clearly would be a rational policy choice, and one with which the law arguably has some remote experience.<sup>188</sup>

Assuming such a policy choice is constitutional,<sup>189</sup> the question from a legal process perspective is which branch is most competent to make it? In the U.S., this policy choice has been made by the judiciary, which has at least tacitly endorsed mandatory arbitration in a number of cases.<sup>190</sup> Yet legal process

<sup>182</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc. v. Comm’ns Workers*, 475 U.S. 643, 649 (1986)).

<sup>183</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2032-33 (1994) (describing institutional competence as one of the “great legal process concept[s]”).

<sup>184</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 163-64 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>185</sup> See *id.* at 165-67; see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 6-47 (1938).

<sup>186</sup> See HART & SACKS, *supra* note 184, at 164-65.

<sup>187</sup> See Steven Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 RUTGERS L. REV. 369 (1999) (discussing allocation of responsibilities between courts and arbitrators).

<sup>188</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting forth a balancing test for determining due process rights in informal administrative adjudications).

<sup>189</sup> For a discussion of Seventh Amendment issues, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 13 OHIO ST. J. ON DISP. RESOL. 669 (2001).

<sup>190</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination claim subject to compulsory arbitration under arbitration clause of securities registration application required by employer); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (securities fraud claims under the 1933 Act and under RICO may be compelled to



theory would indicate that this is precisely the type of question that should be decided by the legislature.<sup>191</sup> It is a fundamental question of what the law should be on an issue of significant public policy that affects broad and diverse interests and which is “heavily laden . . . with value judgments and policy assessments.”<sup>192</sup> Legislative determination allows for democratic participation in the policy-making process and for the various arguments for and against mandatory arbitration to be tested against the mettle of counter-argument as competing interests deliberate toward a consensus.<sup>193</sup> Further, legislators responsible for making the choice are subject to ongoing and closely proximate accountability.<sup>194</sup>

Unelected federal courts, by contrast, have no special competence to bring to the policy question of whether statutory and other non-constitutional claims should be arbitrated rather than decided by courts.<sup>195</sup> To the contrary, one of the central democracy-enhancing competencies of the courts, neutrality, is actually compromised in this context because of the courts’ institutional stake in the outcome.<sup>196</sup> Courts have a vested institutional interest in managing the size of their dockets, and individual judges may have ideological preferences that would cause them to steer certain cases or classes of cases into arbitration

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arbitration where the brokerage agreement includes a mandatory arbitration clause); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (questions of validity of contract with arbitration provision to be decided by arbitrators, not courts).

<sup>191</sup> See *HALE*, *supra* note 132, at 541-49 (“Popularly elected legislative bodies would thus seem to be the organs best suited to make the final choices which government at times has to make between conflicting liberties . . .”).

<sup>192</sup> See *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting); *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825) (noting that legislature may not delegate certain “important subjects”).

<sup>193</sup> This is not to suggest that all outcomes of a democratic legislative process are necessarily democratic, as the rise of Nazi Germany so clearly attests. See Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 *TEMP. INT’L & COMP. L.J.* 199 (1997); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980) (responding to the critique).

<sup>194</sup> As a matter of U.S. constitutional law, such a choice would appear to be well within Congress’ Article I powers. Few would argue that Congress lacks the power to create a statutory right that could only be vindicated through an arbitral forum rather than a judicial forum. It is less clear whether Congress could delegate this adjudicatory authority wholly to private arbitrators. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 840 (1986) (holding that judicial review by Article III courts preserves constitutionality of arbitration procedures in Federal Insecticide, Fungicide, and Rodenticide Act).

<sup>195</sup> This is a determination of policy, of what the law should be, rather than an articulation and application of the law. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 123-50 (1994); Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 *STAN. L. REV.* 719, 730 (1998) (Courts lack “a yardstick for measuring appropriate political competition either between party and nonparty political actors or among nonparty actors.”).

<sup>196</sup> One of the bedrock principles of due process is the right to have one’s legal claims decided by an impartial tribunal. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (impartial tribunal an element of due process); *Tumey v. Ohio*, 273 U.S. 510, 522-32 (1927) (holding that conviction by mayor of village who stood to receive portion of fine collected was denial of defendant’s right to due process). See generally KOMESAR, *supra* note 195, at 141-42; Reuben, *supra* note 55, at 1055-70.

rather than permitting them to proceed before judges or juries.<sup>197</sup> In the end, judicial resolution of this issue gives rise to precisely the kind of judicial value imposition—judicial activism—that legal process theory abhors.<sup>198</sup>

The resolution of the mandatory arbitration question plainly falls within the purview of Congress. Further, making clear that arbitration under the Federal Arbitration Act must be voluntary resolves many of the concerns that lead Professor Stempel to call for substantive judicial review of arbitration awards. Parties choosing arbitration would simply be forsaking substantive review for accurate application of the law in favor of the other benefits of arbitration. Thus these concerns devolve down to where they belong: party choice, an animating principle in arbitration, just as it is in other dispute resolution processes.

#### CONCLUSION

Innovation in dispute resolution is a good thing, generally speaking. However, it does have the potential to blur the lines between processes, leading to party confusion and uncertain legal outcomes. This does not mean that we need to constrain innovation. It does, however, oblige greater clarity in the distinction between processes. Such clarity may be achieved by analyzing principal dispute resolution processes according to their primary characteristics and values, and then making a similar assessment of the adapted process. Where the differences are not significant, it seems reasonable to consider the adapted process a derivative of the primary process. On the other hand, if the differences are great, then it seems more reasonable to treat the adapted process as a new, albeit hybrid, dispute resolution process.

Displacing finality with substantive judicial review is an example of an adaptation of commercial arbitration that calls for separate treatment. Finality is a cornerstone of the arbitration process, making efficiency and other arbitration process virtues possible and distinguishing arbitration from other dispute resolution processes.

Displacing finality with substantive judicial review would produce a process that frustrates rather than furthers traditional arbitration values, one that is more inefficient than efficient, complex rather than simple, formal rather than informal, law-bound rather than flexible in decisional norms. This is not commercial arbitration as it has been historically understood and as it has been embodied in the Federal Arbitration Act. From a process characteristic and value perspective, such a process should not be considered arbitration for purposes of the FAA because of the inevitability of confusion of consumers of arbitration services.<sup>199</sup> Moreover, such arbitrations should not get the substantial supports that the Federal Arbitration Act provides to commercial arbitra-

<sup>197</sup> See MACNEIL, *supra* note 8, at 172-73 (The U.S. Supreme Court's arbitration jurisprudence is based on its vested interest in "docket-clearing pure and simple."); Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15, 16 ("[J]udges have a vested interest in reducing the workload of the courts, and they may attempt to advance that agenda without sensitivity to the impact on the system as a whole . . .").

<sup>198</sup> See ABA STANDARDS, *supra* note 25 and accompanying text.

<sup>199</sup> This is not to suggest that parties should not be able to draft arbitration provisions that include substantive judicial review. The principle of autonomy in dispute resolution is a

tions conducted under its authority: enforcement of the initial agreement to arbitrate, support of arbitrators during the arbitration process, and enforcement of the arbitral award.

The 1925 Federal Arbitration Act wisely preserved the core process characteristics and values of the commercial arbitration process in purpose, language, and structure. Arbitration may have evolved, but it has not changed so dramatically to justify Congress changing the fundamental structure of the process by displacing finality with substantive judicial review. Rather, Congress should continue to support parties in their initial choice to arbitrate their dispute, and hold them to that choice. In choosing to arbitrate, parties agree to take a dispute out of the public adjudication process and to have it decided privately according to other process characteristics and virtues. It is incoherent to require or invite them to bring the dispute back into the public system after private adjudication, and paternalistic for the law to disallow awards that are manifestly different than the result that would obtain at law. To the extent parties seek substantive review, private arbitral appeals processes are more than adequate to preserve party self-determination and accuracy of result within the structural constraints of the arbitration process as it is commonly known. Moreover, such private review neither distorts the traditional process of arbitration nor burdens the courts with a multitude of questions that will require answering on a case-by-case basis under these proposals.

Rather than endorsing substantive judicial review, Congress should take the rare opportunity to amend the FAA to strengthen the core values of arbitration by making it clear that parties may not contract for substantive judicial review. More significantly, perhaps, Congress should mandate that arbitration under the FAA is always based on the actual consent of the parties, disallowing predispute agreements to arbitrate under the act. Finally, Congress should use the process characteristics and values of arbitration to make certain that other changes it makes further, rather than undermine, the core process characteristics and values that give commercial arbitration its distinct character as a dispute resolution process.

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cardinal virtue. However, it does mean that such arbitrations not be considered arbitration for purposes of the benefits of the Federal Arbitration Act.