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Recommended Citation

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BOOTSTRAPPING AND SLOUCHING TOWARD GOMORRAH: ARBITRAL INFATUATION AND THE DECLINE OF CONSENT*

Jeffrey W. Stempel[†]

INTRODUCTION: THE RISE OF ARBITRATION, THE DECLINE OF CONSENT, AND THE DEBASEMENT OF THE LAW

Richard Speidel's contribution to the Symposium, like his work throughout the area of arbitration, leaves little with which a reasonable person might disagree. In particular, his prime thesis makes sense in the context of securities arbitration. Professor Speidel concludes that consent has gone the way of the dodo bird for securities arbitration and that the law should focus on substantive regulation to encourage fairness in arbitration. I do not dispute this assessment so much as I want to supplement it: There remains a valuable role for consent concepts to play in securities arbitration, if only the courts will allow it.

Beyond this picking at the edges of Professor Speidel's assessment, however, his paper raises a more profound issue affecting securities arbitration and other forms of arbitration. The matter of consent has implications not only for all forms of arbitration and alternative dispute resolution ("ADR"), but for contract law and jurisprudence in general. Because of both the overriding importance of the law's treatment of consent and

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[†] Fonvielle & Hinkle Professor of Litigation, Florida State University College of Law. Thanks to Jim Alfini, Adam Hirsch, John Larson, Ann McGinley, Jean Sternlight for insights and assistance, and special thanks to Stephen Ware, who graciously reviewed a draft of this Comment, as well as to the Symposium participants, particularly Ed Brunet and fellow panelists Richard Speidel, Richard Shell and moderator Clark Remington. Thanks also to Dean Donald J. Weidner and Florida State College of Law for research leave and support. Special thanks as well to my former Brooklyn Law School colleagues, especially Symposium organizer Professor Norman Poser, to whom this Comment is dedicated in the probably vain hope that he finds some progression of my analysis of arbitration during the decade we have debated it.

my lack of any major criticism of Professor Speidel's assessment of the current state of securities arbitration and the Ruder Report,¹ my focus is instead directed to questions Professor Speidel essentially leaves for another day after having set the stage for further conversation: whither consent? This Comment addresses overarching jurisprudential concerns regarding party autonomy and legal legitimacy. Specifically, I suggest modifying modern arbitrability doctrine to take consent seriously. The Federal Arbitration Act ("FAA") should be construed through a functional brand of flexible interpretation. Such an interpretation would be evenhanded in its application to consumers, employees, and franchisees as well as to the securities industry and larger business community.²

Although I am perhaps the last person in legal academia to endorse Robert Bork's world view or find in his writings a muse, his recent book *Slouching Towards Gomorrah*,³ provided a catalyst for organizing my misgivings about modern arbitration doctrine and my concern that leading authorities like Professor Speidel have too quickly abandoned defense of the consent paradigm of contract in the context of dispute resolution. As readers of the popular press are aware, Judge Bork argues that by relaxing our commitment to bedrock values and legal principles, we as a society have "slouched" toward a world of moral relativism that has diminished our society in both tangible and intangible ways.⁴ According to Judge Bork, the "Gomorrah" comparison is not farfetched because our society is an America in "decline" that, like the biblical Gomorrah, shows signs of becoming both more sinful and more tolerant of sin.⁵

But despite its marquee value, Judge Bork never really develops the Gomorrah metaphor. He assumes that Gomorrah

¹ See NATIONAL ASSOCIATION OF SECURITIES DEALERS, SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE (1996).

² Although arbitration involving investors raises serious issues of consent, for reasons set forth below, I find the consent aspects of broker-investor arbitration considerably less troublesome than those afflicting brokerage house-employee arbitration and other instances of essentially mandated arbitration or forum selection. See Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1447-50 (1991) [hereinafter *Better Approach*].

³ See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

⁴ *Id.* at 6-9.

⁵ *Id.* at 2.

is bad and thus serves as a useful rhetorical foil. But sin comes in many varieties, including a rush to ride roughshod over individual rights and basic notions of fairness in the heat of pursuing a popular current goal. In essence, this is the indictment Bork levels at modern liberalism as he characterizes it. A similar criticism can be leveled at arbitration zealots of the 1980s and 1990s, including most of the Supreme Court.

The securities industry pursues uniform arbitration to lower the disputing costs associated with litigation and gain the benefit of expert decisionmaking. But the industry also seeks through arbitration to prevent full public viewing of some practices or episodes, to eliminate juries, to lower the possibility of punitive damages awards, and to prevent the establishment and publication of adverse precedent. Let me be clear. I see nothing inherently wrong with an industry pursuing these goals, so long as it does so through legitimate and noncoercive means. As former U.S. Senator S.I. Hayakawa once remarked about America's acquisition of the Panama Canal through a series of crafty colonial imperialist moves, "We stole it fair and square."⁶ I am not naive enough to suggest that private business consistently (or perhaps ever) put altruism before profitability. However, the legal system should require that business, when pursuing profit at the close of this century, do so within the rules of the game regarding contract and social regulation in general. Consequently, consent retains a useful role in regulating the ability of business to pursue self-interest through contract.

In the case of the securities industry, a Gomorrah of sorts emerges from the shoving of nonconsensual arbitration down the figurative throats of customers and employees. For reasons discussed further below and at length in other writings,⁷ broker-customer arbitration comes close to satisfying a consent-based model of arbitrability, but some arbitration "agreements" so lack consent as to embarrass the courts.

⁶ Stanley Meisler, *Combat in Panama: Panamanians Have a Long History of Dependence on U.S.*, L.A. TIMES, Dec. 21, 1989, at A9.

⁷ See, e.g., Stempel, *Better Approach*, *supra* note 2, at 1383-90; Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RES. 259, 300 [hereinafter *The Employment Exclusion*] ("consent of the average employee to arbitration is highly suspect").

Imagine the potential for enforced arbitration throughout society if the courts treat new uses of arbitration clauses as they have securities arbitration "agreements."⁸ A customer purchases a coffee pot with a major credit card and signs the purchase form, which on the back contains an arbitration

⁸ But see Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) [hereinafter *Arbitration and Unconscionability*]; Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996) [hereinafter *Employment Arbitration*]. To some extent, this potential has already been realized. Courts have ruled enforceable arbitration clauses contained in "contracts" enclosed in shipping boxes or shrink-wrapped around computer software. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (packing materials of computer shipment); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7th Cir. 1996) (software shrink-wrap).

To the common sense of the public, shrink-wrap contract cases like *ProCD* seem so wrongly decided that they have become fodder for Dilbert cartoons. See, e.g., Scott Adams, *Dilbert*, TALLAHASSEE DEMOCRAT, Jan. 14, 1997, at C7 (Dilbert: "I didn't read all of the shrink-wrap license agreement on my new software until after I opened it. Apparently, I agreed to spend the rest of my life as a towel boy in Bill Gates's new mansion.").

The *Gateway* court cited with approval *Carnival Cruise Lines, Inc. v. Shuto*, 499 U.S. 585 (1991), enforcing a forum selection clause in fine print on the back of a ticket, a case Professor Shell cites as the optimal illustration of the depths to which the Supreme Court has descended and that the Court "has abandoned any role in policing contracts for fair play." See G. Richard Shell, *Fair Play, Consent and Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365, 1372-74 (1996).

In the articles cited above, Professor Ware largely defends the Supreme Court's approach to contract questions and defends a more formal and objective theory of contract than I advance in this Comment. However, Professor Ware ultimately concludes that the arbitration required of securities industry employees lacks sufficient volition and also suggests reversal of the separability doctrine. This doctrine permits arbitrators to decide in the first instance issues related to defenses to enforcement of the contract as a whole where the scope of the written arbitration agreement ostensibly encompasses the dispute.

I find Professor Ware's argument for overruling *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), most interesting and worth further exploration. The separability doctrine is problematic. See Stempel, *Better Approach*, *supra* note 2, at 1390-92 (referring to *Prima Paint* "problem"). Preliminarily, however, I am inclined to retain *Prima Paint* so long as the judiciary continues to adhere to the unrealistic, formal and narrow view of contract consent and meaning demonstrated in recent cases. Although I agree with much of Professor Ware's analysis, he endorses an excessively narrow view of contract consent that admits of relief for the targeted party under too few circumstances. For example, by placing undue emphasis on the distinction between private and public conduct, Professor Ware would refuse enforcement of the U-4 arbitration forms executed by securities employees but bind nonsecurities employees to mandated arbitration when virtually all employees are similarly deprived of a position to effect real voluntary consent to arbitration.

clause. If the coffee pot ignites a fire that destroys his house and kills members of his family, should he really be required to arbitrate a claim against the manufacturer? What if the customer buys the product via mail order? Is a written arbitration clause contained in the shipping box binding on the purchaser? When a diner in a restaurant receives a check that contains an arbitration clause on the back, is the diner confined to arbitration if ptomaine or salmonella strike?

The average person's initial reaction to these suggestions is likely to be that this parade of horrors conjures the ridiculous. Perhaps. I hope so. But judicial treatment of consent issues found in securities arbitration and other arbitration contexts in recent years suggests no readily apparent means of distinguishing current application of the Federal Arbitration Act from the hypotheticals outlined above.

By drifting away from, or perhaps abandoning altogether, society's traditional notions of meaningful consent, the judiciary has slouched toward a Gomorrah of enforcing agreements that appear to lack real consent. This should raise at least as much concern for us as the licentiousness of Gomorrah seems to raise for Judge Bork and other conservatives. Although some may disagree, I find the erosion of the role of consent in contract law at least as troubling as the nonviolent evils of Gomorrah. A legal system that glosses over serious questions of consent in its contract and dispute resolution jurisprudence reduces its claim to legitimacy and begins to look less like the Anglo-American system we have been raised to revere and more like totalitarian or other systems which place little emphasis on individual rights.

One might well accuse the American judiciary of having taken both the low road of neglect and slouching, as well as the more ambitious path of bootstrapping toward Gomorrah. In its zeal to expand the availability to compulsory arbitration as a partial solution to a perceived litigation caseload crisis, the Supreme Court has labored mightily to interpret the 1926 Federal Arbitration Act⁹ in an evolutionary manner that has expanded the scope and power of the Act.¹⁰ Much of the fruit of this effort has benefitted the judicial system and the Ameri-

⁹ See 9 U.S.C. §§ 1-15 (1994) (first enacted in 1926).

¹⁰ See *infra* pp. 1415-26.

can public by eliminating erroneously constructed barriers to, or prejudices toward, arbitration. The largest beneficiaries appear, however, to be America's business elite, particularly the securities industry. Irrespective of the distributive consequences, there is no denying that the expansion of arbitration has been substantially fueled not only through the rejection of suspect precedents¹¹ but also through reinterpretation of the Act via a more flexible and evolutive form of statutory interpretation to which many judges and Justices claim not to subscribe.¹²

In a sense, the Court has employed an evolutive, purposive and goal oriented mode of statutory interpretation ostensibly eschewed by many members of the Court and thus has "bootstrapped" arbitration into a position of greater prominence. In its rush to empower arbitration, the Court has overlooked traditional bedrock values of our legal system: consent, unconscionability, disclosure, fairness and federalism. Worse yet, in defending the beachhead of the new arbitration established by dynamic statutory interpretation, the Court and lower courts have frequently relied on a formalist and hypertechnical form of statutory interpretation totally at odds with the flexible, policy oriented approach utilized to expand arbitration. This inconsistent approach has, among other things, reduced consent to a mere legal fiction, a shadow of its former self.¹³

¹¹ See Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1991) [hereinafter *Pitfalls*] (criticizing inchoate "public policy" reservations about arbitration and generally approving move away from precedents restricting enforcement of arbitration clauses on public policy grounds).

¹² For example, Former Chief Justice Warren E. Burger was generally regarded as a judicial conservative disinclined to increase the scope of legislation by giving broad or judicially expanded construction to statutes. However, he authored the majority opinion in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a key case that dramatically expanded the reach of the Federal Arbitration Act by construing the statute to create substantive federal law applicable in state as well as federal courts. Current Chief Justice William H. Rehnquist is generally regarded not only as a judicial conservative but also an originalist and a textualist in matters of statutory interpretation. A Justice employing this philosophy will enforce the literal language of a statute but prefers not to expand statutory reach beyond the specific intent of the enacting legislature. But Chief Justice Rehnquist has, with only modest exception, supported the Court's modern, judicially driven expansion of the Act, as has Justice Antonin Scalia, another Justice commonly associated with textualist and originalist values. See *infra* pp. 1417-28.

¹³ See Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither*

Although Professor Speidel's paper is even in approach and emphasis, the reader cannot help but sense that he has tacitly accepted the view that reflective, case-by-case adjudication of consent has become a luxury that the American judicial system either cannot afford or will not support. He concludes his insightful analysis with the disturbing peroration that

it is unlikely that informed consent, bargaining and realistic market opportunities can be easily restored, the answer points toward a more overtly public system of dispute resolution in the securities industry. That system, which has yet to be designed, can require informed consent but cannot rely upon consent as a primary method of regulating the federal contract to arbitration.¹⁴

Although one realizes that Professor Speidel continues to harbor a warm spot in his legal heart for consent, his legal cerebrum thinks modern relative preferences and sociopolitical reality require that arbitral fairness be pursued through regulation rather than any serious effort to resuscitate a meaningful approach to consent.

It is quite possible, of course, that Professor Speidel is correct. If the courts, particularly the Supreme Court, apply a wooden, *Lochner*ized version of contracting¹⁵ to issues of arbitrability, superficial remnants of the consent paradigm are of little value. Better to retreat from the consent battlefield altogether and regroup to seek substantive regulation.

Consent?, 62 BROOK. L. REV. 1335, 1338 (1996) [hereinafter *Whither Consent?*] (characterizing as "clearly correct" Dean Joel Seligman's assessment that "consent in securities arbitration [is] a 'legal fiction' and that 'mandatory arbitration' [is] a more accurate characterization." *Id.* at 1388 (quoting Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV. 327, 330 (1996)).

¹⁴ See Speidel, *Whither Consent?*, *supra* note 13, at 1362-63.

¹⁵ The Court's contract jurisprudence has been criticized as advocating an unrealistic model of alleged freedom of contract and limited government involvement reminiscent of the "*Lochner* era," so named for the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a state wage and hour regulation as impermissibly interfering with freedom of contract. The result in *Lochner* probably was not cheered by the 80-hour-per-week employees whose "freedom" was upheld by the Court to override the legislature's attempt to protect them from sweatshop working conditions. See, e.g., Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153 (1995); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 436 (1993) (stating that the Court's notions of contract are part of sweeping, "even radical, pro-market jurisprudence").

I do not dispute Professor Speidel or others who support substantial government regulation of the arbitral process. The American disputing system requires substantial government standard-setting and policing of dispute resolution. The more disputes are resolved apart from courts and other government agencies, the more government needs to regulate those disputes to ensure the basic integrity of both disputing processes and outcomes. Although the presumptive government stance should be one of noninterference with private agreements, some baseline of control to ensure fairness is required. More arbitration and ADR may mean less government provision of traditional adjudication, but it does not mean less government involvement. Rather, the ADR revolution implies a different type of government involvement that avoids hamhanded meddling in the arbitral process but provides basic guarantees of justice and a means for enforcing them.¹⁶

One can have both a judiciary meaningfully committed to consent jurisprudence and a set of regulations designed to achieve desired substantive policy for parties who consent to dispute via arbitration rather than litigation. The two concepts are inconsistent only if the nation adopts a public policy that prefers arbitration far more than it prefers consent.¹⁷ To the

¹⁶ To the extent that arbitration (or any other ADR method) becomes an externally imposed system replacing civil litigation, it cannot truly be considered the sort of private ordering that should fully or nearly fully replace government administration. For example, a multilateral arbitration agreement among similarly situated entities (e.g., a mythical "Alliance for Insurance Coverage Apportionment") would probably qualify as the type of truly consensual, mutually beneficial, efficient effort to resolve disputes with a minimum of government entanglements that constitutes the sort of "private ordering" that actually transplants the prior government-operated status quo. For example, insurers unable to resolve disputes over allocation or apportionment of insurance benefits are faced with the prospect of litigating these issues in both state and federal courts, with the outcomes controlled by the 50 different state laws on the subject, with substantial expenses in legal fees and pretrial fact development. See JEFFREY W. STEMPEL, *INTERPRETATION OF INSURANCE CONTRACTS* § 3.4 (1994 & Supp. 1995) (discussing issues of insurance coverage and allocation among multiple insurers with coverage responsibilities).

At virtually the other end of the spectrum from the consensual industry agreement hypothesized above is modern American securities arbitration, which results not from any consensus among the affected contracting parties but from one party's imposition of an alternative system on the other parties to their contracts.

¹⁷ As one commentator observed, our legal system values contract law because "we value the consent and the autonomy it presupposes. However, *we do not have*

extent one can find any fault in Professor Speidel's assessment, it is that he arguably throws consent overboard too quickly in order to attempt to keep substantive justice afloat. A revived consent jurisprudence and substantive regulation of arbitration both are essential ingredients to achieving and maintaining justice in ADR.¹⁸

I. THE CONTINUED RELEVANCE OF CONSENT

Although the judicial developments reviewed by Professor Speidel suggest that courts have jettisoned the concept of consent from the judicial lexicon, attempts to relegate consent to the dustbin of either contract or ADR law are misguided. For a variety of reasons, consent remains a vital part of the law even if federal courts today seem to have forgotten this essential truth. Consent offers several distinct benefits if meaningfully incorporated with modern arbitration jurisprudence.

A. *Consent as the Basis for the Constitutionality of Arbitration*

The Seventh Amendment to the Constitution preserves for litigants a right to a jury trial in actions at law.¹⁹ The right to a jury trial does not attach for equitable actions, but in cases presenting claims for both legal and equitable relief a right to

autonomy and consent because of contract; it is the other way around—we have contract because we value autonomy and consent." Dennis Patterson, *Good Faith in Tort and Contract Law: A Comment*, 72 TEX. L. REV. 1291, 1292 (1994) (emphasis added). Professor Patterson appears to use the term "consent" as necessarily requiring that the activity be volitional to be consensual. Unfortunately, too many lawyers, judges and politicians appear to have forgotten this simple but elegant truth. In this Comment, I am also using consent as a broad term meaning voluntary agreement. *But see* Ware, *Arbitration and Unconscionability*, *supra* note 8 (suggesting distinction between voluntary consent given without reservation and involuntary consent given grudgingly).

¹⁸ I generally support the ADR expansion of the past quarter century, viewed arbitration positively when in private practice, and have served as an arbitrator. But because my association with arbitration has been both actual and theoretical, I harbor few illusions. If arbitration continues to be imposed without meaningful consent or is inadequately policed by the judiciary, injustice will result.

¹⁹ U.S. CONST. amend. VII specifically states:

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

a jury trial exists for common questions of fact.²⁰ Although many modern statutes and claims did not exist in 1791, the Amendment has been interpreted to require a jury trial of statutory claims seeking monetary damages, the classic form of legal relief, so long as there is a relatively apt analogy between the modern statutory claim and a historical action for damages.²¹ A limited rejection of the right to jury trial exists for statutory matters distinct from common law actions and designed to vindicate "public rights" rather than private claims.²² Historically, courts conducting essentially equitable

²⁰ See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (Seventh Amendment prohibits court from conducting bench trial of equitable claims prior to jury trial of legal claims in case where judge's factual determinations will create issue preclusion of the jury-triable claims). The *Beacon Theatres* holding was something of a breakthrough decision that operated to expand the right to a jury trial at least as much as to preserve it, because the 1938 merger of law and equity in the Federal Civil Rules as interpreted in *Beacon Theatres* operated to ensure that henceforth juries would make findings of fact in what had previously been regarded as equitable matters tried solely to the court. See *id.* at 515 (Stewart, J., with Harlan and Whitaker, JJ., dissenting on ground majority holding expands jury trial right rather than "preserving" it as required by Seventh Amendment). But see John McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres v. Westover*, 116 U. PA. L. REV. 1, 11 (1967) (praising *Beacon Theatres* as a good example of construing Constitution as flexible document for evolving society).

Despite its arguably revolutionary status, *Beacon Theatres* remains good law and has been repeatedly affirmed by the Court. See, e.g., *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990) (The Court applied *Beacon Theatres* and *Dairy Queen* to require jury trial of erroneously dismissed § 1981 claim and prohibited issue preclusion of common fact determinations based on bench trial of (then equitable) Title VII claim.); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (holding that in action involving franchisor's claim for equitable accounting and franchisee's legal claim for antitrust damages, bench trial of accounting prior to antitrust claim violates Seventh Amendment).

²¹ See, e.g., *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 565-66 (1990) (jury trial required for worker's claim against union for breach of duty of fair representation although appropriate characterization of historical analogy is at best unclear); *Tull v. United States*, 481 U.S. 412, 420 (1987) (jury trial required in government action seeking civil penalties for wetlands degradation); *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (private action pursuant to fair housing provisions of Civil Rights Act of 1968 requiring jury trial in part because of historical analogy to innkeeper's common law duty to receive paying lodgers irrespective of race or national origin); see generally Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

²² See, e.g., *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977) (Seventh Amendment does not prohibit Congress from establishing statutory claims or duties and designating administrative agency as factfinder where statutory scheme seeks to establish and protect public

proceedings possessed some power to resolve disputed facts through a bench trial as part of the effort to "clean-up" resolution of the matter even if the facts decided touch on a legal claim.²³ However, this exception and some of its precedents have been constricted by modern decisions.²⁴

Applied to the typical securities dispute, the Seventh Amendment ordinarily provides a clear default rule in favor of jury trial upon demand of any party.²⁵ Consequently, claims under the Securities Exchange Act of 1934 would ordinarily be subject to jury trial.²⁶ Starting at ground zero, investors possess a seventh amendment right to jury trial in claims against their brokers and vice versa. Because the jury trial right in these cases is constitutional, it cannot be abrogated by legislative enactment, executive order, widely held reservations about juries or enthusiasm for alternative dispute resolution. Only actions by the parties, such as a waiver of the right to jury trial²⁷ or a desire to substitute some other proceeding in lieu of jury trial, can divest a disputant of seventh amendment rights.²⁸

rights rather than to create private right of recovery).

²³ See *Katchen v. Landy*, 382 U.S. 323, 337 (1966) (Seventh Amendment does not require jury trial where trustee sues former creditor to recover payments made by alleged voidable preference).

²⁴ See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36 (1989) (business that has not submitted claim against bankruptcy estate may insist upon jury trial when sued by trustee for receiving allegedly preferential transfer; *Katchen v. Landy* precedent permitting court determination of some legal issues construed narrowly and arguably overruled).

²⁵ See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970) (Seventh Amendment requires jury trial of shareholder's derivative suit raising allegations under Investment Company Act of 1940); *SEC v. Associated Minerals, Inc.*, 75 F.R.D. 724 (E.D. Mich. 1977) (party bringing claims under Securities Act of 1933 has seventh amendment right to jury trial where relief sought is legal rather than equitable).

²⁶ See, e.g., *Service Group, Inc. v. Essex Int'l, Inc.*, 74 F.R.D. 379, 382 (D. Del. 1977) (jury trial required for damage claims under 1934 Securities Exchange Act). This principle is so well established that there are literally no cases dated after 1977 in the Civil Procedure volume (Rule 38) of the United States Code Annotated. Since 1977, the Supreme Court has, in general, acted to expand rather than contract seventh amendment rights. See *infra* note 28 and accompanying text.

²⁷ See, e.g., FED. R. CIV. P. 38(d) ("Failure of a party to serve and file a demand [for jury trial] as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.").

²⁸ See, e.g., *In re Balsam Corp.*, 185 B.R. 54, 58 (E.D. Mo. 1995) (parties can by agreement abrogate right to jury trial).

It follows, of course, that claims are arbitrable only when the disputants have evidenced sufficient consent to arbitration to overcome seventh amendment concerns. This axiom is both simple and seemingly overlooked or underappreciated in the modern ADR debate. The oversight probably results from the judicial tendency to find consent upon the slimmest of reeds.²⁹

Although a serious examination of consent in some of these cases could have resulted in a finding of sufficient consent, it is more than a little disturbing that the Court seems unwilling to make a sustained examination of consent issues. The Court's disinterest in consent issues is disturbing enough. Its refusal to apply a realistic notion of consent is shameful.³⁰

²⁹ See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 107-10 (1992); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 512-63 (1981) (generally prevailing contract law finds waiver on the basis of external indicia of acceptance of transaction rather than requiring specific proof of voluntary and knowledgeable choice among actually existing alternatives). For example, the Supreme Court has expressly or implicitly found adequate consent in a variety of suspicious circumstances. Perhaps most infamously, an employee is found to have consented to arbitrate and forgo constitutional rights on the basis of executing forms required as a condition of work. See *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20 (1991) (broker required to sign New York Stock Exchange form agreeing to arbitrate any disputes arising out of employment held to agreement without serious analysis of consent issue; application of § 1 of the Federal Arbitration Act, which provides that Act does not apply to contract of employment, and rejecting claim). Vacationers have been held to forum selection clauses printed on the back of ocean liner tickets. See *Shute v. Carnival Cruise Lines, Ltd.*, 499 U.S. 585 (1991) (Washington State residents required to bring claim for personal injuries arising out of ocean liner vacation in Florida due to choice of forum language in small print on back of tickets received after purchase and shortly before departure). Disabled vessels have been bound by the forum selection clauses in the form contract signed as a condition of obtaining a tow for the drifting vessel. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Franchisees have been held to arbitration provisions in franchise agreements without any serious focus on issues of consent. See, e.g., *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996) (Subway sandwich shop franchisee subject to arbitration clause despite state law requiring disclosure of arbitration provisions); *Soler Chrysler-Plymouth v. Mitsubishi*, 473 U.S. 614 (1985) (automobile dealer required to arbitrate due to clause required by manufacturer as a condition of relationship).

³⁰ How many of us "agree" to whatever is on the back of a ticket stub or a parking lot sign? How many of us are willing to risk losing a promised job when the employer at the last minute requests/demands execution of an arbitration agreement in conjunction with the W-4 Form? Fortunately, not all courts are as blind to this concrete problem as is the Supreme Court. See, e.g., *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) (arbitration clause signed by securities industry worker unenforceable in Title VII claim in light of context of execution of agreement; arbitration form rushed by

There are troubling consent issues lurking at the periphery of arbitrability decisions. Although a sustained examination may result in defensible enforcement of these arbitration clauses, the Court's sweeping away of consent considerations truncates analysis and robs the case law of content it should contain: i.e., what should the law require by way of consent to make for an enforceable agreement, and does the standard vary according to the stakes of the case?

Because, as Professor Speidel has noted, we have moved toward a system of mandatory arbitration where consent is treated as a mere legal fiction, arbitrability case law lacks serious consent analysis. But without consent the entire edifice of enforcement of arbitration agreements falls before the Seventh Amendment. Although the current Court is unlikely to have a vision of consent on its arbitral road to Damascus or Gomorrah, this should provide limited comfort even to arbitration proponents. Were the Court to become more seriously focused on consent, entire arbitration systems might in the future be invalidated for failure to obtain meaningful consent of the contracting parties. A shift in judicial thinking might invalidate entire regimes of arbitration erected during the Court's current obliviousness to consent issues. In addition, arbitration under these circumstances will remain politically suspect and more ripe for extensive regulation to the extent it is imposed by fiat or duress-like leverage without disclosure and consent.

employee told to sign document as mere formality). *But see* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1996) (enforcing arbitration clause packed in computer shipment).

Professor Ware criticizes *Lai* for tacitly making the right to litigate employment disputes less alienable than other rights. *See* Ware, *Arbitration and Unconscionability*, *supra* note 8. I disagree to some extent in that the *Lai* focus is on actual consent rather than ostensible consent. The *Lai* approach should be the norm for policing all contracts, not only arbitration agreements, although mutual consent can be proven by outward acts. In addition, even if Professor Ware's assessment is correct, courts should impose a more searching standard of inquiry where the right allegedly waived potentially implicates the party's ability to enforce a host of other rights. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1981) (arguing for limited judicial intervention in policing law except where structural barriers prevent political process from adequately considering claims of entity challenging law).

B. *Prudential Reasons for Retaining a Vigorous Concept of Consent*

Although the Seventh Amendment raises additional concerns and makes for a massive system of mandated arbitration built on feet of clay, the constitutional concerns about enforced arbitration are but one reason to insist that courts take the issue of arbitral consent seriously. A number of prudential concerns flowing from contract law, litigation procedure and jurisprudence also counsel continuing concern for consent.

1. *Emphasizing Consent Is Most Consistent with Contract Law*

For the most part, contract is about consent. The concept of contract is best explained by notions of consent, and contract law is most legitimately supported by consent.³¹ Although consent based contract theory has been debated as excessively libertarian,³² such attacks are misguided,³³ even if one finds

³¹ See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). Professor Barnett identifies five major traditional theories (will, reliance, efficiency, substantive fairness and bargain) underlying contract law and finds all to fail in some significant way at explaining or organizing contract law. He finds, persuasively in my view, that a consent based contract theory possesses both greater explanatory power and a more attractive normative underpinning for contract law. See Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969 (1987).

³² See, e.g., Amy H. Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW. U. L. REV. 132, 149-51 (1995).

³³ For example, Professor Kastely's attack on Professor Barnett misses the mark by pulling from the context of his consent theory article a specific illustration, which is then attacked, assertedly for taking a position Professor Barnett seems to me not to have endorsed, and then labeling "absurd" the conclusions Barnett did not reach. See Kastely, *supra* note 32, at 150-51. Most distressingly, Professor Barnett's consent theory is portrayed as more libertarian than a fair reading permits. A more balanced view treats Barnett-style consent theory as both libertarian and "formalist" while also emphasizing the protective, almost paternalistic nature of consent theory in protecting individuals' "freedom from contract." See, e.g., Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 262-63 (1995) [hereinafter *Afterword*]. However, even if Professor Barnett's vision of a consent theory is largely libertarian, it does not follow that the consent basis of contract is strictly libertarian. Requiring consent as a prerequisite to legal enforcement seems at least as communitarian as it is libertarian.

consent insufficient to provide the overarching theory of contract.³⁴ Although one might argue that other aspects of contract—bargain, reliance, promise, efficiency, mobility of resources, etc.—are more central to contract, no serious observer can deny that consent and assent at least lie near the core of contractual values. Even if consent is not sufficient to support a theory, it remains a most important criterion for determining the validity and scope of contracts. One need not be particularly libertarian to appreciate the importance of consent.³⁵

To the extent that contracts generally rest in large part on consent, it is at least equally true that consent is central to the arbitration contract, which touches more closely on fundamental values of civic rights and access to the courts than does the average contract. In the absence of an agreement indicating consent to arbitrate disputes, the “default rule” is civil litigation in courts of general jurisdiction. Subject to limits of illegality or unconscionability, parties may generally make a voluntary agreement to contract out of default rules and into something else. The key word, of course, is voluntary. Involuntary agreements are not, generally speaking, enforceable contracts. Voluntarism presumes consent, although both voluntarism and consent may be found constructively and under circumstances where the consent is grudging, if sufficiently informed and noncoercive. An agreement lacking at least minimal indicia of informed consent is really not a contract and ordinarily does not deserve enforcement.

Arbitration contracts are particularly problematic, as Professor Speidel has noted previously:

[T]he alternative dispute resolution (ADR) phenomenon requires a very close look. A mediated or agreed settlement and a final arbitra-

More specifically, even if one accepts the standard view that “intent” is irrelevant so long as the buyer has an opportunity to review adhesion contract terms, the credit card, boat ticket, shrink wrap, and packaging cases are wrongly decided because the inadequate opportunity for review precludes even constructive consent. See *supra* notes 8, 29-31; Speidel, *Whither Consent?*, *supra* note 13, at 1350 n.58.

³⁴ See generally Todd Rakoff, *Too Many Theories*, 94 MICH. L. REV. 1799 (1996) (contract scholars have been excessively entrepreneurial in advancing preferred unifying theories of contract with little benefit to our actual understanding of contract).

³⁵ At bottom, the consent criterion in contract stems from the simple notion that people should keep their promises but not be legally constrained by promises they did not truly make.

tion award resolve disputes with finality. Although the process of settlement or award may be reviewed, the merits are normally insulated. The pro-ADR rhetoric is strong and, frequently, justice between the parties is done. Where these outcomes are beyond the scope of regulatory law and no third party interests are involved, the process can and should be defended. But there is a potential dark side to ADR, especially where regulated organizations are able to insist upon arbitration to resolve all claims arising from or relating to a contract, including statutory and punitive damage claims against them.³⁶

Having noted the "dark side" of arbitration in this Symposium and in his prior work, Professor Speidel urges substantive regulation as the means for controlling the arbitral beast, too quickly eschewing a role for serious consent based scrutiny by the courts. If arbitration is to continue as a contract driven mode of ADR, it must be adjudicated with ample respect for the importance of consent in contract law.

2. Deferring to Experience: A Burkean³⁷ Perspective on Consent

As noted above, consent is and has long been at least a major underpinning of Anglo-American contract doctrine even if it is not *the* major underpinning of contract. Furthermore, courts have for some time been in the business of adjudicating contracts on the basis of consent, assent, voluntarism and fairness as well as text and evidence of bargaining.³⁸ Even

³⁶ Speidel, *Afterword*, *supra* note 33, at 265.

³⁷ By "Burkean," I mean a conservative perspective reluctant to depart from traditional values and activity unless those advocating change have made a highly convincing case for change. Edmund Burke, the paradigmatic form of this sort of conservative, placed a high value on success proven by experience and was skeptical of reformers who merely hypothesized that the traditional means of organizing society could be improved upon in light of tradition's past effectiveness. See BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW* 55-56 (1994).

³⁸ See E. ALLAN FARNSWORTH, *CONTRACTS* chs. 1-3 (2d ed. 1990) (viewing promise and assent, both of which involve consent, as central to contract, but recognizing that courts find enforceable assent even where resisting party claims to have lacked complete appreciation of agreement or equal bargaining power); Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 58-60 (1995) (early twentieth century contract law guru Samuel Williston, although painted as a formalist supporter of laissez-faire notions, supported judicial policing of contracts on bases of both consent and public policy); Robert A. Hillman, *The Triumph of Gilmore's The Death of Contract*, 90 NW. U. L. REV. 32, 33-34 (1995) (Nineteenth

though these tools may have fallen from fashion in the modern Supreme Court, there is no persuasive reason for abandoning them. At a minimum, then, there is a strong argument for retaining consent as a fulcrum of our contract jurisprudence simply because it is the status quo—or at least was until the last few years of the Court's slouching. Quite frankly, the issue of arbitrability tests whether current conservatives on the bench are "Edmund Burke Conservatives" who resist changes in law and society absent a compelling reason or what might be termed "J.P. Morgan Conservatives" who embrace whatever legal and social goals are sought by commercial interest groups.³⁹

Put in Burkean terms, the issue becomes whether arbitration partisans have advanced any compelling reason to remove consent from the arbitrability equation. No such case has been made. Arguments for enforcement of boilerplate arbitration agreements follow the simplistic view that the existence of a written arbitration agreement presumes consent irrespective of the actual context of the transaction. Beyond this, arbitration proponents make the theoretical argument that the availability of enforced arbitration without significant burdens of bargain, disclosure or consent will enable industry to offer products or services at a lower cost. This pseudo-empirical argument for enforced arbitration as efficiency suffers from two defects: (1) there is no evidence to suggest any reduction in price flows from enforced arbitration;⁴⁰ and (2) there is no compelling

century Harvard Law School Dean Christopher Columbus Langdell's theory of contract, although frequently criticized as formalist and too supportive of laissez-faire social forces, has at its heart a "bargain theory of consideration" which rests on presupposition of agreement to make and abide by bargain; when incorporated into Oliver Wendell Holmes's objective theory of contract, bargain theory took on more free-market overtones.); Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018, 1041 (1981) (contracts are formed through incremental process of agreement); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 113 (1995) (traditional values of contract law and concerns about party conduct and agreement submerged in part because during 1970s "the entire field, under [Seventh Circuit Judge and University of Chicago Law Professor Richard A. Posner's influence], took a massive wrong turn" focusing on economic efficiency of contract and common law adjudication rather than values other than efficiency and behavior outside courts).

³⁹ See KUKLIN & STEMPEL, *supra* note 37, at 53-59 (describing leading political philosophers with influence on law and summarizing Burke's view).

⁴⁰ Although consumer prices may not have been reduced by arbitration, busi-

normative argument that the Kaldor-Hicks efficiency posited by arbitration's cheerleaders, even if achieved, is more important than protecting the rights of a contract party that did not consent.⁴¹

In short, traditional contract law reflects the common sense intuition that society values some things more than lower costs, efficiency or greater aggregate wealth. Default rules and systems reflect a socio-legal judgment as to what should occur in the absence of agreement. Where a default litigation system is supplanted by arbitration, some relatively reliable indicia of agreement to the substitution is logically required. Consent is logically required. If courts insist on adequate consent, there is far less need to "litigationize" arbitra-

ness profits may have been enhanced (although even this article of faith among arbitration proponents has no solid empirical support). But an increase in business profit, although hardly a bad thing, is not the promised consumer benefit that has been used to "sell" arbitration to courts and legislators.

⁴¹ For example, in the *Badie v. Bank of America* litigation, University of Virginia Law School Dean Robert Scott testified as an expert witness for the bank, which had added an arbitration clause in its credit card agreements via an insert to regular customer monthly billings. Continued use of the credit card was to constitute consent to the new arbitration provision. According to Dean Scott, creation of an enforceable arbitration clause through this attenuated method of contracting vindicated the public interest because it would enable the bank to offer credit card services at a lower fee or interest charges. This view is fine in theory, but it appears that neither Dean Scott nor any other bank witness introduced any evidence of a reduction in charges accompanying the bank's switch to arbitration nor any evidence of price reductions wrought through other mandatory arbitration programs. Notwithstanding the absence of empirical proof, the court, beguiled by the theoretical gains, ruled the bank's "arbitration by junk mail" contract enforceable. See *Badie v. Bank of America*, No. 94-4916, 1994 WL 660730, at *1 (Cal. App. Dep't Super. Ct. Aug. 18, 1994).

Moreover, even a world of lower aggregate prices does not in itself support a rejection of consent in contract law. Put differently, should even a relatively small group of people be directed toward a dispute resolution forum not of their choosing simply because this may lower the interest rate on the unpaid balance of a credit card by one-tenth of one percent? In the specific context of securities arbitration, the potential trade-off is starker still. Should even a relatively small number of investors be forced to arbitrate unwittingly or without promise or assent in return for at best marginal savings in commission expenses? If arbitration results in reduced detection and punishment of fraud, churning or unduly risky broker behavior, the trade-off becomes a poor one irrespective of the aggregate savings to consumers as a whole, the majority of whom are not defrauded by even the most corrupt of industries. See Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 714 (1996) (costs of even a small increase in securities fraud dwarf any savings from reducing procedural expenses in view of sheer size of American capital markets).

tion.⁴² Furthermore, for some claims the judicial mechanisms for assessing truth are more likely to be effective than those of arbitration.⁴³ In these classes of cases, courts should insist on a high quality of consent as a prerequisite to enforcing arbitration agreements.

In addition, the notion of consent is central to much of our jurisprudence. Our litigation system is an adversarial one premised on disputants retaining counsel. In civil and even criminal litigation, disputants can do much to shape the conduct and outcome of litigation through consent: waiver, stipulations, and settlement (partial or complete). Exiting of the system via consensual settlement is permitted even on the metaphorical steps of the Supreme Court.⁴⁴ But even in this arena of sharpened adversity, where the parties ordinarily have counsel and are acutely aware of the dangers of being held to a constructive agreement through failure to speak or act decisively, courts ordinarily require some meaningful degree of consent before attaching legal consequences.

3. Consent, Judicial Competence and Improving Arbitrability Adjudications

A more vigorous consent regime of arbitrability holds potential to provide procedural and other adjudication advantages over the current practice of mandatory arbitration.

a. *A consent paradigm for arbitration is articulable, feasible and affordable.*

One ground for ejecting consent from the arbitrability branch of contract law posits that serious attention to consent

⁴² See Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1445-46 (1996) (criticizing increasing formalization of arbitration procedures as negating speed, cost and efficiency advantages traditionally enjoyed by arbitration over litigation).

⁴³ See Selya, *supra* note 42, at 1456-57 (suggesting that courts are more competent to determine discrimination claims but no better than arbitration panels for assessing securities disputes).

⁴⁴ See, e.g., *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866 (9th Cir.), *cert. denied*, 444 U.S. 981 (1979) (parties settle antitrust dispute with petition for certiorari pending, leading to dispute over apt fee owed petitioner's counsel under unusual contingency fee agreement).

issues interjects too much unpredictability and subjectivity, thereby undermining the Federal Arbitration Act⁴⁵ and its attendant national policy.⁴⁶ The charge is at best overstated.

⁴⁵ This argument has not been stated quite this openly in arbitrability litigation or adjudication but is discernable in the Court's tendency to resist serious inquiry regarding consent issues in arbitrability cases. Even when the Court holds an arbitration clause unenforceable, it tends to do so based only on formal or superficial reasons rather than a full contextual inquiry into the agreement.

For example, in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995), the Court refused to require the Kaplans to arbitrate although they had guaranteed the commodity trading obligations of a company they controlled, which had entered into an arbitration agreement. The Court's reasoning: the Kaplans individually were different entities from their company, the entity that signed the arbitration agreement and that was that. *Id.* at 1928-30. Although this may have been the right result and certainly is in part a welcome tip of the judicial hat toward consent, it is nonetheless a suboptimal arbitration decision. A serious inquiry would have examined whether in the context of the transaction the Kaplans as personal guarantors of a closely held company they owned reasonably expected any commodity trading disputes to be resolved in an arbitration proceeding.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995), the Court essentially decided that investors should not be held to the unfairly surprising terms of a choice of law agreement in a securities brokerage contract providing for arbitration where the chosen law, that of New York, was unusual in its prohibition against arbitrators awarding punitive damages no matter how egregious a defendant's conduct. But even *Mastrobuono*, by far the best of the Court's recent arbitration decisions, was decided on the basis of rough theorizing about the matter—positing that the Mastrobuonos, academics, were insufficiently sophisticated to appreciate the limitations of New York remedies law—rather than any actual inquiry as to the intent, understanding and agreement of the parties to the contract.

⁴⁶ See, e.g., *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983):

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

See also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660 (1996) (identifying *Moses H. Cone* as initial case placing Court on record as favoring arbitration as a matter of national policy).

Professor Sternlight's assessment is perhaps overstated in two facets, however. First, the Court's interpretation of the Act as an endorsement of arbitration as well as a statute mandating an end to discrimination against arbitration as a matter of contract enforcement can be seen at least tacitly in cases such as the 1960 Steelworker's Trilogy, even though these were labor arbitration cases and the Court's enthusiasm for labor arbitration predates its embrace of commercial arbitration. The Steelworker's Trilogy consists of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*,

The Act reflects a national policy of enforcing arbitration agreements. It does not reflect a national policy in favor of arbitration over litigation or any other form of dispute resolution. The intent of the Arbitration Act was to override a judge-made rule refusing to give specific enforcement to predispute arbitration agreements.⁴⁷ A proper application of the Act would preserve traditional contract doctrine, including the consent concept.⁴⁸ Reviewing, enforcing, and policing arbitration

363 U.S. 593 (1960).

Second, *Moses H. Cone* and its progeny have emphasized that the perceived national policy favoring arbitration mandates a deferential view of the scope of an arbitration agreement but not necessarily a similarly relaxed notion of consent. See, e.g., *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643 (1986) (refusing to compel arbitration of particular work dispute where particular type of dispute is not mentioned on face of labor arbitration agreement). The insidiousness of the Court's consent jurisprudence has not been its express rejection of the consent concept, but rather the implicit rejection of consent through a hair trigger tendency to deem an arbitration agreement consensual under even the most coercive circumstances.

⁴⁷ See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION; NATIONALIZATION; INTERNATIONALIZATION* (1992) [hereinafter *AMERICAN ARBITRATION LAW*] (reviewing origins and enactment of the Act; chapter 9, *Analysis of Legislative History*, is particularly focused on the intent of the Act as passed); Stempel, *The Employment Exclusion*, *supra* note 7, at 288-93.

The House Judiciary Committee stated the following with regard to the Act: "The bill declares that such agreements shall be recognized and enforced by the courts of the United States." H.R. REP. NO. 96, 68th Congress, 1st Sess. (1926) (quoted in MACNEIL, *supra*, at 117). Nothing is said to suggest that the Act in any way disturbs normal tenets of contract law. Rather, the Act appears an effort to require federal courts to enforce arbitration agreements that meet the standards by which other contracts are enforced by federal courts. See Stempel, *Pitfalls*, *supra* note 11, at 271-74 (prior to Act, federal courts and many state courts exhibited jealousy of jurisdiction and refusal to enforce arbitration agreements merely because this would divert dispute to nonjudicial forum).

⁴⁸ As Professor Sternlight observes:

The practice of interpreting ambiguities to favor arbitration, which the Court first enunciated in *Moses H. Cone* in 1983, is nothing less than a means of spreading binding arbitration by Supreme Court fiat. Some courts have used this interpretive power boldly to require consumers, employees and others who likely had no idea arbitration would be relevant to a given issue to submit the problem to arbitration. However, no policy supports the Court's practice of interpreting an ambiguous arbitration agreement any differently from any other ambiguous contract Congress never authorized the Court to put its thumb on the scale to favor arbitration in the commercial or consumer context, and such bias also lacks support as a matter of policy.

Sternlight, *supra* note 46, at 704-05 (footnotes omitted); see *supra* note 46 (suggesting Court's expansion of Act to create national policy favoring arbitration rather than merely commanding courts not to discriminate against arbitration con-

agreements according to the quality of consent evidenced in the matter admits of workable judicial standards.⁴⁹

tracts predates *Moses H. Cone*).

⁴⁹ In particular, through the application of traditional adjudication, courts could ensure that arbitration agreements qualify as enforceable contracts meeting the consent criterion. Written agreements to arbitrate would be treated as presumptively enforceable, but the presumption would be rebuttable upon a showing of any of the following:

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

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

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

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

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

Stempel, *Better Approach*, *supra* note 2, at 1434-35 (footnotes omitted). The five suggested criteria for refusing to enforce ostensible arbitration agreements are developed at greater length in the article, which also reviews the history of arbitrability adjudication and historical grounds for refusing to enforce arbitration clauses.

These five grounds for avoiding an arbitration clause, with minor variants or additions, would provide courts with a sensible yardstick for determining whether a written arbitration provision sufficiently satisfied the consent criteria to merit enforcement. Courts applying this sort of template would not be rejecting arbitration on the basis of judicial hostility to the concept nor interfering with freedom of contract. My proposed typology of consent based defenses to arbitrability has been criticized as merely restating existing defenses available in contract law and thus tending to "reinvent the wheel." See Ware, *Employment Arbitration*, *supra* note 8, at n.138. What I propose is a refinement of the wheel rather than its reinvention. In my view, courts have been clumsy in their treatment of the consent aspects of arbitrability because they have not adapted traditional consent norms of contract to arbitration. Having more specified arbitrability defenses will assist the judicial enterprise.

Although some arbitration proponents might argue that adoption of a consent scrutiny approach is an overdose of due process that makes arbitration enforceability too difficult, the argument is not persuasive. Courts have adjudicated contract matters for centuries. As noted above,⁵⁰ even in the purported heyday of classical contract doctrine and the objective theory of contract, courts policed agreements on the bases of the parties' understanding of the stakes and of the bargain, as well as issues of consent and fairness. Reinvigorating these traditional concepts is unlikely to add significantly to the judicial burden. An initial upsurge in judicial resources devoted to this richer review of arbitration contracts is likely to be temporary, with judicial precedents subsequently requiring parties to establish adequate contracting norms and procedures and to conform their behavior to the standards enunciated by the courts.

b. Consent based contract interpretation provides a more useful criteria for determining arbitrability in a manner consistent with judicial competence.

i. A Non-Securities Example of the Dangers of Neglecting Consent Analysis

A meaningful doctrine of consent could operate to relieve courts of the need to engage in more difficult issues that are less susceptible to adjudication such as statutory conflict, pub-

To some extent, I am also proposing an expansion of the wheel in that I clearly envision more court based policing of the quality of consent in contracts than do Professor Ware and other neoclassical contracts scholars. For example, even though Professor Ware and I agree in general that consent should be the focus, his preferred consent doctrine is far more likely to hold parties to mass-imposed form agreements than is mine, at least outside the securities context. Within securities, our positions reverse to some degree since he places greater emphasis than do I upon the semi-public nature of the securities self-regulatory organizations.

Rather, courts using these five grounds for avoiding an arbitration clause would be ensuring that freedom was actually sufficiently present in the context of the asserted arbitration contract. In other words, examination of arbitration clauses according to these criteria would vindicate the longstanding national policy Professor Speidel identifies as "freedom from contract." See Speidel, *Whither Consent?*, *supra* note 13; Speidel, *Afterword*, *supra* note 33, at 262-64.

⁵⁰ See *supra* notes 32-41 and accompanying text.

lic policy limits on arbitrability or even the historically judicial issue of unconscionability.⁵¹ When focusing on traditional adjudication of contract issues such as offer, acceptance, consideration and consent, courts might well do better than they do when attempting to make broad pronouncements of the law.

Ironically, a recent example, albeit not one from securities arbitration, was relatively recently rendered by the Supreme Court in the commercial ADR area. In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,⁵² a fruit distributor shipped its products overseas. The bill of lading issued for the transaction, a shipment from Morocco to Massachusetts, contained a clause stating that the transaction would be governed by Japanese law and that any disputes arising under the arrangement would be arbitrated in Japan before the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc. The vessel was time-chartered to a Japanese company. A dispute arose, but the claimant unsuccessfully resisted arbitration on consent grounds, arguing that the bill of lading was a contract of adhesion. The claimant also lost on the issue on which the Supreme Court granted certiorari: Was the arbitration provision barred by the Carriage of Goods by Sea Act ("COGSA"), a federal statute providing that any limitation on liability contained in a shipping agreement was unenforceable?⁵³ In particular, did the required arbitration in a distant forum with potentially less favorable contract breach remedies constitute what was in effect a limitation on liability?

The Court held that COGSA did not conflict with the FAA and that an arbitration clause in an arguably inconvenient forum would not constitute a limitation of remedies of the shipper within the meaning of COGSA. Because the Court found arbitration (even in Japan) not to be the functional equivalent of a limitation on liability, the Court found no conflict between COGSA and the Federal Arbitration Act. Had a

⁵¹ Although I have advocated a continued strong role for unconscionability analysis as a means of policing arbitration agreements, a court's determination that an agreement is excessively favorable to one party (a definition of unconscionability) involves the court in more of the semi-legislative determination of regulating private behavior than does adjudication of matters such as the scope of the agreement, the existence of fraud or the presence of consent.

⁵² 115 S. Ct. 2322 (1995).

⁵³ See 46 U.S.C. § 1303(8) (1936).

conflict existed, the Court would have been forced to determine which statute controlled. Remarkably, only Justice Stevens dissented, and only he raised any concern over consent and contracting fairness.⁵⁴ Although Justice Stevens appreciated the general judicial desire to avoid statutory conflicts, he thought the majority had "ignored a much less damaging way to harmonize COGSA with the FAA" through a serious consideration of the contractual consent and validity issues presented by the oppressive application of the billing of lading.⁵⁵

Justice Stevens is right on two counts. First, as he notes, serious contract policing of arbitration agreements would, as in *Vimar*, frequently lead to invalidation or modification of arbitration clauses, thus avoiding some statutory conflicts. In addi-

⁵⁴ Justice Stevens also criticized the Court's continued adherence to and expansion of *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), which enforced a ticket stub forum selection clause. Although the contract consent issue was not directly addressed by the majority, Justice Stevens noted the importance of the matter through citation to a similar case involving a different bill of lading provision:

The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all its twenty-eight lengthy paragraphs, of which this is [but one clause in the middle]. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law.

Vimar, 115 S. Ct. at 2335 (quoting *United States v. Farr Sugar Corp.*, 191 F.2d 370, 374 (1951)). Perhaps nostalgically, I note that Justice Stevens quotes from a Second Circuit case decided a half-century before, underscoring the degree to which the modern Court has, but for perhaps Justice Stevens alone, strayed from the commitment to consent and common sense contract construction once exhibited by the American bench. See Braucher, *supra* note 38, at 60 (modern Court decides contract matters as though hypnotized by "blinding fog" of freedom to contract rhetoric), 72 (in contract cases reviewed by Professor Braucher, Justice Stevens "plays the role of most sensible member of the Supreme Court").

Justice O'Connor concurred "because the District Court has retained jurisdiction over this case while the arbitration proceeds, [so that] any claim of lessening of liability that might arise out of the arbitrators' interpretation of the bill of lading's choice of law clause, or out of their application of COGSA, is premature." *Vimar*, 115 S. Ct. at 2330. As of this writing, there has been no further reported decision in *Vimar*.

⁵⁵ *Vimar*, 115 S. Ct. at 2337 (Stevens, J., dissenting).

tion, there is a second benefit from focusing on contract first and statute or policy second: Courts are generally better equipped to assess contract or other private law disputes than to determine and evaluate statutory meaning and public policy. Although these latter types of evaluation are unavoidable for modern courts, this hardly requires courts to pursue the potentially sweeping activism of setting forth a general statutory pronouncement or making an interstitial or extrapolated assessment of the American polity's real views about arbitration. Instead, a court might better function as a plain vanilla judiciary and decide contract disputes largely according to the norms of contract, including the consent criterion.⁵⁶ Contract policing according to consent and other criteria is an essentially more focused adjudicatory role and less a policymaking role. As such, it should generally be preferred for courts under the norms of the American politico-legal system.

ii. Applying Consent Criteria for Better Determinations of Securities Arbitrability

Under the current regime of softpedaling consent issues and forcing many cases into the problem of conflicting rules and public policy, the legal profession will probably continue to diverge markedly over arbitration issues. If a brokerage house arbitration agreement provides that a Buffalo retiree must arbitrate a churning claim against her New York stockbroker in Vladivostok, reasonable observers would find the arrangement unconscionable or a substantive violation of the 1934 Act or both. But does it violate substantive law for the hypothetical little old lady in tennis shoes to shuffle from Buffalo to Manhattan to arbitrate these claims? Academics and judges may disagree over these matters of legislative reach and public policy. But these same jurists may be considerably more united in addressing the degree of knowing and voluntary consent exhibited in a contracts transaction. Rather than focusing on the convenience and tactical advantages of such disputes, the legal

⁵⁶ I emphasize again, however, that my view of the correct contract based application of consent criteria is somewhat more searching than other scholars have found it to be in areas outside of arbitration. *See, e.g., Rubin, supra* note 29, at 512-63.

system should focus on whether the consumer was adequately informed and agreed to arbitrate in Manhattan. If so, such agreements should ordinarily be enforced. As discussed below, consent based arbitral adjudication would be neither costly nor eviscerating of arbitration.

Courts may be able to reach greater agreement and consistency when adjudicating issues of consent, provided we can agree on the general ground rules regarding what constitutes consent. Of course, continued division is undoubtedly possible, with some Justices willing to find consent in the most cursory signature on boilerplate forms while others may require painstaking explanation and roughly equal bargaining power as prerequisites to a finding of consent. But under a doctrinal regime that makes a reasonably searching inquiry into consent, my prediction is that most courts would agree more often than lawyers agree over issues of statutory conflict, public policy, politics and whether a particular disadvantage created by contract constitutes a substantive diminution of substantive rights.

Consequently, a serious consent doctrine seriously enforced holds the potential for making arbitration law a good deal more consistent and candid. If the primary issue in most arbitrability disputes is consent rather than public policy or statutory conflict, the court's (or arbitrator's) inquiry is the relatively simple one of determining whether the complaining party in fact consented to the arbitration provision of which it complains. This is what courts historically have done well and what historically has been assigned to courts in U.S. polity. When courts must deal with questions of statutory conflict and public policy, they enter a realm closer to, and perhaps overlapping into, the domain of the legislature. Even though assessment of substantive law and fundamental fairness are traditional judicial activities, they are areas of adjudication that more frequently turn on the ideological divisions of the bench.

Applied to securities, a consent regime would worry less about whether a particular arbitration provision was inconsistent with national securities regulation and worry more about whether there was actual consent. If the court finds real consent, it should hesitate to disturb the arbitration arrangement

unless it finds the arbitration scheme one that creates a substantial danger for national securities regulation policy.

A tougher issue arises when the industry's commitment to arbitration is so uniform and widespread that the only means by which even the best informed consumer can escape securities arbitration is to avoid the securities based financial markets altogether. At the Symposium panel discussion, G. Richard Shell recounted his humorous but troubling episode attempting to avoid the standard arbitration clause in several brokerage agreements he was pursuing on behalf of family members.⁵⁷ Because he is a sophisticated lawyer/businessperson/scholar and because he effectively controlled several accounts, the general counsel for the brokerage house was willing to waive the arbitration clause after Professor Shell's relatively mighty efforts to avoid mandatory arbitration. Where average customers are involved, this outcome is unlikely, prompting the question as to whether arbitration clauses insisted upon as a condition of opening an account should be enforced. Symposium participants suggested that a few smaller brokers offered account agreements without arbitration clauses, but these are seemingly too difficult to find for most consumers, including Professor Shell, who found it more effective to argue with a major broker than to shop for a more pliable minor broker.⁵⁸

Six years ago, I argued for enforcement even where the industry offered no nonarbitration version of the discretionary account clause,⁵⁹ and I continue to hold to this view concerning this type of brokerage agreement. First, by definition, the discretionary trading account is something for the above-average consumer. Before one buys stocks, let alone needs instantaneous broker discretion, one needs a fair amount of wealth as compared to the average American. Holders of such accounts should not include the proverbial little old lady in tennis shoes. Perhaps the securities industry should not be opening such accounts for average or unsophisticated customers (i.e., even little old ladies with money), but that is an issue dif-

⁵⁷ See G. Richard Shell, *Fair Play, Consent & Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365, 1369-70 (1996).

⁵⁸ See Marc I. Steinberg, *Securities Arbitration: Better for Investors than the Courts?*, 62 BROOK. L. REV. 1503, 1504-05 (1996) (brokerage houses increasingly tending to require arbitration as a condition of doing any business with investor).

⁵⁹ See Stempel, *Pitfalls*, *supra* note 13, at 288-92.

ferent from arbitrability. My point is that one does not need a discretionary trading account to participate in the American capitalist system.⁶⁰ If a typical investor is adequately apprised about the arbitration clause, the investor may not enjoy Professor Shell's success in haggling over the term, but the term is not oppressive so long as the investor can reject the agreement and instead invest in nondiscretionary trade brokerage accounts, mutual funds or direct purchase of stock from the issue company.

The hard questions about adhesion and escape occur if these alternative investment vehicles are uniformly offered on an "arbitration only" basis. Although the investor may in theory spurn an imposed arbitration agreement affecting securities in favor of her local bank or cash in the mattress, these are probably not realistic financial options when certificates of deposit are paying six percent and the stock market has risen at an average annual rate of nearly fifteen percent during the past decade. Worse yet, current Supreme Court jurisprudence admits of no readily ascertainable stopping point for containing the march to mandatory arbitration. After cases like *Badie v. Bank of America*, allowing arbitration to be "contracted for" by virtue of continuing use of a credit card,⁶¹ it seems only a matter of time before commercial banks insert arbitration clauses in the checking and savings account agreements of their customers.⁶² If these are sustained by the judiciary, the

⁶⁰ Although it obviously helps to have money, access to expertise and negotiating leverage. See, e.g., Diana B. Henriques & Floyd Norris, *Wealthy, Helped by Wall St., Find New Ways to Escape Tax on Profits*, N.Y. TIMES, Dec. 1, 1996, at A1 (describing proliferation of new transactions designed to avoid or minimize capital gains taxes offered by investment bankers to wealthy, illustrating topic with description of entrepreneur's avoidance of \$54 million in capital gains tax). For example, since 1988 the IRS reports that taxpayers with only mutual funds as an investment have reported a 200% increase in capital gains while other investors have reported reduced capital gains. *Id.*

⁶¹ *Badie v. Bank of America*, No. 94-4916, 1994 WL 660730 (Cal. App. Dep't Super. Ct. Aug. 18, 1994) (appellate court sustains trial court ruling that bank credit card customers bound by compulsory arbitration agreements established by notice mailed to customers with regular monthly statements); see *Engalla v. Permanente Medical Group, Inc.*, 43 Cal. Rptr. 2d 621, 638-42 (Cal. Ct. App. 1995) (rejecting fraud defense to arbitration even though clause in medical group's contract promised hearing within 60 days although group aware that 99% of prior claims took nearly two years to receive hearing), *review granted and opinion superseded*, 905 P.2d 416 (Cal. 1995) (lower court holding subject to change after state supreme court review).

⁶² See Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*,

investor literally has no escape from arbitral adhesion other than the mattress. Without doubt, the judiciary must retain enough vestige of the consent criterion to draw a prohibitive line prior to this state of affairs. My own preference is that the line be drawn in the financial industry. Unless prospective investors have at least a significant opportunity to participate in securities investment without arbitration, there is insufficient meaningful choice to make arbitration clauses enforceable. Mutual funds would suffice, as would brokerage accounts without mandatory arbitration offered by at least two major brokers, so long as this information was not too costly to unearth and so long as the consumer is not pressured away from pursuing the nonarbitration version of the account. Differential pricing would not invalidate such agreements so long as the presumably higher price for retaining the litigation option was not prohibitively expensive.

4. Consent as "Market" Barometer of Fairness

In addition to providing for a sounder approach to determining arbitrability, application of consent criteria can serve the value the Supreme Court claims to have fostered with its sweeping enforcement of arbitration: deference to the private market of transactions. The prevailing economic and legal theory posits that the economic system and private behavior generally will better succeed where the parties are accorded wide latitude in structuring their relations. But the prevailing theory becomes ludicrous when there is no real give and take⁶³ between contracting parties. When the securities industry, for

59 ALB. L. REV. 905, 926-28 (1996) (suggesting that expansion of reach of Federal Arbitration Act and increasing willingness of both federal and state courts to uphold mass imposition of arbitration clauses opens up realistic possibility of arbitration becoming part of even routine consumer contracts). The success of Bank of America's efforts to "contract" to arbitrate by junk mail and of computer and software makers to "contract" to arbitrate through use of wrapping and packaging suggests that merchants now have a wide array of options for forcing arbitration on customers and that these forms of "contract" will be upheld by many, perhaps most, courts. *See supra* note 8 (citing computer packaging arbitration cases).

⁶³ I again emphasize that real give and take does not require elaborate bargaining over all aspects of a transaction. Consent may be adequate where the parties have adequate alternatives or are sufficiently aware of the implications of their decision such that they may be held to a conscious decision to "take" a contract term rather than "leave" it.

example, moves massively toward mandatory arbitration, a free market ceases to exist, at least as to dispute resolution, unless the customer or the employee has some meaningful alternatives. The presence of alternatives is part of the essence of a free market. Without such alternatives, producers and consumers have no more freedom or incentive to reach optimal results than would exist if business policy were declared by the Politburo. In effect, the jurisprudence of the 1980s and 1990s has permitted a private interest group version of the Politburo to impose a national policy of mandatory arbitration that essentially eliminates a market for securities disputes for all but the most affluent investors—and apparently no employees—and a few dogged academics like Professor Shell.⁶⁴

If the courts were to conduct a significant inquiry into the indicia of consent and to require a minimally adequate version of consent as a prerequisite to enforcing arbitration agreements, the securities industry and American business in general would have a substantial incentive to offer a variety of dispute resolution products among which consumers could choose, with prices differentiated according to particular disputing options. In this type of environment, consumer behavior would provide powerful evidence of the relative preferences for and value of the disputing alternatives. Perhaps arbitration would be the dispute resolution means of choice. Perhaps not. But until the Court actually protects the conditions of free market exchange by protecting a basic assumption of the market (consensual agreement), there is no real ADR market in contract, only industry fiat achieved through either monopoly power or concerted activity. Although the mandated arbitration of the securities industry is probably not violative of the antitrust laws—although the issue probably deserves more scrutiny than it will ever receive—neither is it the sort of free-flowing market that justifies judicial deference to the mass-produced arbi-

⁶⁴ Forgotten in the judiciary's ideological infatuation with markets and arbitration is the ability of private actors to garner effectively inescapable power rivaling that of the government. See Robin Toner, *Harry and Louise Were Right, Sort Of*, N.Y. TIMES, Nov. 24, 1996, § 4, at 1 (although insurers campaigned against Clinton Administration health care proposals as stripping consumers of choice, employer-supported health insurance plans, the major source of health insurance, increasingly offer no choice among insurers and less choice over terms of selecting or seeing physicians).

tration clauses found in brokerage agreements and employment papers signed by workers in the securities industry.

In addition, there is another market eliminated by the Supreme Court's recent infatuation with arbitration: the market among states to regulate arbitration agreements in different ways so long as not inconsistent with the Federal Arbitration Act. This shortcoming is discussed below.⁶⁵

II. THE SUPREME COURT'S SCHIZOPHRENIA AND RESULT-DRIVEN INTERPRETATION OF THE FEDERAL ARBITRATION ACT

A. *The Supreme Court's Inconsistent and Partisan Application of Functional and Formal Arbitration Jurisprudence*

Although the Court's reconsideration of arbitrability began during the 1970s,⁶⁶ the 1980s and 1990s saw something of a revolution in the Court's approach to arbitration. In 1983, the Court issued a strong opinion favoring the use of court injunctive power to enforce predispute arbitration agreements.⁶⁷ In 1984, it went one better by not only requiring arbitrability of a franchise dispute in the face of arguably contrary state law, but also declaring that the Federal Arbitration Act, passed in 1926,⁶⁸ established substantive federal law applicable in both state and federal proceedings.⁶⁹ This 1984 decision in *Southland v. Keating* marked a major change in the Court's reading of the Act, much to the consternation of Justice O'Connor, who viewed the Act as merely setting forth the procedural rules regarding enforcement of arbitration clauses in federal court.⁷⁰

⁶⁵ See *infra* notes 84-90 and accompanying text.

⁶⁶ See, e.g., *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (enforcing arbitration clause in towing contract entered into by damaged vessel and salvage operation). Despite signs of more support for arbitration, other Court decisions in the 1970s and 1980s rebuffed arbitration of certain statutory claims, making the area one ripe for substantial change in the mid-1980s. See, e.g., *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984) (42 U.S.C. § 1983 civil rights claims); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII).

⁶⁷ *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983).

⁶⁸ 9 U.S.C. §§ 1-15 (1994).

⁶⁹ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁷⁰ See *id.* at 24 (O'Connor, J., dissenting, joined by Rehnquist, J.). In particu-

During the next dozen years, as chronicled in detail throughout this Symposium,⁷¹ the Court's enthusiasm for arbitration continued to grow. In 1987, the Court signaled another major reversal of the field by holding that claims brought under the 1934 Securities Exchange Act were subject to arbitration.⁷² In 1989, it went the next yard and held that claims under the 1933 Securities Act were arbitrable,⁷³ expressly reversing the 1953 *Wilko v. Swan* decision and giving some posthumous revenge to Justice Frankfurter, who had strongly dissented.⁷⁴

In 1991, the Court required a broker alleging age discrimination claims to arbitrate⁷⁵ even though earlier Court precedent had suggested that civil rights and job discrimination claims were inapt for arbitration,⁷⁶ and even though the broker was required by New York Stock Exchange Rules to sign the arbitration agreement as a condition of his employment.⁷⁷

After a decade of substantial change in arbitration law, one might have expected a rest from the Court. However, during the Court's 1994 Term, it decided four arbitration cases.⁷⁸

lar, Justice O'Connor relied on the Court precedent of *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198 (1956), which held that in diversity jurisdiction cases, state law on arbitration was controlling.

⁷¹ See Selya, *supra* note 42; Steinberg, *supra* note 58, at 1503-07 (discussing evolution of arbitration jurisprudence and processing of securities disputes by courts and arbitrators).

⁷² See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

⁷³ See *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

⁷⁴ See *Wilko v. Swan*, 346 U.S. 427 (1953).

⁷⁵ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁷⁶ See *supra* note 1.

⁷⁷ In addition to the obviously coercive undertones of the arrangement, the Arbitration Act provides that it does not apply to a "contract of employment." 9 U.S.C. § 1 (1994). The Court avoided this limitation through the sort of reasoning that would give most first-year law students a chuckle: The arbitration provision was not part of a "contract of employment" since it was a separate document between the employee and the NYSE. The Court conveniently ignored the employee's compulsion to sign with the NYSE because his employer compelled him to do so as part of the employment relationship. Justice Stevens provided a typically terse and insightful dissent which fell on deaf ears.

⁷⁸ *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995).

Arguably, all were unnecessary in that these decisions did not clarify the law much or reach out to decide pressing national issues. As one commentator summarized:

Taken as a whole, the four cases [decided in 1995] . . . do not generate unusual outcomes. The determinations are characteristically supportive of arbitration; the decisional content of the opinions rehearses and reinforces existing doctrine. A few statements provide new insight into the court's thinking on arbitration, but even these additions only amount to new twists and turns in the Court's fantastic doctrinal constructs on arbitration. The wall of judicial policy that protects arbitration is solid and looms large, and appears increasingly impossible to scale.⁷⁹

But the 1995 term cases arguably did more than just solidify and inch outward the breadth of pro-arbitration doctrine. In one of the cases, the Court lost sight of its normal solicitude of federalism as well as consent values when it struck down Montana's attempt to require that arbitration clauses be more clearly presented to contracting parties to lessen the danger of a party being bound to arbitrate due to clauses quietly slipped into the fine print of lengthy boilerplate contracts.⁸⁰ Only Justice Thomas dissented, on grounds of states' rights rather than consumer fairness or contractual consent.⁸¹ Justice O'Connor, apparently weary of the fight to hold the Arbitration Act to its pre-1984 meaning, did not even join the dissent.

Much of the past decade's judicial receptiveness toward arbitration is worth applause. For the most part, arbitration is a fair and effective means of dispute resolution.⁸² On the whole, society should be happy to see the demise of older precedents regarding ADR as evil and courts as sublime. Prior to the court's quiet revolution on arbitration, contracting parties frequently used judge made "exceptions" to arbitrability simply as tactical ploys for forum shopping or other efforts to gain a step on litigation opponents.⁸³

⁷⁹ See Thomas E. Carboneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. J. INT'L ARB. 1, 2 (1995) [hereinafter *Beyond Trilogies*].

⁸⁰ *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

⁸¹ *Id.* at 1662 (Thomas, J., dissenting).

⁸² By way of disclosure, I should add that I have been involved in two commercial arbitrations as counsel and that both were resolved favorably to my former clients. In addition, I have served as both a commercial and securities arbitrator.

⁸³ See, e.g., *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821

But in its drive to usher in the new era and reduce the court's monopoly on dispute resolution, the Court's decisions have exhibited a disturbing intellectual expediency, an insensitivity to serious problems of consent and fairness. Oddly, the Court has been most interested in departing from its embrace of arbitration largely on behalf of litigants who appear less deserving of a respite from the arbitration juggernaut.

For example, the Court's 1996 decision in *Casarotto* striking down Montana's full disclosure provision sided with the owners of the Subway sandwich shop chain in a dispute with dissident franchisees.⁸⁴ In light of Subway's reputation as a franchise of limited value to its franchisees and the substantial fairness issues that have been raised about franchising generally, arbitration clauses in franchise agreements would seem a particularly good candidate for full disclosure laws such as Montana's.⁸⁵ Certainly, the preemptive scope of the Federal Arbitration Act can be read as prohibiting state efforts of this type. But a less formalistic and wooden view of the Act would prohibit state efforts to stand in the way of enforcing arbitration agreements yet nonetheless permit states to provide nonburdensome ground rules for ensuring that arbitration agreements were truly knowing and voluntary, an assumption that was a driving force behind the Federal Arbitration Act along with dispute resolution efficiency.⁸⁶

The Supreme Court, of course, is not alone in its resistance to state law that in any way treats arbitration differently

(2d Cir. 1968) (antitrust claims incompatible with arbitration due to statutory nature and public interest).

⁸⁴ *Casarotto*, 116 S. Ct. 1652 (1996). The Subway sub shop kingdom is reputedly something less than a franchisee's nirvana. For example, one source for a 1994 *Wall Street Journal* article equated ownership of a Subway franchise as "basically buying yourself a low-paying job." Barbara March, *Sandwich Shop Chain Surges, But to Run One Can Take Heroic Effort*, WALL ST. J., Sept. 16, 1992, at A1.

⁸⁵ See *supra* note 84.

⁸⁶ I have reviewed the entire legislative history of the Act, which is hardly a major accomplishment in light of its slimness. A fair reading of the congressional materials shows that the states' rights concerns of Justices O'Connor and Thomas cannot be foreclosed, and that the drafters were a good deal more concerned about worker rights to avoid coercion into predispute arbitration clauses than was the *Gilmer* Court. A more comprehensive examination of the origin of the Act, including prior interest group activity and earlier attempted legislation, comes to a more firmly rooted view that the Act was intended to apply only in federal courts. See MACNEIL, *AMERICAN ARBITRATION LAW*, *supra* note 47, chs. 7-9.

than other contracts. Prior to *Casarotto*, the leading case on the issue, *Securities Industry Association v. Connolly*,⁸⁷ reached the same conclusion. *Connolly*'s author, Judge Bruce Selya, is of course a featured speaker in this Symposium. At the risk of displaying bad manners by criticizing a participant from another panel,⁸⁸ it seems inescapable to me that *Connolly* displays the same excessive formalism and narrow focus regarding the Arbitration Act as does *Casarotto*, although with the Selya trademark of far more interesting prose. *Connolly* and *Casarotto* both adopt the premise that any distinction affecting an arbitration contract is automatically invidious and therefore inconsistent with the Act, a most strident pose in light of the creative manner in which the Act was metamorphosized into substantive law in the 1984 *Southland* decision. Even without the enacting Congress' likely surprise at the extension of the Act, it hardly follows that a state law seeking to enhance volitional arbitration is fatally inconsistent with the Act. Both *Connolly* and *Casarotto* assume that greater disclosure unduly hinders arbitration, inadvertently suggesting that franchisees like the Casarottos or the stock investors Massachusetts sought to protect in *Connolly* would never have signed an arbitration form had they appreciated what they were doing. This is hardly a strong recommendation for the supposed ADR Elysian Fields of arbitration.

But *Connolly* is more defensible than *Casarotto*. The Massachusetts law at issue in *Connolly* not only required a "conspicuous" presentation of the arbitration clause and a written disclosure of the "legal effect of the pre-dispute arbitration

⁸⁷ 883 F.2d 1114 (1st Cir. 1989).

⁸⁸ However, my chutzpa is considerably less than that of Judge Triewiler, who not only authored the Montana Supreme Court's *Casarotto* opinions but also concurred especially to attack Judge Selya's *Connolly* opinion with vigor bordering on the personal. See *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995) (reaffirming earlier holding after remand for consideration in light of *Terminex* case); *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994); *Id.* at 939 (Triewiler, J., specially concurring) (finding *Connolly* opinion "offend[ing]", "naive," "self-serving" and "cynical").

Perhaps excessive in its rhetoric—although one is hard-pressed to bring oneself to pity Judge Selya in a verbal exchange—the Triewiler concurrence raises serious concerns that went unheeded in the Supreme Court: "[Federal court] decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up." *Id.* at 941 (Triewiler, J., specially concurring).

contract,” but also made it illegal for brokerage houses to require arbitration as a “nonnegotiable condition precedent to account relationships.”⁸⁹ This last trait seriously hinders arbitration and is perhaps, but not indubitably, adverse to the Federal Act’s notion of nondiscrimination against the arbitration agreement.⁹⁰ By contrast, the Montana law struck down in *Casarotto* required only prominent disclosure and explanation. Subway and other franchisers, indeed businesses of all types, continued to be free under the Montana law to insist on arbitration as a condition of doing business. Under those circumstances, a state’s legislative insistence on meaningful disclosure is simply not the sort of judicial hostility that prompted Congress to pass the Arbitration Act. In addition, respect for state prerogatives augers in favor of placing reasonable limits on the preemptive reach of the Federal Act. Viewed functionally rather than formally, Montana’s law deserved more deference even if Massachusetts’ law did not.

B. *Jurisprudential Inconsistency and the Felt Necessities of the Time*

One of Justice Oliver Wendell Holmes’s many pithy quotations posited (in best legal realist fashion thirty years prior to the Legal Realist movement) that judges decide cases not only on the basis of precedent but also based on the “felt necessities of the time.”⁹¹ During the past two decades, the United States Supreme Court has devoted a good deal of its energies to the jurisprudence of alternative dispute resolution, most prominently arbitration. Its decisions in this arena comfortably fit Holmes’s maxim: There exists a widespread view that society is choking on baroque litigation and needs streamlined dispute

⁸⁹ See *Connolly*, 883 F.2d at 1117 (citing MASS. REGS. CODE tit. 950, § 12.204(G)(1)(a)-(c) (1988)).

⁹⁰ For example, had the Massachusetts law been upheld, brokers could have satisfied the negotiability standard by offering commissions of X where the customer agreed to arbitrate and 5X where the customer would not execute the arbitration agreement. This sort of dramatic cost differential would undoubtedly prompt most customers to elect arbitration and allow the broker to make handsome profits even if faced with troublesome litigants in the nonarbitration accounts, yet would satisfy the state law standard of ensuring that consumers had some choice regarding arbitration.

⁹¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (1881).

resolution. Not surprisingly, a Supreme Court holding this view can be expected to render decisions promoting arbitration and other forms of ADR. Judicial decisions are not suspect merely because they reflect contemporary attitudes, but the potential always exists for such decisions to sacrifice logic or principle upon the altar of expediency or ideology. The Court's approaches to construing the Federal Arbitration Act, the linchpin of these decisions, has been marred by vacillation between a wooden formalism and a freewheeling sort of purposive dynamic interpretation—some would say a rewriting—of the Act. The Court should resolve this jurisprudential split personality in favor of a consistently purpose-oriented approach to construing the Arbitration Act that promotes arbitration without losing sight of other legal and social values.

For example, *Southland v. Keating* is a pivotal opinion that federalized American arbitration law. As such, it is a controversial opinion which dramatically expanded the reach of the Act and sub silentio overturned a twenty five-year-old precedent, *Bernhardt v. Polygraphic Co. of America*,⁹² which had construed the Act to be procedural in nature and not to override substantive state law otherwise applicable under the *Erie* doctrine.⁹³ The *Southland* majority fails even to mention *Bernhardt*, acting as though it either wrote upon the proverbial clean slate or as if the substantive federal law created by the Act were obvious.⁹⁴ Only Justice O'Connor, writing for a two-person dissent, cites *Bernhardt*, chiding the majority for failing to come to grips with important adverse precedent.⁹⁵ As to precedent and stare decisis, there is no doubt that Justice O'Connor's criticism of the *Southland* majority is well-

⁹² 350 U.S. 198 (1956).

⁹³ *Id.* at 202 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (abolishing notion of general federal common law applicable to interstate disputes and requiring that where jurisdiction is based solely on diversity of citizenship federal court must apply state substantive law in resolving dispute)); see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (as corollary to *Erie* doctrine, federal court presiding over diversity jurisdiction case must utilize choice of law rules of forum state).

⁹⁴ See *Southland Corp. v. Keating*, 465 U.S. 1, 1-17 (1984) (no mention of *Bernhardt v. Polygraphic Co. of America* in *Southland* majority opinion).

⁹⁵ See *id.* at 23-24 (O'Connor, J., joined by Rehnquist, J., dissenting) (citing *Bernhardt* as controlling and accusing majority of erroneously ignoring or improperly overruling *Bernhardt* without sufficient explanation).

taken. *Bernhardt* should have been controlling absent direct refutation by the majority. On the question of legislative meaning and intent, leading scholars, including Professor Speidel, have also sided with O'Connor's perspective, finding the better view that the original intent of Congress was that the Act apply in federal court but not in state court.⁹⁵ Professor Macneil is particularly critical of the *Southland* view of the Act and demonstrates beyond serious question that the *Bernhardt* reading of the Act is more consistent with original intent.⁹⁷ He concludes that the Court's purported legislative history and intent of the Act is "pathological" and illegitimate: "[T]here are some rules of the game [of fair advocacy with statutory history and intent]—violated grievously, I believe, by Chief Justice Burger in *Southland Corp. v. Keating*"⁹⁸

Ironically, the Court has not only turned its back on the more persuasive original reading of the Act, but also negated the enacting Congress' concern that the Act not lead to enforcement of arbitration agreements through contracts of adhesion. As chronicled in Professor Macneil's history of the Act, colloquy over an earlier, unenacted version of the Act reflects congressional concern that a law overcoming historical judicial reluctance to enforce arbitration agreements not result in erosion of consent concerns:

Senator [] Walsh then expressed concern about what we might now call the adhesive aspects of arbitration contracts. Having said that he saw no reason "why, when two men voluntarily agree to submit their controversy to arbitration, they should not be compelled to have it decided that way," he went on:

The trouble about the matter is that a great many of these contracts that are entered into are really not vol-

⁹⁵ See IAN R. MACNEIL, *FEDERAL ARBITRATION LAW* § 10.5.3 (1994); MACNEIL, *AMERICAN ARBITRATION LAW*, *supra* note 47; Sternlight, *supra* note 46, at 664-66; Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 *HOFSTRA L. REV.* 385, 389 (1992) (all essentially agreeing with interpretation of Arbitration Act proffered by *Bernhardt* majority and Justice O'Connor's dissent in *Southland*).

⁹⁷ See MACNEIL, *AMERICAN ARBITRATION LAW*, *supra* note 47, ch. 9; *see especially* MACNEIL, *FEDERAL ARBITRATION LAW*, *supra* note 96, at 117 (quoting House Judiciary Committee Report, H.R. REP. NO. 96, 68th Cong., 1st Sess., at 1 (1926)) (stating that Act is procedural and is designed to ensure enforcement of arbitration agreements by the courts of the United States), 118 (noting Report's focus on federal courts only).

⁹⁸ MACNEIL, *FEDERAL ARBITRATION LAW*, *supra* note 96, at 170.

untarily [sic] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment [the type of agreement in *Gilmer*]. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

[W.H.H.] Piatt [a witness for the bill from the New York Commerce Association] responded that it was not the intention of the bill to cover insurance cases. Senator Walsh continued to express concern about this problem, giving other examples— freight contracts [the problem in *Vimar*] and construction contracts—and pressing Piatt on the point. Piatt apparently conceded the need to do something about the problem.⁹⁹

In other words, there is significant evidence to suggest that the enacting Congress would not have approved of the Act's application to instances of coercive consent. But like the enacting Congress' intent to limit the Act to federal courts and to respect state prerogatives, this dollop of originalism favoring those resisting arbitration has been swept away via the legal fictions of the current Supreme Court.

For many principled legal scholars, of course, a demonstration of departure from original intent would be in itself an irrebuttably damning indictment. Unfortunately, while many of them are on the Court, either initially or ultimately they have receded from any defense of originalism in the interpretation of the Act.¹⁰⁰ While there are worse things than philosophical inconsistency, the arbitration cases are something of

⁹⁹ MACNEIL, *FEDERAL ARBITRATION LAW*, *supra* note 96, at 90 (footnotes omitted) (quoting Senator Walsh at length from *Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess., at 2 (1923)) (footnote omitted).

¹⁰⁰ Justices O'Connor and Rehnquist initially fought the *Southland* interpretation but have apparently given up, leaving only Justice Thomas (as of his 1996 dissent in *Casarotto*) to continue to fight for originalism. Justice Scalia is more textualist than originalist, but one can hardly regard § 2 of the Act as compelling the *Southland* result. One might have then expected Justice Scalia to follow original intent, or at least to have some interest in correctly discerning it, but he has uniformly supported the expansive application of the Act to all disputes. Justice Kennedy is ordinarily viewed as something of an originalist but has also routinely supported expanded arbitration in the *Southland* model.

an embarrassment for the Court's conservatives: Faced with a choice between the desires of the business establishment and the original intent of Congress, they have ultimately sided with industry.

But as Ralph Waldo Emerson observed, a foolish consistency is the hobgoblin of small minds. There are substantial reasons why a jurist of any ideology would seek to "think big" and in evolutive fashion about the Arbitration Act. As noted above, a widely held view among lawyers and laypersons posits that society has too much litigation and that laws should be interpreted to further rather than retard ADR initiatives. To be sure, serious scholarship has dramatically undermined the argument that the Act was originally intended to create substantive federal law. In addition, the Arbitration Act predates the 1938 *Erie v. Tompkins* revolution in federal and state judicial relations and the revolutionary broadening in the Court's notions of what constituted interstate commerce that occurred during the 1930s and 1940s. In 1926, the connotation of commerce was sufficiently narrower, making it quite possible, perhaps even likely, that the enacting Congress envisioned that the Act would really only apply in cases otherwise eligible for federal court jurisdiction.

Nonetheless, the Act's text, legislative history and background are hardly crystal clear. The Act is sufficiently indeterminate that its recasting as substantive federal law is at least permissible. Although *Erie* is seen as a decision supporting state autonomy, it is also seen as a decision promoting consistency and attempting to curb undue forum shopping.¹⁰¹ These goals of *Erie* are better met through a federal law that supplants contrary state law.¹⁰² With twenty-twenty hindsight, the enacting Congress might well have spelled out a substantive and preemptive reach for the Federal Arbitration Act.

In addition, irrespective of either actual or reconstructed congressional intent, *Southland* can be well defended on the ground that it modernized the Act in a manner consistent with longstanding legal, social and political preferences. Construing

¹⁰¹ See *Hanna v. Plummer*, 380 U.S. 460, 468 (1965) ("twin aims" of *Erie* are "discouragement of forum-shopping and avoidance of inequitable administration of the laws").

¹⁰² Defined as state law on arbitration that significantly impairs the federal Act's policy of enforcing proper arbitration agreements.

the 1926 Arbitration Act to create substantive federal law "updates" and modernizes the statute to make it more useful in an era of growing caseloads and interest in ADR.¹⁰³ When confronted with an interpretative fork in the road, there is nothing inherently wrong with the Court using these factors to decide the case so long as other, more commanding factors do not compel the court to choose a different path.

Among the Justices deciding *Southland*, only Justice Stevens candidly addressed the dynamic statutory interpretation at work in the case, observing that

Justice O'Connor's review of the legislative history of the Federal Arbitration Act demonstrates that the 1925 Congress that enacted the statute viewed the statute as essentially procedural in nature, [however] I am persuaded that the intervening developments in the law compel the conclusion that the Court has reached.¹⁰⁴

Justice Stevens went on to note that treating the Act as substantive federal law did not require wholesale displacement of state law because "[t]he limited objective of the Federal Arbitration Act was to abrogate the general common-law rule against specific enforcement of arbitration agreements . . . [but that] beyond this conclusion, which seems compelled by the language of § 2 [of the Act] and case law concerning the Act, it is by no means clear that Congress intended entirely to displace state authority in this field."¹⁰⁵ Faced with this legal landscape, Justice Stevens wisely urged that the Court's standard operating procedure of refraining from unnecessary invalidation of state law limit the sweep of the *Southland* holding. This approach would have wisely called for a different result in *Casarotto* and would have preserved Montana's law requiring clear disclosure of predispute arbitration agreements. Yet Justice Stevens was silent in *Casarotto*, joining in the majority's curt reversal of the Montana Supreme Court.¹⁰⁶ Justice Stevens is not a strict originalist in matters of statutory interpretation¹⁰⁷ and is also something of a pragmatist. Regarding

¹⁰³ This appears to have been Justice Stevens's view in his *Southland* concurrence. See *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984) (Stevens, J., concurring in part and dissenting in part).

¹⁰⁴ *Id.* (Stevens, J., concurring and dissenting).

¹⁰⁵ *Id.* at 18.

¹⁰⁶ See *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

¹⁰⁷ See William D. Popkin, *A Common Law Lawyer on the Supreme Court: The*

arbitration, he currently appears to have adopted his now-familiar stance of adhering even to precedent he views as wrongly decided in order to protect the reliance interests of social actors and hence does not argue against the *Southland* expansion of the Act.¹⁰⁸

Prior to his apparent fatigue from the fight, Justice Stevens in *Southland* argued for both a "dynamic" view of statutory meaning and a functional or instrumental view of the courts role in giving meaning to statutes. Dynamic statutory interpretation is the view that courts should or do in fact construe statutes in light of contemporary circumstances even in the face of a distinctly contrary original understanding of the enacting legislature.¹⁰⁹ Dynamic statutory interpretation stresses statutory purpose, application and legal evolution as much or more than the law's text or congressional intent. Defenders of the approach, me among them, view it as an approach that permits courts to assist the lawmaking enterprise, to make statutes (at the risk of paraphrasing Army recruiters) the best they can be in light of congressional goals and contemporary context. Without doubt, however, the approach also holds the potential for judicial arrogation of power over the legislative and executive branches.¹¹⁰ While this may be a real

Opinions of Justice Stevens, 1989 DUKE L.J. 1087, 1149-51.

¹⁰⁸ *Id.* (noting Justice Stevens's pattern in this regard); see William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992).

¹⁰⁹ See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* ch. 7 (2d ed. 1995); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various versions of evolutive statutory construction); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989); see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that older statutes should be no more binding than common law on current courts); Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 653 (1991); Nicholas Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 412 (1989) ("What Calabresi and Eskridge have shown is that in many cases, originalism never really served as the actual basis for deciding statutory cases. For years, judges have been profoundly nonoriginalist in deciding cases but have used originalism as a means for justifying their results.").

¹¹⁰ See, e.g., John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (arguing that dynamic approach improperly permits courts to assist current majorities in improperly revising or dismantling

danger for certain contemporaneously contested social or economic issues, the dynamism of *Southland* can be defended as legitimate in view of the less than clear text of the law (whatever some members of the Court might assert), similarly murky original congressional intent, the underlying purpose of the statute to encourage enforcement of valid arbitration clauses despite the traditional hesitancy of courts, modern public policy favoring ADR, and "signals" from Congress that it supported arbitration even if it was not readily moving to amend the 1926 Act to make it more sweeping. This sort of judicial activism—and *Southland* is judicial activism on behalf of businesses, demonstrating that judicial activism is not exclusively a liberal enterprise—simply enlists the Court in improving the statute in a manner likely to be consistent with current (and perhaps past) congressional, political and social sentiment.

Consequently, the Court's revisionary expansion of the Act can be defended on principled grounds. What cannot, in my view, be defended, however, is the Court's use of dynamic statutory interpretation to expand the reach of the Act coupled with the Court's unwillingness to give serious attention to issues of consent and its application of a formal and mechanized style of jurisprudence for enforcing the Act even in the face of state efforts to ensure greater fairness and higher quality consent regarding arbitration. Despite Emerson's maxims about foolish inconsistency, it seems only equitable good sense that the Court utilize essentially the same method of statutory construction and adjudicative technique when dealing with arbitration.¹¹¹ To the extent that the Court has "boot-

legislation of prior majorities without benefit of repeal or amendment)); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994) (criticizing dynamic approach as providing theoretical smokescreen for application of personal preferences by courts).

¹¹¹ Where fields of law differ substantially in type, origin or goal, different interpretative and adjudicatory methodologies may be in order. For example, a statute such as 42 U.S.C. § 1983 (1994) can be seen as codifying a flexible principle of nondiscrimination, what Judge Richard Posner terms a "common law" statute. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987). This type of statute seems a strong candidate for an evolutive, pragmatic, functional and flexible approach by the courts. In contrast, penal laws, tax codes or trade laws may be better viewed as highly specific statutes forming a tighter regulatory framework more constantly updated by Congress or agencies. These sorts of laws would ap-

strapped" the Act into becoming a more far-reaching and powerful law, the Court should presumptively utilize a similarly flexible and functional method of enforcing arbitrability so that the newly expanded law is not abused or applied in a manner that exceeds the permissible bounds of "good" dynamic statutory interpretation. An effective pragmatic approach to policing the Act would seemingly make substantial use of consent criteria. Consent concerns have long been central to contract law.¹¹² The enacting Congress harbored significant consent concerns;¹¹³ modern society continues to value consent; consent serves to minimize the dangers of expanded arbitrability; consent comports well with judicial competence and role; and consent serves state, federal and market interests implicated in dispute resolution.¹¹⁴

The Court's arbitration decisions, although largely useful in reducing judicial monopoly and hostility toward ADR, have failed in part because this body of Court opinions present two different modes of statutory analysis inconsistently applied by the Court. On the one hand are the Court decisions that have interpreted the Arbitration Act to fulfill its purpose and to make it a more useful statute in current times. Other arbitration decisions, however, are marred by a surprising formalism coupled with hyperliteral textual glaucoma regarding the arbitration clauses and contracts under review, with the Court seemingly disinterested in the broader context of the contracts at issue. It is as if an ordinarily stodgy and formalist Court

pear better candidates for a more literal textual approach or a more formal methodology of interpretation and application.

¹¹² See MACNEIL, *AMERICAN ARBITRATION LAW*, *supra* note 47, at 68 (citations omitted):

Early twentieth century American contract law and equity are far from renowned for the protections they afforded against one-sidedness. Nonetheless, such principles as fraud, duress, undue influence, and capacity were significant and direct restraints on unfettered freedom of contract. In addition, covert protection was often afforded by rules relating to consideration and mutuality, and through even more covert techniques such as interpretation. All of these were available to deal with the problems seen by anti-reform advocates. Later, principles in general contract law, such as unconscionability and limitations on the effectiveness of contracts of adhesion, were developed and became potential or actual protections against one-sidedness in arbitration agreements.

¹¹³ See *supra* notes 92-99 and accompanying text.

¹¹⁴ See *supra* notes 19-61 and accompanying text.

temporarily donned dynamic and functional garb in order to strengthen arbitration but quickly reverted to the mechanical method so that continued use of the more nuanced approach would not constrict the newfound reach of arbitration. Whatever the motivation, the chronology suggests that the mechanical perspective has dominated since the Court engaged in judicial expansion of the Act more than a decade ago.

On the question of statutory colloquy, the matter is more complicated. Although *Southland* can be criticized as judicial activism for certain elements of the business community, the decision need not necessarily be the last word on the reach of the Act. If the Court is "wrong," then Congress has a realistic possibility of correcting the Court's error through legislation. The political entities "harmed" by *Southland* are the states, a powerful political group that has a realistic means of seeking legislative reversal. The same is not true of the diffuse, disorganized, poorer and weaker employees who are compelled to arbitrate job claims against an employer under *Gilmer*. States are arguably the losers in the most recent *Casarotto* Subway sandwich case as well, as they were in the important predecessor case of *Connolly*,¹¹⁵ but states vary in their support of "full disclosure arbitration laws." Consequently, states are unlikely to storm the ramparts of Congress to legislatively overrule the Court on this point, particularly if the interest group pushing them is a group of diffuse franchisees earning modest incomes rather than the states' business juggernauts. Overall, the Court's conduct has tended to provide select business entities with policies they might well have failed to win in the electoral arena but which can be protected from legislative or executive erosion. This is a potentially troubling aspect of any form of evolutive statutory interpretation and becomes highly problematic where the Court's dynamism is arguably misplaced or is coupled with formalist defense and retrenchment on the heels of dynamic expansion. The Court might well have read the American polity correctly when it concluded that arbitration enjoyed contemporary favor but most likely misread

¹¹⁵ See *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989) (ruling that Massachusetts statute requiring clear disclosure and explanation of arbitration clause in securities agreement was preempted by federal Act), *cert. denied*, 495 U.S. 956 (1990).

things badly to think that the polity or its representatives meant to embrace the expansive and aggressive mandatory arbitration of the 1990s. But without the protection of significant consent jurisprudence in the courts, domestic politics is a relatively ineffective vehicle for reforming judicial wrong turns in arbitration law.

And yet the Court appears to compound rather than correct its strides down the wrong fork of the interpretative and adjudicative road. For example, one might ask: If recent Court decisions about arbitration had little import to other cases (a criticism leveled in particular at the 1995 decisions),¹¹⁶ why did the Supreme Court grant certiorari and decide them? Legal scholars have criticized the Court for taking so many personal jurisdiction cases during the 1980s only to render highly fact-specific opinions that did little to increase the doctrinal guidance given to lower courts.¹¹⁷ The same can be said of the Court's punitive damages cases of the 1980s and 1990s, which indicate, often by one-vote majorities, an increasing resistance to large punitive damages awards but fail to provide readily applied measures for determining whether such awards are excessive.¹¹⁸

But the personal jurisdiction and punitive damages cases differ from the arbitration cases in one major respect. The former, even if annoyingly indeterminant, have largely been decided under the same consistently flexible approach that seeks to vindicate important due process values. Even if one disagrees with the Court's personal jurisdiction and punitive damages opinions, the Court is at least trying to decide these cases through the same technique—and probably the right technique: A functional or instrumental approach that seeks to protect defendants but also to permit courts to continue to be used to bring tortfeasors and others to justice. Perhaps the

¹¹⁶ See Carboneau, *Beyond Trilogies*, *supra* note 79, at 1-2.

¹¹⁷ See SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986).

¹¹⁸ See, e.g., *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988).

Court should have stopped several opinions ago, but at least the Court is trying to be a part of the solution rather than a part of the problem.

By contrast, the Court in arbitration seems increasingly gripped in a wooden methodology of hair-splitting allegiance to the text of adhesion contracts, combined with formalistic syllogism, of which the *Gilmer* Court's assertion that employee Gilmer was not really forced to sign an arbitration clause in his contract of employment is only the most embarrassing. As noted above, even in correctly decided cases such as *Southland* and *Mastrobuono*, allowing the defrauded customers to retain an arbitrator's punitive damages award, the decisions are presented in more formalist garb, although they are best explained by a functional and purpose-vindicating analysis.

Generally, the Court ventures into dynamic statutory interpretation in favor of arbitration but resists it in cases where it would likely lead to constricted arbitrability. As one scholar has noted, the Court has a "deregulatory" and "contractualist" view of arbitration.¹¹⁹ To this assessment, I add with emphasis that there is nothing inherently wrong with being contractualist about arbitration so long as one practices a sensible denomination of contractualism, one that holds a front pew for consent. The type of contractualism I advocate is therefore more inherently regulatory than the caveat emptor/laissez faire brand of contract practiced by the Court.¹²⁰ As Professor Speidel suggests, perhaps even enlightened contractualism and consideration of consent are insufficient, and a more overtly regulatory framework is required. But before more judicial ink is spilled on the Arbitration Act, the Court would profit from taking cues from cases where it has avoided formalist solutions.

CONCLUSION

In the post-*McMahon* world of arbitration between the securities industry and its customers and the post-*Gilmer* world of arbitration between the industry and its employees, consent concepts have a vital role to play—if only the courts

¹¹⁹ See Carboneau, *Beyond Trilogies*, *supra* note 79, at 2 n.9, 23-25.

¹²⁰ See Braucher, *supra* note 38; Shell, *supra* note 15.

will let them. Expecting strong legislative or industry trade group action to protect small shareholders or employees from nonconsensual mandatory arbitration is a chimera made not only unlikely, but virtually impossible by the modern form of politics, where well-heeled interest groups such as the securities industry possess at least enough political clout to prevent adverse legislative and executive outcomes. Without doubt, the securities industry and the business community generally can protect the victory provided by the courts. Mandatory arbitration has become the default rule for securities disputes and threatens to become the system of imposed dispute resolution for employment and other controversies. Unless the operation of arbitration programs is so palpably unfair as to create a scandal, the collective action problems of organizing consumers to mount political resistance to imposed arbitration are simply too great.¹²¹ So long as arbitration programs are not obvious kangaroo courts, they will not be as strictly regulated by the industry, legislatures or administrative agencies as one would optimally hope.

In such a setting, the prudential powers of the judiciary are particularly necessary. Courts are often accused of being unelected "counter-majoritarian" institutions. Whatever the credence to the criticism in other contexts, it is not persuasive in the area of dispute resolution issues implicating the very notion of access to the courts. The arbitration revolution of the past decade is not so much the result of a groundswell of public opinion as it is an interest group victory.¹²² In a democracy, of course, interest groups are entitled to most of their victo-

¹²¹ Large institutional customers of the securities industry (e.g., state pension funds) or wealthy individuals (e.g., Warren Buffett) are an exception: customers with political clout. But these same entities have the necessary leverage to avoid arbitration or customize it to their liking in their dealings with the securities industry. Rationally, they will exercise (and apparently have exercised) this leverage to help themselves rather than spending additional resources directed toward political reform.

¹²² See 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, 310-15 (1996); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-58 (1993) (noting degree to which 1976 Pound Conference organized by Chief Justice Burger operated to establish new orthodoxy that litigation suffered from severe problems and required widespread use of ADR as partial cure, in part by presenting roster of speakers overwhelmingly critical of litigation status quo).

ries so long as their political activity stays within the bounds of the rules. But it certainly does not follow that the arbitration revolution erased centuries of western society's commitment to consent as a fundamental underpinning of human relations. In other areas of American society, it remains clear that consent and autonomy remain bedrock concepts of human relations.¹²³

Under these circumstances, there remains a vital role for courts in connection with arbitration and other forms of ADR: policing the consensual quality of the agreements. No matter how rational the regulatory framework, no matter how fair arbitration may be in practice, it should never become a virtually inescapable default method of dispute resolution. Only those who have meaningfully consented to arbitration should be required to arbitrate.¹²⁴ Unless courts require meaningful consent, they debase our social norms, the arbitration process and themselves. During the past decade, however, the judiciary has done just that in its rush to embrace arbitration at the expense of the more vital value of consent. Regardless of whether one describes the judicial failure as the result of "slouching" or "bootstrapping," the result is a disappointing jurisprudence uncleansed by even the most efficacious substantive regulation of arbitration.

In his one-volume examination of the Federal Act, Professor Macneil, Professor Speidel's treatise collaborator, refers to the expanding evolution of the Act as a jurisprudential "Road to Damascus."¹²⁵ But the more apt Biblical allusion to the

¹²³ Most political rhetoric of the day emphasizes the importance of consent and autonomy: e.g., proposals for school vouchers; calls for reduced government regulation; greater concern for preventing sexual assault even in the relatively ambiguous contexts of date rape and spousal rape; charter schools; and the generally libertarian and antigovernmental rhetoric of the day. Although much of this trend is "pro-market," it hardly follows that the temper of the times is adverse to serious notions of voluntary consent. On the contrary, coercive markets are not markets at all.

¹²⁴ Even if consent is obtained, the Federal Arbitration Act's statement that it does not apply to a "contract of employment" requires, in my view, that arbitration agreements are not enforceable against employees. See Stempel, *supra* note 47. The judiciary's failure to enforce properly this limitation on arbitrability is so deeply erroneous as to make its securities arbitration jurisprudence shine by comparison.

¹²⁵ See MACNEIL, *AMERICAN ARBITRATION LAW*, *supra* note 47, ch. 14 (*The Road to Damascus*). The apostle Paul, then known as Saul, a persecutor of Christians,

Middle East is that of Judge Bork. Notwithstanding the zeitgeist favoring arbitration and ADR over traditional litigation, a world where the courts give greater credence to interest group preferences and unreal notions of market activity than they give to a fair reading of legislation and the existence of consent in contractual relations seems a good deal more like Gomorrah.

was en route to Damascus when suddenly faced with a blinding light. Without sight, he was taken to Damascus and informed by God that he was a "chosen vessel" of the Lord's work, whereupon, "there fell from his eyes as it had been scales: and he received sight forthwith, and arose, and was baptized." *See The Acts* 9:3-18. In light of Professor Macneil's generally harsh attack on the Court's poor historicism in interpreting the Federal Arbitration Act, the Damascus analogy is an odd one—but no odder than the evolution of American arbitration law.

