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Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns

Jean R. Sternlight*

Courts and commentators have typically assumed that binding arbitration is both private and consensual, and that it therefore raises no constitutional concerns. This Article challenges both assumptions and goes on to consider arguments that arbitration agreements may unconstitutionally deprive persons of their right to a jury trial, to a judge, and to due process of law. The author argues first that courts' interpretation of seemingly private arbitration agreements may often give rise to "state action," particularly where courts have used a "preference favoring arbitration over litigation" to construe a contract in a nonneutral fashion. The author next draws on the Supreme Court's decisions governing waiver of constitutional rights to argue that arbitration agreements are invalid where they are unclear, and further contends that many unknowing or coercive agreements are invalid as well. Having demonstrated the relevance of constitutional analysis to many seemingly private arbitration agreements, the Article contends that many arbitration agreements unconstitutionally deprive prospective federal court litigants of their right to a jury and to an Article III judge. Finally, the author asserts that some arbitration clauses violate the Due Process Clause as well by denying parties their right to adequate notice, an impartial judge, a meaningful appeal, and other specific procedural protections. The Article concludes that we must reconsider the applicability

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of the Constitution to private arbitration agreements. While many such agreements will present no constitutional concerns, other agreements must be voided under the Constitution.

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I. INTRODUCTION

A. *A Civics Lesson in the Year 2010*

Once upon a time, the United States Constitution guaranteed all persons the right to have civil claims resolved by a jury of one's peers.¹ The Constitution also ensured that civil litigants would be provided with "due process of law,"² typically including: adequate notice of a potential deprivation,³ an unbiased judge,⁴ the right to be represented by counsel if one could afford an attorney,⁵ the right to present evidence,⁶ the right to confront and cross-examine adverse witnesses,⁷ and the right to some explanation of the judge's decision.⁸ Moreover, claims brought in federal court were required to be heard by a judge who, having been appointed for life and ensured no diminution in compensation, was more insulated from bias than an elected decision maker.⁹

Statutes, rules, and common-law provisions also supplemented the constitutionally guaranteed rights. For example, plaintiffs were allowed to bring an action in any federal or state court where they could lawfully secure personal jurisdiction and venue.¹⁰ Following a

1. To be more specific, the jury-trial right was provided with respect to all claims and defenses brought at "common law" in federal court. The Seventh Amendment of the federal Constitution provides:

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.

U.S. CONST. Amend. VII; see also *infra* notes 291-346 and accompanying text for further discussion of the right to a jury trial.

2. U.S. CONST. amends. V and XIV. See *infra* notes 376-442 and accompanying text for further discussion of the due process rights to notice and a fair hearing.

3. See *infra* note 376 and accompanying text.

4. See *infra* notes 383-384 and accompanying text.

5. See *infra* notes 398-399 and accompanying text.

6. See *infra* notes 393-394 and accompanying text.

7. See *infra* note 394 and accompanying text.

8. See *id.* As discussed *infra* in greater detail, the Supreme Court has displayed flexibility in applying the Due Process Clause to informal proceedings, holding that not all proceedings must be converted into an adversary hearing. See *infra* notes 365-375 and accompanying text.

9. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). See generally *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) (stating that the purpose of life-tenure appointment is to preserve the independence of the third branch of government).

10. The limits of personal jurisdiction and venue were prescribed by the Constitution and by federal and state law. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The saying was

period of "discovery," in which both parties could obtain information about the other's claims,¹¹ the neutral judge (virtually always a lawyer) would apply the law to the facts as presented. If successful, plaintiffs could often obtain punitive as well as compensatory damages and possibly attorney fees.¹² Either party could appeal if unsuccessful, and the appellate court would reverse if it found legal error or substantial factual errors on the part of the judge or jury.¹³ Where the parties met certain requirements, they could proceed by "class action," a method of litigation that enabled a group of aggrieved persons to litigate together a claim that, if brought individually, would prove prohibitively expensive.¹⁴

Today, our privatized system of justice looks very different. Although the same constitutional and statutory rights still theoretically exist, they rarely apply. Rather, in virtually every business transaction, including those involving individuals, large institutions are requiring consumers and employees to give up their constitutional rights to a jury trial, an impartial judge and due process, by agreeing in advance that any dispute shall be resolved through binding arbitration rather than in court.¹⁵ Such clauses are, for example, being imposed by doctors and hospitals on patients; by schools on students; by service providers, banks and financial institutions on their customers; by franchisors on their franchisees; and by virtually all employers on their employees.

that the plaintiff is the master of his/her case. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (noting that the plaintiff's choice of forum should generally be afforded deference).

11. Both federal and state rules of civil procedure allowed such discovery as interrogatories, document requests, and depositions. See, e.g., FED. R. CIV. P. 26-37. In the case of litigation between a consumer or employee and a larger party, discovery was particularly important for the consumer or employee. See Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 311 (1995).

12. Statutes and common law determined the availability of various types of damages, costs and attorney fees. See generally DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* (2d ed. 1993); HERBERT NEWBERG, *ATTORNEY FEE AWARDS* (1986).

13. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (discussing standards of appellate review). For an analysis of the *First Options* case and its repercussions on the subject of arbitration, see Natasha Wyss, Note, *First Options of Chicago v. Kaplan: A Dangerous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351 (1997) (in this issue).

14. See generally FED. R. CIV. P. 23; HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* (3d ed. 1992).

15. Many consumer claims would give rise to a right to a jury trial if brought in federal court. Even those consumers who would not have had a right to proceed before a jury lose their right to proceed before a judge, and to other procedural protections provided in litigation, when their claim is sent to binding arbitration.

While such arbitration is said to be justified on the ground that it is voluntary, in fact consumers and employees are given no real opportunity to choose litigation or other dispute-resolution techniques over arbitration. The company may, if it wishes, set out the arbitration clause in minuscule print, bury it in a stack of seemingly unimportant documents and paragraphs, and describe the process in language not likely to be comprehensible to the typical reader. Moreover, although theoretically the arbitration is not mandatory, effectively the consumer/employee has no choice but to sacrifice her right to a fair day in court if she wants the job, service or product in question.

Companies can use the arbitration agreements not merely to replace a judge or jury with an arbitrator, but also to select the particular arbitrators, the substantive law, the relief that will be available, the statute of limitations, the procedures to be used in preparing for and hearing the arbitration, and the geographical location of the arbitration hearing. The arbitrators selected need not be lawyers nor need they follow the law. They may even be affiliated with the company's line of business. Moreover, the arbitration agreement may preclude the plaintiff from bringing a class action or from collecting such relief as punitive damages or attorney fees. Once the arbitration action has been filed, the parties are rarely entitled to much discovery. If either side is unhappy with the arbitrator's decision, appeal is usually impossible. There is no public access to the arbitration proceeding. Nor do arbitrators generally write or publish detailed opinions. Our system of justice is now private.¹⁶

16. This privatization of our justice system was foreseen by some prescient attorneys and judges. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1997) (discussing the Supreme Court's interpretation of arbitration law that will allow "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 ("The Supreme Court has created a monster"); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1955-67 (1996) (arguing that the institution of arbitration "is being exploited as a tool by which to achieve a surreptitious reduction of justice services in our society"); Cliff Palefsky, *Arbitrary Arbitration: The Founders Would Frown on Mandatory ADR*, S.F. DAILY, Mar. 1, 1995, at 4 (commenting on the privatization of the justice system as a major turn for the worse in modern legal history); RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 299 (1996) ("Compulsory arbitration has become a cornerstone of power attorneys' carefully crafted, no-contest structure, aimed at ensuring the legal dominance of large corporations."); see also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RES. 241, 243-47 (1996).

B. The Future is Now: The Supreme Court's Preference for Binding Arbitration

Far-fetched? Paranoid? Not really. The United States Supreme Court's recent decisions enunciate a preference for binding arbitration over litigation that has placed consumers' and employees' due process, jury-trial, and Article III rights in serious jeopardy.¹⁷ Many whole industries, as well as individual employers, are now requiring employees to give up their right to litigate claims against their employer as a condition of getting the job.¹⁸ In the securities field,

17. Of course, binding arbitration is already well ensconced in the unionized labor field. See BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 12, 16 (10th ed. 1983) (showing that 100% of contracts studied contained a grievance procedure and 97% contained an arbitration provision). However, it is well recognized that the arbitration that takes place in the organized labor context differs substantially from consumer and commercial arbitration, the subject of this Article. See generally Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 3-4 (discussing two alternative conceptions of the mediator's role); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979); Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929, 932 (1927); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an 'Adequate Substitute' for the Courts?*, 68 TEX. L. REV. 509, 510-15 (1990) (noting that, whereas a labor arbitrator effectively continues the bargaining process, a commercial arbitrator behaves more like a judge). Further, while binding arbitration is also well established in many commercial contexts where two equal parties bargain for arbitration rather than litigation to allow for application of industry standards, see generally Dale Beck Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CAL. L. REV. 317 (1979), it is quite a different matter for companies to mandate arbitration in consumer and employee contracts. See Carbonneau, *supra* note 16, at 1955-56 n.30 (observing that English law prohibits application of predispute arbitration agreements to consumers); 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. RES. 297, 334-40 (1996) [hereinafter Stempel, *Reflections*] (contrasting "new" and "old" ADR).

18. Following the Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that an individual's claim of age discrimination could be arbitrated, lower courts have sent a wide range of individual employment claims to arbitration. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (dealing with a race discrimination claim); *Great Western Mortgage Co. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (involving a sexual harassment claim); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (Title VII claim); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (sexual harassment claim); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (sexual discrimination claims). In 1995, the American Council of Life Insurance, the largest life insurance trade association in the United States with 640 member companies, reported that its members employ 250,000 insurance sales representatives who have agreed to arbitrate all disputes with their employers. See Brief Amicus Curiae for the Am. Council of Life Ins. in Support of the Pet'rs at 2, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (No. 93-1001). Some courts, however, reach the opposite result. The Eleventh Circuit recently held that, due to a provision in the union contract, employees were not required to arbitrate their employment discrimination claims unless the employees individually agreed to arbitrate, unless the clause conferred authority to resolve federal statutory claims upon the arbitrator, and unless the employees could insist on

most brokerage houses now require their customers to sign agreements such that disputes over the management of the account will be resolved through arbitration, rather than in court.¹⁹ Also, arbitration has recently become much more common in other contexts, such as banking and investment,²⁰ and service contracts with providers ranging

taking the claim to arbitration. See *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997).

19. See Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459 (1996); C. Edward Fletcher III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 447 (1987); William A. Gregory & William J. Schneider, *Securities Arbitration: A Need for Continued Reform*, 17 NOVA L. REV. 1223, 1228 (1993); William C. Hermann, Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 717 (1990); Constantine N. Katsoris, *Should McMahon Be Revisited?*, 59 BROOK. L. REV. 1113, 1131-32 (1993); Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095, 1101-02 (1993); Perry E. Wallace, Jr., *Securities Arbitration After McMahon, Rodriguez, and the New Rules: Can Investors' Rights Really be Protected?*, 43 VAND. L. REV. 1199, 1201 n.7 (1990); Gail Elaine Papermaster, Note, *Will the Courts Scherk the Little Old Lady in Dubuque? The Impact of Scherk v. Alberto-Culver on the Individual Investor in a Global Securities Market*, 21 TEX. INT'L L.J. 129, 130 (1985). In 1996, Representative Pat Schroeder introduced legislation which sought to prevent employers from requiring employees to sign away their rights by submitting to mandatory binding arbitration. See Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. (1996). Schroeder observed that this practice began in the securities industry, but the bill was aimed at all areas of employment. See 142 CONG. REC. E1205 (daily ed. June 27, 1996) (statement of Rep. Schroeder). One organization within the securities industry has taken steps away from mandatory arbitration of employment claims. See *infra* note 110.

20. See generally Budnitz, *supra* note 11, at 268 (arbitration programs established to avoid class action suits seeking punitive damages); Dwight Golann, *Taking ADR to the Bank: Arbitration and Mediation in Financial Services Disputes*, ARB. J., Dec. 1989, at 3 [hereinafter Golann, *Bank*]; Joseph T. McLaughlin, *Resolving Disputes in the Financial Community: Alternatives to Litigation*, ARB. J., Sept. 1986, at 16; Erik Moller et al., *Private Dispute Resolution in the Banking Industry*, MR-259-ICJ RAND INST. FOR CIV. JUST. (1993); James T. Pitts, *Arbitrating Lender Liability Claims*, 105 BANKING L.J. 227 (1988); Lloyd N. Shields, *The Role of Mandatory Arbitration for Financial Institutions*, ARB. J., Dec. 1991, at 49; N. Sue Van Sant Palmer, *Lender Liability and Arbitration: Preserving the Fabric of Relationship*, 42 VAND. L. REV. 947 (1989); Ellie Winninghoff, *Consumers' Arbitration Risks Debated*, N.Y. TIMES, Oct. 24, 1994, § 1 (Financial Desk), at 37 (noting that all sorts of banks, ranging from community banks to multinationals, are interested in arbitration for all sorts of accounts). In a joint amicus brief in *Allied-Bruce*, the American Bankers Association stated that its members, holding "approximately ninety-five percent of the domestic assets of United States banks, . . . regularly include arbitration agreements in their loan and other contracts;" the American Financial Services Association, representing more than 300 consumer credit companies, stated that its "members frequently rely on arbitration agreements as dispute resolution mechanisms;" and ITT Consumer Financial Corporation stated that "[a] substantial number of ITT's consumer loan contracts contain arbitration agreements." Brief Amici Curiae for the Am. Bankers Ass'n, the Am. Fin. Serv. Ass'n, and ITT Consumer Fin. Corp. in Support of Pet'rs at 4, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (No. 93-1001).

from doctors²¹ to pest exterminators.²² One article reported that even Cheerios boxes now contain arbitration provisions.²³

The Supreme Court and many commentators downplay the Court's role in this privatization process. They characterize the Court's decisions as merely applying the Federal Arbitration Act (FAA)²⁴ to allow parties to select arbitration voluntarily. However, this Article will show that the Court is playing a critical role in this privatization process. The Court, far from engaging in neutral legal analysis that simply allows parties to contract for arbitration that is mutually advantageous, has in recent decisions stretched and twisted traditional canons of construction to favor arbitration over litigation.²⁵ These Supreme Court decisions will have an extremely broad impact, given the Court's other recent conclusions that the FAA applies in

21. Arbitration is already in place in many medical practices. *See generally* Irving Ladimer et al., *Experience in Medical Malpractice Arbitration*, 2 J. LEGAL MED. 433 (1981); Michael A. Hiltzik & David R. Olmos, 'Kaiser Justice' System's Fairness is Questioned, L.A. TIMES, Aug. 30, 1995, at A1 (stating that mandatory arbitration clauses are appearing in many HMO contracts). *See also* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903 (Cal. 1997) (remanding to trial court the decision of whether HMO participant must arbitrate claim against the HMO where the HMO allegedly acted fraudulently in representing the nature of the arbitral system).

22. The Alabama Pest Control Association, representing over 85% of the pest control companies in the state of Alabama, stated that its members "regularly enter into termite bonds with customers . . . that contain predispute arbitration clauses" substantially similar to that at issue in *Terminix*. Brief Amici Curiae for the Ala. Water & Wastewater Inst., the Ala. Manufactured Hous. Inst. and the Ala. Pest Control Ass'n in support of Pet'rs at 3, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (No. 93-1001).

23. *See* Winninghoff, *supra* note 20. The article stated that the sweepstakes offer on the Cheerios box called for arbitration and implied that World Cup Soccer tickets did as well.

24. *See* United States Arbitration Act of 1925, Pub. L. No. 25-401, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-307 (1997)). The Act increasingly came to be known as the Federal Arbitration Act following Congress' deletion, in 1947, of the section naming the statute the USAA. *See* IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 231 n.48 (1992). This Act has proved to be the primary vehicle for establishing the viability of arbitration in the United States. *See infra* notes 40-46 and accompanying text.

25. *See, e.g.,* *Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20 (1991) (citing federal policy favoring arbitration as supporting arbitration rather than litigation of age discrimination claims); *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983) (stating that, given the federal policy favoring arbitration, defenses to arbitration should be interpreted narrowly). *See also infra* notes 51-59, 160 and accompanying text (discussing these and other cases, favoring arbitration over litigation). The Court contends that Congress has mandated this preference for arbitration over litigation. However, the arguments asserted in this Article do not require that a determination be made as to whether the policy of favoring arbitration over litigation in fact was mandated by Congress or by the Court. Actions by either body constitute state action. *See infra* notes 142-175 and accompanying text. In a previous article I have, however, argued that it is the Court, rather than Congress, which has favored arbitration over litigation. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) [hereinafter Sternlight, *Panacea*].

state as well as federal court²⁶ and that it covers all transactions that could possibly be regulated under the far-reaching interstate commerce clause.²⁷

C. *The Court's Preference for Binding Arbitration Over Litigation is Unconstitutional*

This Article contends that the Supreme Court's interpretation of the FAA as favoring arbitration over litigation is not merely bad as a matter of policy,²⁸ but also is often inconsistent with the proper interpretation of the Constitution. By expressing and applying a preference for binding arbitration over litigation, the Court is directly countering the Constitution's guarantees of due process of law in all courts, and to a life-tenured judge and jury trial in appropriate matters brought in federal court.²⁹

To a surprising extent, courts, litigants and commentators have ignored the fact that arbitration involves the waiver of constitutional rights and have treated interpretation of the FAA as only a statutory and policy issue.³⁰ Perhaps overwhelmed by the purported benefits of

26. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-71 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984).

27. See *Allied-Bruce*, 531 U.S. at 281. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-08, at 316 (2d ed. 1988) ("Contemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for congressional action is largely a formality."). It must be noted that a 5-4 Court voted recently, for the first time in 60 years, to invalidate a federal statute as exceeding Congress' power under the commerce clause. See *United States v. Lopez*, 514 U.S. 549 (1995) (striking down statute criminalizing possession of a gun within 1,000 feet of a school). Particularly in light of the Court's subsequent decision in *United States v. Robertson*, however, it does not appear that the Court will soon be restricting the commerce clause power in any substantial way. See *United States v. Robertson*, 514 U.S. 669 (1995) (ruling that mining gold exclusively in Alaska did implicate interstate commerce).

28. See generally Sternlight, *Panacea*, *supra* note 25 (arguing that the preference has no legitimate basis in legislative history, and that neither economic nor other policy arguments support a policy allowing large companies to impose possibly unfair arbitration clauses on ignorant consumers and employees); Carbonneau, *supra* note 16, at 1956-60.

29. As discussed *infra*, the extent to which the exercise of the preference interferes with constitutional rights will vary, depending on the nature of the arbitration that is employed and depending on the rights that would have been afforded absent arbitration. Cf. Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 ORE. L. REV. 487, 495, 565 (1989) [hereinafter Golann, *Mandatory*] (arguing that, while consensual binding arbitration raises no constitutional issues, mandatory binding arbitration cannot be imposed in federal court on jury claims nor used to divert "core" common-law cases away from Article III judges). This Article moves beyond Professor Golann's work to consider the constitutionality of purportedly consensual arbitration agreements.

30. Courts' failure to address the constitutional issues must be attributed in large part to litigants' and commentators' failure to present a serious constitutional argument. But see Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992) (arguing

arbitration, both for reducing litigation dockets³¹ and for the parties to litigation, courts have emphasized that parties ought to be allowed to choose their own dispute-resolution technique.³² However, courts have failed to consider whether and to what extent parties' "choices" are constitutional.³³ When pressed, those lower courts that have addressed the constitutionality of arbitration agreements have upheld them on the grounds that either there is no "state action"³⁴ and hence

that waiver arguments cannot appropriately be applied to some consumers, but still failing to argue that the Court's expressed favoritism toward arbitration is itself unconstitutional); Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, 85 CAL. L. REV. 577 (1997) (arguing that intertwining of public and private processes in enforcement of contractual arbitration gives rise to state action); Palefsky, *supra* note 16 (arguing that the Supreme Court's expressed favoritism for arbitration is unconstitutional). See also Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989) (assessing constitutionality of mandatory arbitration).

31. See *Casarotto v. Lombardi*, 886 P.2d 931, 939-40 (Mont. 1994) (Trieweiler, J., specially concurring) (critiquing "those federal judges who consider forced arbitration as the panacea for their 'heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy," and arguing that the FAA is designed to protect arbitration that is knowingly selected rather than forced upon parties through form agreements); Palefsky, *supra* note 16 (arguing that courts have created a fictitious new public policy that trumps all others—"the policy of clearing my docket"), *cert. granted and vacated*, 515 U.S. 1129 (1995).

32. See, e.g., *Securities Indus. Ass'n v. Lewis*, 751 F. Supp. 205 (S.D. Fla. 1990) (protecting the parties' choice of arbitration against perceived attack by state statute).

33. None of the Supreme Court's many recent arbitration decisions has addressed the constitutionality of binding arbitration. Those few lower courts that have considered the constitutionality of binding arbitration have done so in one of two contexts. Some have analyzed whether particular arbitrators' procedural approaches comply with the mandates of due process. See, e.g., *FDIC v. Air Florida Sys. Inc.*, 822 F.2d 833, 841-43 (9th Cir. 1987) (no state action); *Sportastiks, Inc. v. Beltz*, No. 88 C9293, 1989 WL 26825, at *4 (N.D. Ill. March 22, 1989) (no state action); *United States v. American Soc'y of Composers*, 708 F. Supp. 95, 96 (S.D.N.Y. 1989) (no state action); see also *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (no state action, even with respect to certain legislatively mandated arbitration). Others have examined whether, given the lack of appellate review, arbitrators may constitutionally award punitive damages. See, e.g., *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-93 (11th Cir. 1995) (no state action); *International Ass'n of Heat & Frost Insulators & Asbestos Workers Local Union 42 v. Absolute Envtl. Servs., Inc.*, 814 F. Supp. 392, 402-03 (D. Del. 1993) (no state action).

34. The Due Process Clauses of the Fifth and Fourteenth Amendments, as well as virtually all other clauses of the Constitution, have been interpreted to govern only the State (both state and federal governments) or persons acting under color of state law. See *TRIBE*, *supra* note 27, § 5-15, at 350-51. Only constitutional arguments based on the Thirteenth Amendment (which forbids slavery and involuntary servitude) do not require a showing of state action. See *CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION* 159 (1993). It is difficult to see how many attacks on arbitration could be based on the Thirteenth Amendment. See generally *R. George Wright, State Action and State Responsibility*, 23 *SUFFOLK U.L. REV.* 685 (1989). For cases holding that private arbitration agreements do not implicate state action, see *Davis*, 59 F.3d at 1191-94 (noting that, because "arbitration was a private proceeding arranged by a voluntary contractual agreement of the parties The arbitration proceeding itself did not constitute state action," even where the state stepped in to enforce the award, because finding state action would subject all arbitrators to due process

no constitutional violation, or else that, despite state action, parties have waived their constitutional rights.³⁵

This Article shows that courts' blithe treatment of the constitutional rights to a civil jury trial, to a life-tenured judge, and to procedural due process in the context of binding arbitration is entirely inconsistent with their protective attitude toward the same and other constitutional rights in many other contexts. It argues that, while the Constitution certainly does not require courts to void all arbitration agreements, such as where two businesses knowingly and voluntarily

limitations); *Air Florida*, 822 F.2d at 842 n.9 ("[W]e do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."); *Elmore*, 782 F.2d at 96-97 (arguing that it would be too disruptive of federal policies favoring arbitration to find state action in even federally imposed arbitration and thereby constitutionalize arbitration); *Absolute Envtl. Servs., Inc.*, 814 F. Supp. at 402-03 (holding that arbitration award did not violate employer's procedural due process rights, because no state action was involved in private labor arbitration); *Sportastiks*, 1989 WL 26825, at *4 (noting that the argument that there is state action because the American Arbitration Association is a federal agency must fail, because such argument "would bring a vast portion of the private sector under the Fifth Amendment, solely through private contracts for alternative dispute resolution"); *Austern v. Chicago Bd. Options Exch., Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (ruling that investors could not state constitutional claim against Chicago Board Options Exchange with respect to arbitration because Board's conduct was not state action), *aff'd*, 898 F.2d 882 (2d Cir. 1990); *American Soc'y of Composers*, 708 F. Supp. at 96-97 (refusing to find state action in arbitration imposed by consent decree to which United States was a party and noting that concluding otherwise could require all arbitrations to "be subject to due process limitations through the simple act of [appeal]"). But see *R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 262 (7th Cir. 1995) (holding that state action exists where federal Commodity Exchange Act indirectly requires commodity exchange brokers to arbitrate disputes with the industry by delegating the registration function to a private association which requires arbitration); *Rifkind & Sterling, Inc. v. Rifkind*, 33 Cal. Rptr. 2d 828, 834-35 (Cal. Ct. App. 1994) (ruling that state action is present to the degree a court is involved in confirming an arbitration award but that such limited state action does not require close review of punitive damages award).

35. See, e.g., *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) (rejecting securities investor's claim that he was denied his constitutional right to a jury trial by being compelled to arbitrate, because "the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a valid arbitration agreement"); *Davis*, 59 F.3d at 1193 (noting that brokerage may not challenge arbitrator's award of punitive damages where brokerage drafted arbitration clause); *American Soc'y of Composers*, 708 F. Supp. at 97 (rejecting the petitioner's constitutional challenge in part on ground that the petitioner had agreed to the process when he joined the society). Commentators have presented this argument as well. See, e.g., Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1361 (1985) ("By contracting to submit their disputes to arbitration, the parties have waived their right to more protective procedures."); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 567 (1994) ("Even if the definition of state action is expanded to include court enforcement of an arbitrator's award of punitive damages, a due process challenge to such an award is likely to fail on the ground of waiver"); see also Brunet, *supra* note 30, at 107-08 (noting that, so long as a business has not acted unconscionably or adhesively, waivers should be found).

agree that their disputes should be resolved through a fair informal arbitration process, the Constitution does impose limits. Specifically, it precludes the state from helping one party require another to give up her day in court in favor of an arbitration process that is unfair or that deprives an unwitting party of her right to a jury or a life-tenured judge. Courts must not refuse to engage in drawing these distinctions based on an erroneous assumption that the Constitution has no relevance to the enforcement of private arbitration agreements.

Part II will closely examine the jurisprudence through which the Supreme Court has implemented its preference for binding arbitration over litigation. It will also show how, in implementing the Court's expressed preference for arbitration, lower courts have failed to distinguish between cases where arbitration agreements are voluntary and fair, and those in which they are neither. Next, Part III will argue that the Court's interpretation of the FAA to favor binding arbitration over litigation, thereby imposing arbitration where it was not chosen voluntarily, is unconstitutional. Focusing first on the "state action" doctrine, Part III(A) will show that congressional actions and courts' interpretive decisions establishing a preference for arbitration are actions of the state sufficient to implicate the Due Process Clause. Part III(B) will then demonstrate that imposing a preference for arbitration to interpret agreements in a way that is biased against the exercise of constitutional rights is inconsistent with even the most lenient waiver standard previously applied by the Court. Next, Part III(C) will argue that the preference denies federal court litigants their Seventh Amendment right to a jury trial.³⁶ In Part III(D), the Article shows that the Court's application of a preference for arbitration over litigation deprives federal court litigants of their right to appear in front of a life-tenured judge.³⁷ Finally, Part III(E) contends that, depending on the nature of the arbitration that is imposed, the preference may cause persons to be deprived of their due process rights to notice and a fair hearing.³⁸ The Article concludes that, while it is certainly

36. As discussed *infra* at notes 298-300 and accompanying text, the Seventh Amendment applies only to actions brought in federal court. While many states' constitutions contain comparable provisions, such provisions would be defeated by an inconsistent federal statute. See U.S. CONST. art. VI, § 2.

37. Again, Article III only applies in federal court. Although many states' constitutions also restrict delegation of cases to entities other than courts, such provisions could only defeat a state and not a federal statutory preference for arbitration. See U.S. CONST. art. VI, § 2.

38. The Due Process Clause, unlike the Seventh Amendment and Article III, applies in state as well as federal court. A strong argument can also be made that requiring parties to participate in certain binding arbitration violates the constitutional prohibition on delegating legislative or executive power to private individuals. See generally Bruff, *supra* note 30, at

constitutional for courts to enforce those arbitration agreements where either of the parties actually and legitimately waived their rights, or where the particular arbitration protects the parties' constitutional rights, it is unconstitutional to use a "presumption" of consent to impose arbitration if the mandated arbitration will deprive parties of their rights to a jury trial, to an Article III judge, or to procedural due process.³⁹

II. THE COURT'S RECENT ENUNCIATION OF A PREFERENCE FOR BINDING ARBITRATION OVER LITIGATION

A. *The FAA as Originally Envisioned*

When Congress originally passed the FAA in 1925, it did not intend to create the statute recently molded by the Supreme Court's interpretive efforts. As I have explained elsewhere, Congress passed

455-63 (arguing that delegation can be constitutional where, given proper standards, it serves the public interest); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 64-65 (1990) (arguing that all private delegations are inconsistent with separation of powers doctrine). Many courts have held certain mandatory arbitration unconstitutional in that it violated a federal or state prohibition on private delegation. See, e.g., *Hays County Appraisal Dist. v. Mayo Kirby Springs, Inc.*, 903 S.W.2d 394, 397 (Tex. Ct. App. 1995) (invalidating use of mandatory binding arbitration to determine property taxes in part on separation of powers grounds); *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 234 N.W.2d 35, 37-38 (S.D. 1975) (holding a statute mandating arbitration of police and firefighter labor disputes to be an unconstitutional delegation of legislative power); *State ex rel. Everett Fire Fighters Local No. 350 v. Johnson*, 278 P.2d 662, 666 (Wash. 1955) (ruling that a municipal charter provision requiring firefighter contract disputes to be arbitrated was an unconstitutional delegation of legislative authority); see also *Mount St. Mary's Hosp. v. Catherwood*, 260 N.E.2d 508, 517 (N.Y. 1970) (noting that use of mandatory arbitration to devise labor union contract must be tested as would a statute, to ensure that the result is not "arbitrary or capricious"). But see *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R.R.*, 225 F. Supp. 11, 22-23 (D.D.C. 1964) (finding that a statute compelling arbitration of railroad firemen's dispute was not an unlawful delegation without proper standards); *Motor Vehicle Mfrs. Ass'n v. State*, 550 N.E.2d 919, 923-25 (N.Y. 1990) (refusing to void mandatory lemon-law arbitration on anti-delegation grounds, where legislature specifically provided for arbitration by impartial arbitrator and allowed for judicial review of awards); cf. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985) (refusing to address argument that federal statute's language was so vague as to be unconstitutional delegation of legislative powers, where the issue was not adequately briefed or argued before the Court). However, the anti-delegation constitutional argument applies primarily to arbitrations designed to produce a legislative-type rule, rather than those designed to make an individually-oriented factual determination. See Bruff, *supra* note 30, at 482. As this Article focuses primarily on the latter type of arbitration, it will not extensively discuss the anti-delegation argument.

39. It is difficult to imagine an arbitration agreement that would not preclude use of a judge or jury. However, not all binding arbitration is necessarily inconsistent with the due process requirements of notice and a fair hearing. See *infra* notes 347-442 and accompanying text.

the FAA to enable two or more well-informed businesses voluntarily and knowingly to select arbitration in lieu of litigation,⁴⁰ rather than to allow large businesses to impose binding arbitration on ignorant consumers and employees through the use of form contracts.⁴¹ The Act provides that where parties have agreed to arbitrate, a party may enforce the agreement by filing a motion to compel arbitration or to stay litigation that was commenced by the opposing party.⁴² Once the arbitrators have issued their decision, the Act essentially provides that it may be vacated by a court only upon a showing of serious misconduct by the arbitrators or an opposing party.⁴³ Congress

40. See Sternlight, *Panacea*, *supra* note 25, at 647. Section 2, the key provision of the Act, provides that in "any maritime transaction or a contract evidencing a transaction involving commerce" an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1997).

41. Professor Stempel has similarly distinguished between "old ADR," that which was envisioned by Congress when it enacted the FAA, and the "new ADR" which has developed in recent years. See Stempel, *Reflections*, *supra* note 17, at 334-40.

42. See 9 U.S.C. §§ 3-4 (1997). Where there is a disputed issue as to whether an arbitration agreement exists or applies to the current dispute, a court is required to hold a mini-jury trial to resolve those issues. See 9 U.S.C. § 4. Courts have used an analysis similar to that which they employ in resolving motions for summary judgment to assess whether a party has presented sufficient evidence of a dispute regarding arbitrability to warrant a jury trial on the issue. See, e.g., *Doctor's Assocs. Inc. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996) (holding that a party is not entitled to a jury trial under section 4 of the FAA "merely by demanding one," but rather must present sufficient evidence to establish entitlement to jury trial); see also *Rush v. Oppenheimer & Co.*, 681 F. Supp. 1045 (S.D.N.Y. 1988) (providing jury trial on questions of arbitrability but then granting JNOV reversing jury's conclusion and requiring arbitration).

43. The Act states that an award may be vacated upon a showing that it was procured by "corruption, fraud, or undue means," or "[w]here there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)-(b). Examples include situations where the arbitrators were guilty of such misconduct as refusing to postpone a hearing upon good cause shown, or where the arbitrators exceeded their powers. See 9 U.S.C. § 10 (1997); *Petrol Corp. v. Groupement D'Achat Des Carburants*, 84 F. Supp. 446 (D.C.N.Y. 1949). These grounds for vacating an arbitral award have been interpreted extremely narrowly by the courts. See, e.g., *Doctor's Assocs. v. Distajo*, 66 F.3d 438, 451-53 (2d Cir. 1995) (finding an arbitration clause was not void for lack of mutuality where franchise agreements as a whole were supported by consideration), *cert. denied*, 116 S. Ct. 1352 (1996); *Wilson Elec. Contractors, Inc. v. Minnote Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989) (holding that an arbitration clause does not have to be supported by independent consideration where the entire contract has consideration); IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 19.2.1, at 19:7-19:9 (1995) (noting that challengers to arbitration clauses on contract grounds face an "uphill battle" and that such arguments will "hardly ever" prevail); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1397-1414 (1991) [hereinafter Stempel, *A Better Approach*] (discussing the great difficulty in prevailing on such defenses as fraud, illegality, impossibility, waiver, coercion, failure of consideration, unconscionability, or contract of adhesion). While the Supreme Court has stated that an arbitral award also may be reversed to prevent "manifest disregard," this ground for appeal has also been interpreted quite narrowly. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled by Rodriguez de*

intended for the FAA to apply in federal but not state courts,⁴⁴ and certainly did not envision that the FAA would be used by the Court to preempt state efforts to protect consumers from being coerced into arbitration unknowingly.⁴⁵ Congress recognized that arbitration was substantially different from litigation and for that reason intended that parties should be allowed, but not forced, to accept arbitration.⁴⁶

From 1925 through 1966, an era I have previously identified as the period of "original intent," decisions of the Supreme Court and lower federal and state courts were consistent with the premise that arbitration should be based on actual knowing consent by both parties.⁴⁷ In the next period, from 1967-1982, although the Supreme Court planted the seeds for the eventual reinterpretation of the Act, the Court continued to recognize that arbitration agreements were appropriate primarily to the extent that they were found mutually acceptable by the parties.⁴⁸ While the Court issued a decision stating that social policy favored the use of arbitration by businesses in the international context to avoid potentially confusing choice-of-law problems or international incidents,⁴⁹ the Court also issued decisions refusing to force employees to arbitrate statutory claims against their employers simply because the union contract contained an arbitration clause.⁵⁰ The Court, again, issued no decision applying the FAA to

Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989); MACNEIL, *supra* § 40.5.1.2.-40.5.2.1; see also Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 670-71 (1995).

44. See Sternlight, *Panacea*, *supra* note 25, at 647-52.

45. See *id.*

46. See *id.* at 652.

47. See *id.* at 647-49. In *Wilko*, the Court refused to require customers to use arbitration in pursuing a fraud claim against a securities brokerage house, even though the consumers had signed an arbitration agreement, instead interpreting the Securities Act of 1933 to preclude mandatory arbitration of such claims. See *Wilko*, 346 U.S. at 434-35. During this same period, very few courts even contemplated applying the FAA to state courts, instead relying on individual state arbitration acts to determine whether state court litigation should be stayed or dismissed in light of an arbitration agreement. See Sternlight, *Panacea*, *supra* note 25, at 650-51.

48. See Sternlight, *supra* note 25, at 653-60.

49. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (upholding validity of arbitration agreement as applied to securities fraud claim brought by American company against German company); see also *THE BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (enforcing forum-selection clause agreed to between sophisticated U.S. and foreign companies).

50. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (refusing to preclude union members from litigating Fair Labor Standards Act claim against their employer, even though they had previously unsuccessfully submitted a claim based on the same underlying facts to a joint labor/management grievance committee); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (refusing to require union members to arbitrate

state courts or preventing state legislatures from protecting consumers or others from unfair arbitration agreements.

B. The Court's Enunciation of a Preference for Arbitration Over Litigation

1. Arbitration to Be Favored Over Litigation

The Supreme Court's stance toward arbitration changed dramatically beginning in 1983, when the Court first announced the "favorite myth:" the idea that courts should favor arbitration over litigation.⁵¹ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* involved a dispute between a contractor and its customer, a hospital.⁵² As is often the case in the construction industry, the parties had entered into a broad binding arbitration agreement purporting to cover all disputes arising from or relating to the construction.⁵³ However, when Mercury Construction claimed that the hospital owed it certain delay charges, the hospital filed suit in state court to prevent Mercury from seeking arbitration of the claim, arguing that Mercury had "lost any right to arbitration under the contract due to waiver, laches, estoppel, and failure to make a timely demand for arbitration."⁵⁴ The Supreme Court held that, given the strong federal policy favoring arbitration,⁵⁵ such defenses to arbitration as laches and estoppel should be interpreted narrowly and arbitration should proceed.⁵⁶ Significantly, the Court provided no historical nor policy justification for its conclusion that federal policy favored arbitration over litigation, stating only: "Courts of Appeals have since [the 1967 decision in *Prima Paint Corp. v. Flood & Conklin*

Title VII employment discrimination claims against their employer). See generally Sternlight, *Panacea*, *supra* note 25, at 658-60.

51. See Sternlight, *supra* note 25, at 660-62.

52. 460 U.S. 1 (1983).

53. See *id.* at 4-5.

54. *Id.* at 7. Mercury, in turn, filed suit in federal district court seeking an order compelling arbitration pursuant to the FAA. See *id.*

55. See *id.* at 24-25.

56. See *id.* The Supreme Court's affirmance of the Fourth Circuit's reversal of the district court's stay also relied on the Court's earlier abstention decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Court held in *Moses H. Cone* that, given the various discretionary factors set out in *Colorado River* and given particularly the fact that federal law governs the issue of arbitrability, the federal district court was wrong to defer to the pending state court decision. See *Moses H. Cone*, 460 U.S. at 19-28. The Court further found that, although the Fourth Circuit had acted in a manner outside of the ordinary in ordering arbitration, when only the question of the stay itself had been appealed, the Supreme Court would not disturb the ruling "in view of the special interests at stake and the apparent lack of any prejudice to the parties." *Id.* at 29. The special interests at stake amounted to nothing more than the parties' interest in speedy arbitration.

Manufacturing Corp.] consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree.”⁵⁷ While a federal policy “favoring arbitration” might conceivably mean a policy that looked upon arbitration with favor, rather than a policy that favored arbitration over litigation, the Court made it clear that it was endorsing the latter use of the term “favor.” Specifically, it explicitly proclaimed that any doubts as to whether an ambiguous contract called for arbitration over litigation “should be resolved in favor of arbitration.”⁵⁸ Since *Moses H. Cone*, the Supreme Court and lower courts have frequently reiterated the contention that federal policy favors arbitration over litigation, but have never explained the source of this policy, other than citing *Moses H. Cone* and the FAA.⁵⁹ The Court has not made any attempt to reconcile the supposed federal policy favoring arbitration

57. *Id.* at 24 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967)). The appellate court cases cited by the Court, *see id.* at 24 n.31, do little to explicate the source or justification of a policy of favoritism. *See Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 643 (7th Cir. 1981); *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 43-45 (3d Cir. 1978); *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976); *Acevedo Maldonado v. PPG Indus., Inc.*, 514 F.2d 614, 616-17 (1st Cir. 1975); *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211-12 (2d Cir. 1972); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360-61 (10th Cir. 1971). While four of the cases (*Dickinson*, *Hart*, *Becker*, and *Coenen*) do enunciate the policy that contracts should be liberally construed to favor arbitration and that any doubt should be resolved in favor of arbitration, these cases do not cite any legislative history or policy argument to support this position. Rather, they simply cite other appellate cases, some of which were labor arbitration cases and thus not directly relevant to the question of whether commercial arbitration should be favored over litigation. *See, e.g., Wick*, 605 F.2d at 168; *Becker*, 585 F.2d at 44-45. The other four cases (*Hanes*, *Acevedo*, *Germany*, and *Hart*) cited by the Court do not actually say that arbitration is to be favored over litigation. However, some do say that, given the federal policy favoring arbitration, parties should not lightly be inferred to have waived their contractual right to arbitration. *See River Terminal*, 477 F.2d at 547. In this context, the *Germany* decision notes that the FAA “favors the submission of disputes to arbitration in accordance with the intentions of the parties . . . as a means of easing court congestion.” *Id.*

58. *Id.*

59. *See* cases cited *infra* note 160; *see also Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (noting that, because the FAA not only reversed judicial hostility to enforcement of arbitration contracts but also created a rule of contract construction favoring arbitration, securities industry employee was required to arbitrate claim that did not become arbitrable pursuant to new NASD rules until after her termination); *Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 214-16 (S.D.N.Y. 1989) (citing policy of favoritism toward arbitration to interpret arbitration clause broadly to cover securities claims that were nonarbitrable at the time of agreement, as well as claims against individual broker). *But see United Bhd. Of Carpenters & Joiners of Am. v. Desert Palace, Inc.*, 94 F.3d 1308, 1311 (9th Cir. 1996) (stating that there is no strong federal policy favoring of commercial, as opposed to labor, disputes).

with the Constitution's mandate of jury trials, due process, and decisions by life-tenured judges.

2. Endorsement of Broad Applicability of FAA

Having found that the FAA required arbitration to be favored over litigation, the Supreme Court then took additional steps to ensure that the FAA would be applied very broadly.

a. Coverage of Employment-Law Contracts

Courts have apparently been so impressed by the value of arbitration that they have abandoned their purported practice of interpreting a statute according to its plain meaning, in order to favor arbitration over litigation. Although section 1 of the FAA explicitly provides that the Act shall not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"⁶⁰ numerous courts have managed to hold the FAA applicable to virtually all employees involved in interstate commerce.⁶¹ While the reasoning seems contorted⁶² and requires courts to draw odd conclusions, such as that manufacturers who make goods for interstate commerce are not involved in interstate

60. 9 U.S.C. § 1 (1997).

61. See, e.g., *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997) (holding that the exclusion applies only to workers "actually engaged in Interstate Commerce"); *Greatwestern Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997) (same); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) (same); *Signal-Stat Corp. v. Local 475*, 235 F.2d 298, 303 (2d Cir. 1956) (holding that the exclusion does not apply to a salesman with managerial responsibilities); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450 (3d Cir. 1953) (holding that exclusion does not apply to workers who made electronic equipment for international distribution); see also *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20, 25 n.2 (1991) (observing that lower courts have uniformly held section 1's exclusion inapplicable to securities traders, while refusing to rule conclusively on the issue); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 168 (Haw. 1996) (following most federal circuits and applying FAA in employment context).

62. See Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 1997 LAB. L. J. 329 (June 1997); Matthew W. Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 265-66 (1991) [hereinafter Stempel, *Reconsidering*]. As Professor Stempel explains, Judge Maris' leading decision in *Tenney* elevated the Latin canon of statutory construction, "ejusdem generis" (it is known by its associates), to the level of a rule to conclude that the exclusion applied only to those workers who, like sailors and railway workers, physically moved goods from one state to another. See *id.* at 297-301 (critiquing the *Tenney* decision). No court has ever offered a viable policy rationale for why the exclusion should be so narrowly tailored.

commerce⁶³ or that a basketball star who travels to a different city every night is not involved in interstate commerce,⁶⁴ it seems to have been accepted because it allows courts to apply the FAA's arbitration mandate as broadly as possible.

b. Expansion of the FAA to Apply in State Court and to Preempt State Legislation

In 1984, in *Southland Corp. v. Keating*, the United States Supreme Court held that the FAA applied in state as well as federal courts and preempted state legislation interpreted to protect franchisees from unfair arbitration agreements.⁶⁵ Eleven years later, in *Allied-Bruce Terminix Cos. v. Dobson*, the Court rejected the plea of twenty state attorneys general and reiterated that the FAA applied in state as well as federal court.⁶⁶ It also expanded the FAA's jurisdiction to the furthest possible point, interpreting the statute's coverage to extend to the maximum reach of the interstate commerce clause.⁶⁷ Most recently, in *Doctor's Associates, Inc. v. Casarotto*,⁶⁸ an 8-1 Court held that the FAA even preempted a state's requirement that a contract containing an arbitration clause include notification on the first page of the contract.⁶⁹ *Allied-Bruce* and *Doctor's Associates*, taken together, will void many laws enacted by states to protect consumers and others from potentially unfair arbitration by prohibiting arbitration of certain

63. See *Signal-Stat Corp.*, 235 F.2d at 303. See also *Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971) (noting that exception does not apply to stock broker).

64. See *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972).

65. 465 U.S. 1, 10-11 (1984); see also *Perry v. Thomas*, 482 U.S. 483, 490-92 (1987) (holding that the FAA also preempted state legislation geared to ensure that employees could bring wage protection claims in court, rather than being forced to arbitrate such claims); cf. *Tuco Inc. v. Burlington N.R.R. Co.*, 912 S.W.2d 311, 314 (Tex. App. 1995) (holding that the FAA preempts only that state legislation which is inconsistent with the FAA).

66. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-74 (1995). See Brief Amici Curiae for the Att'ys Gen. in support of Resp'ts, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (No. 93-1001).

67. See *Allied-Bruce*, 513 U.S. at 273-75. The plaintiff, a purchaser of Terminix termite protection services, argued that the FAA applied only where the parties actually contemplated interstate commerce. See *id.* Several courts of appeal had adopted this or other more narrow interpretations of the FAA, but the Court instead held that the FAA reached all transactions that Congress could have regulated under its power to regulate interstate commerce. See *id.*

68. 116 S. Ct. 1652, 1656-57 (1996).

69. See *id.* at 1656-57.

claims,⁷⁰ mandating adequate notice,⁷¹ or prohibiting out-of-state arbitration.⁷² Such legislation is now valid only with respect to purely local transactions,⁷³ or where the parties in their arbitration agreement have expressly agreed to be governed by local law.⁷⁴

c. Rejection of Public Policy Exception

Since 1985, the Court has also made it clear that very few types of disputes, if any, are excluded from arbitration on the basis of public policy. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court held that an antitrust claim could be arbitrated in the context

70. See, e.g., 710 ILL. COMP. STAT. ANN. 5/1 (West 1993) (Uniform Arbitration Act (UAA) is not applicable to health-care disputes except where intentional torts are alleged); IND. CODE ANN. § 34-4-21 (1986) (mandating that the UAA is not applicable to consumer leases, sales and loan contracts); IOWA CODE § 679A.1 (1987) (listing the UAA as not applicable to contracts of adhesion, labor disputes or tort actions); KY. REV. STAT. ANN. § 417.050 (Banks-Baldwin 1994) (noting that the UAA does not apply to employment conflicts).

71. See, e.g., ALA. CODE § 6-5-485 (1975) (requiring that arbitration agreements contained in medical-liability agreements be signed by both parties); ALASKA STAT. § 09-55-535 (Michie 1996) (requiring bold-print notice regarding health-care-provider arbitration); CAL. BUS. & PROF. CODE § 7191 (1995), CAL. CIV. PROC. CODE § 1295 (West 1981), CAL. CIV. PROC. CODE § 1298 (West 1995), CAL. HEALTH & SAFETY CODE § 1363.1 (West 1990), CAL. INS. CODE § 11512.33 (Deering 1996) (mandating 10-point boldface notice provisions for contractors, medical services, real estate contracts, and health care providers, and further requiring health care service plans and disability insurance policies to explicitly disclose loss of a jury trial); COLO. REV. STAT. § 13-64-403 (1987) (mandating 10-point boldface type for health care arbitration provisions); MICH. COMP. LAWS § 423.9d (1996) (mandating that agreement set out issues to be arbitrated); TENN. CODE ANN. § 29-5-302 (1980) (requiring parties to specifically sign or initial arbitration agreements regarding farm property, structures or goods, or residences).

72. See, e.g., LA. REV. STAT. ANN. § 2779 (West 1995) (voiding arbitration provisions in construction contracts that require arbitration to occur in a foreign state or pursuant to the laws of another jurisdiction); MICH. COMP. LAWS § 445.1527 (1996) (voiding arbitration clauses contained in franchise agreements that provide for out-of-state arbitration); S.C. CODE ANN. § 15-7-120 (Law. Co-op. 1976) (voiding all arbitration agreements requiring out-of-state arbitration); VA. CODE ANN. § 8.01-262.1 (Michie 1996) (requiring all arbitrations under contracts made in Virginia to be heard in county or city where contract was performed); see also *Coastal Health Care Group, Inc. v. Schlosser*, 673 So. 2d 62, 65 (Fla. Dist. Ct. App. 1996) (holding FAA preempted rule in *Damora v. Stresscon Int'l Inc.*, 324 So. 2d 80 (Fla. 1975), which refused to enforce arbitration agreements requiring that arbitration take place outside of Florida).

73. See, e.g., *Columbus Anesthesia Group v. Kutzner*, 459 S.E.2d 422, 423-24 (Ga. Ct. App. 1995) (holding that FAA does not apply where interstate commerce does not exist in transaction between local doctor and medical supply company); cf. *Coastal Health*, 673 So. 2d at 66 (noting that FAA applies and preempts state law refusing to enforce arbitration agreements calling for out-of-state forum, where transaction between two Florida corporations involved interstate meetings and telephone conversations).

74. See *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 470 (1989); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 100 (N.Y. 1995).

of an international business transaction.⁷⁵ In subsequent decisions, the Court also held that securities fraud claims were arbitrable (explicitly reversing its own prior holding in *Wilko*)⁷⁶ and further held that parties could agree to arbitrate RICO claims⁷⁷ and claims brought under the Age Discrimination in Employment Act.⁷⁸ At this point, it seems that all claims covered by the FAA are arbitrable, unless Congress expressly provides that the claims should only be resolved through litigation.⁷⁹ The Supreme Court has not yet found that any federal statute contains such a prohibition on arbitration.⁸⁰

3. Courts' Rejection of Common-Law Defenses

The FAA provides that arbitration clauses may be voided "upon such grounds as exist at law or in equity for the revocation of any

75. 473 U.S. 614, 629 (1985). Actually, although the Court emphasized the international nature of the transaction, one of the parties was Puerto Rican and the situs of the transaction was Puerto Rico, and thus within the United States. *See id.*

76. Initially, in *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the court held that securities fraud claims brought under section 10(b) of the Security Exchange Act of 1934, 15 U.S.C. § 78, were arbitrable, even though *Wilko* had held that securities fraud claims brought under section 12 of the Act were not. *See Wilko v. Swan*, 346 U.S. 427, 438 (1953). Subsequently, in *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484-85 (1989), the Court explicitly overruled *Wilko* and held that section 12 claims were in fact arbitrable.

77. *See McMahon*, 482 U.S. at 239-42.

78. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-28 (1991).

79. *See id.* (noting that Congress may preclude arbitration of claims under a particular statute); cf. *Lambdin v. Dist. Ct.*, 903 P.2d 1126 (Colo. 1995) (holding that clear state legislative intent precludes prospective waiver of right to pursue judicial remedies); *Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243, 257 (Mich. 1996) (Cavanagh, J., concurring) (concluding that the Michigan Constitution should be interpreted to preclude persons from waiving right to bring substantive civil rights claims in court), *cert. denied*, 117 S. Ct. 1311 (1997).

80. However, the Ninth Circuit has interpreted several federal statutes to restrict the circumstances under which certain federal claims may be arbitrated. Specifically, it has ruled repeatedly that Title VII, federal statute barring discrimination, allows arbitration of such claims only where employees had knowingly waived their right to litigation. *See Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997) (employer's issuance of handbook requiring arbitration did not deprive employee of right to litigate claim of disability discrimination); *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997) (no waiver of right to litigate employment discrimination claim by employee who signed Form U-4); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994). The Ninth Circuit also interpreted the federal Petroleum Marketing Practices Act to prohibit arbitration of claims under that Act where the arbitration agreement purported to shorten the plaintiff's statute of limitations and to limit the plaintiff's potential remedies. *See Graham Oil v. Arco Prod. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994). *But see Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996) (refusing to interpret Fair Labor Standards Act to require knowing waiver).

contract.”⁸¹ Superficially, such defenses as fraud, duress, and unconscionability might seem to be quite potent. However, the Supreme Court held in *Mitsubishi Motors* that the favoritism afforded to arbitration required that any such challenges be “well supported” by the evidence.⁸² The following discussion will show how the courts have relied on the supposed federal policy of favoring arbitration over litigation to interpret the defenses of fraud, duress, and unconscionability quite narrowly and to uphold virtually all arbitration agreements against attack.⁸³

a. *The Prima Paint Caveat*

Despite the FAA’s explicit language, courts often refuse to hear parties’ contractual defenses to arbitration agreements at all, instead frequently requiring parties to present such defenses to the arbitrators, rather than to the courts. Pursuant to the doctrine of “severability,” announced by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁸⁴ where a party challenges an entire contract on such grounds as fraud, duress, or unconscionability, it is up to the arbitrator to assess the claim.⁸⁵ A court generally becomes

81. 9 U.S.C. § 2 (1997). Citing this provision, the Supreme Court has repeatedly justified its preemption of protective state legislation in part on the ground that consumers and others may avoid an unfair arbitration agreement if they can convince the court that the contract is void under normal state contract-law doctrines. In *Allied-Bruce*, the Court observed:

In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract.”

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2). See also *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987) (noting that general principles of state contract law govern such arguments as unconscionability); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (“Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”); *Southland Corp. v. Keating*, 465 U.S. at 1, 16 n.11 (1984) (“We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement.”).

82. See *Mitsubishi*, 473 U.S. at 627.

83. One court even granted Rule 11 sanctions against securities investors who argued that the arbitration clause was invalid on grounds of fraud. See *Gonick v. Drexel Burnham Lambert, Inc.*, 711 F. Supp. 981, 987 (N.D. Cal. 1988) (sanctions appropriate where investors’ argument on the arbitration issue was totally devoid of citations in support of their argument).

84. 388 U.S. 395 (1967).

85. See *id.* at 403-04. The Court reasoned that, if no fraud was alleged as to the making of the arbitration clause itself, then under the FAA courts would be compelled to

involved only where the party challenges the arbitration clause itself and not other aspects of the contract.⁸⁶ Yet it is difficult to imagine a factual scenario in which a party would use fraud solely to impose an arbitration clause and not to affect other essential terms of a contract.⁸⁷ Thus, court after court has cited *Prima Paint* to support its refusal to consider consumers' challenges to arbitration agreements.⁸⁸ This refusal is highly significant in that arbitrators are even less likely to void purported arbitration agreements than are courts.⁸⁹ While a few

order the matter to arbitration. See *id.* While *Prima Paint* itself involved a claim of fraud, subsequent decisions by the Supreme Court and lower courts have made clear that the doctrine also applies to claims including illegality, duress, unconscionability, mutuality, mistake, and other matters. See MACNEIL ET AL., *supra* note 43, § 15.3.2.

86. See *id.* Professor Stempel points out that two federal cases have found that a court should resolve a claim of fraud as to the entire contract where a party alleges "fraud in the factum", i.e., fraud going to the very *existence* of the agreement, as opposed to "fraud in the inducement." Stempel, *A Better Approach*, *supra* note 43, at 1399-1402 (discussing *Dougherty v. Mieczkowski*, 661 F. Supp. 267 (D. Del. 1987), and *Cancanon v. Smith Barney, Harris Upham & Co.*, 805 F.2d 998 (11th Cir. 1986)). Courts also become involved where the party challenges the *scope* of the arbitration clause, contending that the particular controversy is not covered by the clause. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); MACNEIL ET AL., *supra* note 43, §§ 15.3.2 & 19.1.2.

87. See MACNEIL ET AL., *supra* note 43, § 19.2.1 n.6. If a party wants to defraud or use duress on its opponent, why not go after something big like the price or quality of the goods or services at issue?

88. See, e.g., *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994) (concluding that where securities investors claimed securities brokerage fraudulently induced them to sign a customer agreement containing an arbitration clause, and where that clause was only one of 19 clauses in the agreement, it was up to arbitrators to assess the fraud); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934-35 (9th Cir. 1992) (remanding case to district court to allow court to determine whether securities brokerage employee's claim of adhesion went to the entire contract or merely to the arbitration clause); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1278 (6th Cir. 1990) (noting that crucial question is "whether [the plaintiffs'] amended complaint contains a well-founded claim of fraud in the inducement of the arbitration clause itself, *standing apart from the whole agreement*, that would provide grounds for the revocation of the agreement to arbitrate"); *Bhatia v. Johnston*, 818 F.2d 418, 422 (5th Cir. 1987) (indicating that a securities customer failed to meet the threshold requirement of alleging that arbitration clause, as opposed to entire contract, was adhesive); *Merrill Lynch Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. 1981) (holding that a securities customer's claim that she was distracted and coerced by the high-pressure sales talk of the Merrill Lynch representatives goes to the validity of the entire contract, and not merely the arbitration clause, and thus must be heard by arbitrators rather than the court); *Rosen v. Waldman*, No. 93 CIV. 225 (PKL), 1993 WL 403974, at *2-3 (S.D.N.Y. Oct. 7, 1993) (noting that consumer's fraud claim must be heard by arbitrators unless the broker "made a specific misrepresentation regarding the arbitration clause or in some way . . . prevented or dissuaded the other party from becoming aware of the existence or meaning of the arbitration clause"); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 473 (D. Mont. 1993) (indicating that a claim that entire contract between supplier and distributor was fraudulently induced and unconscionable must be submitted to the arbitrator).

89. While little if any empirical work has been done on this point, most commentators believe that arbitrators, who probably believe in the fairness of the arbitral process, are likely to favor that process. See Stempel, *A Better Approach*, *supra* note 43, at 1391 n.64. Given their training, arbitrators are also more likely to look to overall fairness than

courts have recently interpreted the Supreme Court's 1995 decision in *First Options of Chicago, Inc. v. Kaplan*⁹⁰ to allow them to hear contractual challenges to arbitration agreements, most courts still seem to be following *Prima Paint*.⁹¹ Meanwhile, arbitrators' decisions on whether to uphold or void the contract are only appealable on a very limited basis.⁹²

b. Courts' Favoritism Toward Arbitration Leads Them to Reject Valid Common-Law Defenses

Lower courts' assessments of contractual challenges to arbitration often seem to reflect an alternative reality. Purporting to apply state law,⁹³ courts seem committed to a belief that all binding arbitration agreements are conveyed with sufficient clarity as to be comprehensible to the parties,⁹⁴ are agreed to absent fraud or duress,⁹⁵ and are fair, although perhaps lacking in formal protection.⁹⁶ This mythical vision is apparently based on the kinds of arbitration agreements the FAA was intended to govern—those knowingly

to technical legal defenses. Moreover, at least subconsciously, arbitrators may recognize that if they find a dispute nonarbitrable they are effectively firing themselves. Arbitrators generally have a financial interest in ensuring that cases remain in arbitration. They are usually paid according to the time they put into a given case. See, e.g., NADER & SMITH, *supra* note 16, at 306 (arbitrators generally charge at least \$200 per hour for their time).

90. 514 U.S. 938, 943-44 (1995) (holding that, unless the contract specifies otherwise, courts rather than arbitrators must decide whether a particular issue is covered by the arbitration clause). See also Wyss, *supra* note 13 (examining the implications of *First Options*).

91. Those courts not following *Prima Paint* have reasoned that the holding in *First Options* "suggests that the related and antecedent issue of whether an agreement to arbitrate is a contract of adhesion, fraudulently induced, or otherwise revocable, is an issue for the courts as well, because essential to the *First Options* inquiry is the assumption that an agreement to arbitrate was made voluntarily." *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996); see also *Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 965 (S.D.N.Y. 1996) (same); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 106 n.3 (S.D.N.Y. 1995) (noting that the *Prima Paint* approach may not survive *First Options*).

92. See *supra* note 43 and accompanying text; see also MACNEIL ET AL., *supra* note 43, § 19.2.2.

93. See *First Options*, 514 U.S. at 944; *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987) (noting that courts should apply state law in determining whether a contractual defense to arbitration exists); *Houlihan*, 31 F.3d at 694-96; *DeGaetano v. Smith Barney, Inc.*, No. 95 CIV. 1613, 1996 WL 44226, at *3 (S.D.N.Y. Feb. 5, 1996). The Ninth Circuit, however, has insisted that such defenses are a matter of federal law and has refused to apply certain California defenses on this ground. See *Mago*, 956 F.2d at 934; *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988); *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783 MHP, 1993 U.S. Dist. LEXIS 11333, at *4-*5 (N.D. Cal. Aug. 4, 1993) (noting apparent inconsistency between Supreme Court precedent and Ninth Circuit rule).

94. See *infra* notes 99-112 and accompanying text.

95. See *supra* note 43 and accompanying text.

96. See *supra* note 30 and accompanying text.

entered between two businesses with roughly equal bargaining power.⁹⁷ However, rather than admit that an arbitration agreement is unclear, fraudulent, coercive or unfair, courts have often engaged in highly formalistic analyses that essentially reject reality and factual distinctions in favor of this mythical vision.⁹⁸ The following sections examine this phenomenon with respect to courts' assessment of the clarity of the agreement, whether the agreement was secured fraudulently or involuntarily, and whether the agreement was substantively unfair.

i. Was the Agreement Clear Enough?

Lower courts have often disregarded both the content and placement of an arbitration clause, as well as the parties' degrees of knowledge and education, to conclude that an arbitration clause was sufficiently "clear" as to constitute an agreement.⁹⁹ Lower courts have

97. See Carbonneau, *supra* note 16, at 1953-57 (tracing broad expansion of arbitration); Stempel, *Reflections*, *supra* note 17, at 334-40 (calling upon courts to distinguish between "new" and "old" ADR).

98. Professor Fisk has noted a similar trend in courts' interpretation of the Employee Retirement Income Security Act of 1974. She observes that courts employ a "trope" of bargaining, as well as a highly formalistic method of contractual interpretation, which has led to a body of law sharply biased against the employee. See 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, 179 (1995). As many Critical Legal Studies scholars have observed, formalistic modes of thought and rhetoric are often tied to substantively conservative approaches. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); cf. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (defending formalist approach in certain contexts).

99. Although the Supreme Court, in *Mastrobuono v. Shearson, Lehman, Hutton, Inc.*, 514 U.S. 52, 63 (1995), purported to recognize that securities customers were unlikely to be aware that "by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right," the Supreme Court has not yet failed to enforce any arbitration clauses on the ground that there was no agreement to arbitrate. A few lower courts have, however, found that a policy favoring arbitration should not be used to mandate arbitration not actually agreed to by the parties. See, e.g., *Catholic Diocese of Brownsville, Tex. v. A.G. Edwards & Sons, Inc.*, 919 F.2d 1054, 1056-57 (5th Cir. 1990) (affirming trial court's exclusion of arbitration of federal securities claims because "the Federal Arbitration Act cannot trump the express agreement of the parties to exclude matters from arbitration"). In *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419 (11th Cir. 1990), the court refused to order arbitration of a federal securities claim where the arbitration clause stated:

this Agreement to arbitrate does not constitute a waiver of your right to a judicial forum where such waiver would be void under the securities laws and specifically does not prohibit you from pursuing any claim or claims arising under the federal securities laws in any court of competent jurisdiction.

Id. The court reached this result even though the Supreme Court had interpreted the law to allow such arbitration. Cf. *Gershman v. Goldman, Sachs & Co.*, Civ. A. No. 92-2488, 1992 WL 392612, at *2 (E.D. Pa. Dec. 14, 1992) (mandating arbitration of federal securities claim despite clause language similar to that in *Goldberg*, and citing preference for arbitration); *Scher v. Bear Stearns & Co. Inc.*, 723 F. Supp. 211 (S.D.N.Y. 1989) (same).

routinely upheld arbitration clauses which failed to inform consumers that by accepting arbitration they waived their right to a day in court.¹⁰⁰ Although many courts have held that it is "obvious" that one waives a jury trial by accepting arbitration,¹⁰¹ in this author's experience even some law students may be unaware that an acceptance of binding arbitration is a rejection of trial. Nonetheless, courts have insisted that typical investors, senior citizens, and consumers are all sufficiently knowledgeable to understand the significance of an arbitration provision.¹⁰²

100. For example, the arbitration clause contained in a fairly typical customer agreement used by securities brokers stated only: "It is agreed that any controversy between us arising out of Becker's business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange . . ." *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 445-46 (S.D.N.Y. 1985) (upholding validity of arbitration clause although the plaintiffs claimed they signed without understanding the significance of the arbitration agreement and without knowing they were waiving their constitutional right to trial by jury).

101. In the *Cohen* case, the Ninth Circuit upheld an arbitration agreement although the plaintiffs, securities customers, claimed that the brokerage had misled them by failing to inform them of the meaning and effect of the arbitration clause. *See Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286-88 (9th Cir. 1988). In a frequently quoted opinion, the court stated:

We know of no case holding that parties dealing at arm's length have a duty to explain to each other the terms of a written contract. We decline to impose such an obligation where the language of the contract clearly and explicitly provides for arbitration. . . .

. . . .

We see no unfairness in expecting parties to read contracts before they sign them.

. . . .

We are unable to understand how any person possessing a basic education and fluent in the English language could fail to grasp the meaning of that provision.

Id. at 287-88 (citation omitted). In reaching this conclusion, the Ninth Circuit quoted the Seventh Circuit's earlier decision in *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("[T]hough perhaps not contemplated by the [plaintiffs] when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate. The [plaintiffs] cannot use their failure to inquire about the ramifications of that clause to avoid the consequences of agreed-to arbitration."). *See also Bakri v. Continental Airlines, Inc.*, No. CV 92-3476 SVW(k), 1992 WL 464125, at *2 (C.D. Cal. Sept. 24, 1992) (holding arbitration clause valid although employee claimed that he did not understand the meaning of "final and binding" in that "[t]hese words are both plain on their face and typical of arbitration clauses").

102. In *McCarthy v. Providential Corp.*, No. C94-0627 FMS, 1994 U.S. Dist. LEXIS 10122, at *1-*2 (N.D. Cal. July 18, 1994), the plaintiffs were a group of senior-citizen homeowners who entered into "reverse mortgage loans" whereby they received cash advances secured by the equity in their home. When the plaintiffs attempted to bring suit against Providential under the federal Truth in Lending Act, the defendant sought to compel arbitration, arguing that the deeds of trust contained an arbitration clause. *See id.* at *2-*3. The plaintiffs sought to void the clause, arguing that the defendants had failed to inform them that they were waiving important rights, but the court rejected the argument, stating that there is no duty under federal law to inform people verbally of the ramifications of a contract clause. *See id.* at *15. The court stated:

Regardless of the parties' degree of knowledge, courts have also typically upheld arbitration clauses that are buried in large documents, conveyed in small print, and explained in confusing terms.¹⁰³ Some

Contrary to [the] plaintiffs' assertions, it does not take a 'clairvoyant' to understand the meaning of clause. Regrettably, [the] plaintiffs' assumption of loans without understanding all of the terms of the contract may represent the norm and not the exception. This failure to inquire, however, will not shield them from obligations clearly and explicitly contained in the agreement.

Id. at *13 (citation omitted); *see also* Meyers v. Univest Home Loan, Inc., No. C-93-1783 MHP, 1993 U.S. Dist. LEXIS 11333, at *3 (N.D. Cal. Aug. 4, 1993) (finding that consumers who obtained home loans were bound by arbitration clause even though none of the plaintiffs were aware of arbitration as a method of dispute resolution prior to applying for the loan, even assuming that the form was "buried" among a group of loan documents, and even though none could recall reading or hearing about the arbitration agreement). *See generally* Stempel, *Reflections, supra* note 17, at 352 (emphasizing need to appreciate differences between the sophistication and power of various disputants). *But see* Berger v. Cantor Fitzgerald Sec. & Prudential Sec., 942 F. Supp. 963, 966-97 (S.D.N.Y. 1996) (allowing a brokerage employee the opportunity for discovery to support claim that he was led to sign U-4 agreement calling for arbitration because of fraud and misrepresentation, and emphasizing employee's lack of experience with arbitration).

103. *See, e.g.,* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148-50 (7th Cir. 1997) (finding arbitration clause effective although it was not provided to consumer until it was shipped out with computer ordered by phone), *cert. denied*, 118 S. Ct. 47 (1997); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 834-35 (8th Cir. 1997) (arbitration agreement upheld even though it appeared on page 31 of employee handbook, and even though page 3 of handbook stated that the handbook "is not intended to constitute a legal contract"); Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 700 (10th Cir. 1989) (finding that arbitration clause is not unenforceable merely because it is a "form, boilerplate contract" nor because Merrill Lynch "made no attempt to highlight the arbitration provision," as even if clause is adhesive it is not unconscionable); Webb v. R. Rowland & Co., 800 F.2d 803, 807 (8th Cir. 1986) (holding a form arbitration clause contained in securities customers' agreement not unenforceable as a contract of adhesion because contracts are valid so long as they are not unconscionable, and there is "nothing inherently unfair about [arbitration]"); Curtis v. Newhard, Cook & Co., 725 F. Supp. 1072, 1073-74 (E.D. Mo. 1989) (holding valid an arbitration clause imposed by securities broker on customers as applied to a federal securities-law claim even though the clause stated that "[i]t is understood that the following agreement to arbitrate does not constitute a waiver of the right to seek a judicial forum where such a waiver would be void under the Federal Securities Laws"). *But see* Renteria v. Prudential Ins. Co., 113 F.3d 1104 (9th Cir. 1997) (refusing, under Title VII, to enforce arbitration agreement where clause did not expressly put employee on notice of what she was waiving); Heurtebise v. Reliable Business Computers, Inc., 550 N.W.2d 243 (Mich. 1996) (holding that arbitration provision in handbook did not require employee to arbitrate gender discrimination claim where employer had reserved the right to modify handbook at its own discretion), *reh'g denied*, 554 N.W.2d 10 (Mich. 1996), *cert. denied*, 117 S. Ct. 1311 (1997); Bell v. Congress Mortgage Co., 30 Cal. Rptr. 2d 205 (Cal. Ct. App. 1994) (refusing to enforce arbitration clause included by lender in documents signed by individual homeowners who refinanced their homes, where the clause appeared in an unhighlighted paragraph in the middle of the page, was contained in a packet of documents also including a promissory note and deed of trust, where the unsophisticated borrowers were required to sign various documents in blank, and where no representative of the lender discussed or explained the arbitration clause). Ralph Nader has stated that the counsel for Bank of America secured depublishing of the *Bell* decision in order to protect Bank of America's interest in the pending case of *Badie v. Bank of America*. *See* NADER & SMITH, *supra* note 16, at 303-05.

courts have upheld arbitration clauses even though the document provided to the consumer or employee did not even mention arbitration.¹⁰⁴ One court upheld an arbitration clause contained in an employment application although the application stated that it did not constitute an employment contract.¹⁰⁵ Another court upheld as valid an arbitration clause that a bank sent to customers as an insert with their monthly statement, even though the customers did not even sign the agreement.¹⁰⁶

Courts have also required arbitration although it was not clear that the dispute was actually covered by the arbitration agreement. For example, in *Armijo v. Prudential Insurance Co. of America*,¹⁰⁷ the Tenth Circuit held that, while it was not clear whether or not the brokerage employees had consented to arbitrate their employment-law claims against their employer, the federal policy favoring arbitration required that the arbitration clause be given the broader of the two possible interpretations.¹⁰⁸ As the court put it: "Notwithstanding the ambiguity . . . (or perhaps more correctly, because of such ambiguity), we conclude that the most appropriate construction . . . is to apply [the] arbitration provisions to employment disputes involving these Plaintiffs."¹⁰⁹ Similarly, courts have frequently held that a securities

104. See, e.g., *R.J. O'Brien & Assocs., Inc. v. Pipkin*, 64 F.3d 257, 260 (7th Cir. 1995) (mandating arbitration of commodities dispute although Form 8-R provided only that signatory would be bound by National Futures Association requirements and did not specifically mention arbitration, stating that "[a] contract . . . need not contain an explicit arbitration clause if it validly incorporates by reference an arbitration clause in another document").

105. See *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 149, 163-69 (Haw. 1996); cf. *Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243, 247 (Mich. 1996) (finding no arbitration agreement where employee handbook provided that no contract existed).

106. See *Badie v. Bank of Am.*, No. 944916, 1994 WL 660730, at *3 (Cal. App. Dep't Super. Ct. Aug. 18, 1994) (noting that notice provided was not best possible); Plaintiffs' Post-Trial Brief at 8, 11-30 (alleging that only four percent of customers read and recalled the insert) (brief on file with author); see also *NADER & SMITH*, *supra* note 16, at 300-05 (providing details on *Badie* litigation). In another case, the Utah Supreme Court found an arbitration agreement could be upheld, even though it was imposed on a hospital patient in a procedurally unconscionable manner, based on the fact that the agreement contained a fourteen day revocation clause, if the patient read and understood it. See *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

107. 72 F.3d 793 (10th Cir. 1995).

108. See *id.* at 798; *New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 62-63 (2d Cir. 1996) (interpreting exclusion provisions of arbitration clause to prohibit arbitration of claim, even though allegations did not "fit word for word under the exclusionary clause").

109. *Armijo*, 72 F.3d at 798; see also *American Recovery v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92-93 (4th Cir. 1996) (holding that a request for arbitration may not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996) (relying on preference favoring arbitration to hold that

industry employee who signed a U-4 registration statement while applying to work as a securities trader was required to arbitrate all claims against the employer,¹¹⁰ even though the U-4 does not specify which disputes are arbitrable.¹¹¹ In one case, a court required an

clauses which "could have been drafted with more precision" cover dispute); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) (interpreting arbitration provision broadly to cover tort, fraud and deceit claims as well as claims for breach of contract); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53-54 (7th Cir. 1995) (noting that, given federal policy favoring arbitration, the arbitration clause was interpreted broadly to include employee's statutory as well as contractual claims against his employer); *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248-51 (2d Cir. 1991) (emphasizing that federal policy requires interpreting arbitration clauses as broadly as possible, court rejected the plaintiff's argument that disputes did not arise out of or relate to the contract containing the arbitration clause); *McCarthy v. Providential Corp.*, No. C94-0627 FMS, 1994 U.S. Dist. LEXIS 10122, at 9-11 (N.D. Cal. July 18, 1994) (noting that given federal preference for arbitration, arbitration clause covering claims arising out of or relating to loan documents is interpreted to cover the plaintiffs' claims for violation of the Federal Truth in Lending Act). Several courts have relied on the preference to interpret arbitration clauses broadly so as to cover claims against persons who were not signatories to the agreement. *See Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990) (holding corporation officers entitled to arbitration because they were agents of the corporation); *Rosen v. Waldman*, No. 93 Civ. 225 (PKL), 1993 WL 403974, at *2 (S.D.N.Y. Oct. 7, 1993) (interpreting customers' arbitration agreement with brokerage to cover claims against broker in individual capacity, as well as against brokerage).

110. Securities regulators such as the National Association of Securities Dealers (NASD) have actually *required* their member brokerages to impose arbitration on their trader employees. However, the Directors of NASD recently voted that it should be up to the brokerages whether to require arbitration of employment disputes. Such a change would ultimately have to be approved by the SEC. *See Patrick McGeehan & Margaret A. Jacobs, NASD Set to End Practice of Submitting All Employment Disputes to Arbitration*, WALL ST. J., July 21, 1997, at A4.

111. The U-4 registration statement provides only that the applicant agrees "to 'arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register.'" *Lockhart v. A.G. Edwards & Sons, Inc.*, Civ. A. No. 93-2418-GTV, 1994 WL 34870, at *1 (D. Kan. Jan. 25, 1994). Furthermore, although employees are generally not provided with the relevant exchange rules, most courts have applied the language broadly to cover even discrimination claims against the employer. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23-27 (1991) (requiring brokerage employee to arbitrate age discrimination claim); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 659 (5th Cir. 1995) (determining that a brokerage manager must arbitrate employment claim); *Feinberg v. Bear Stearns & Co.*, No. 90 Civ. 5250 (JFK), 1991 WL 79309, at *1-*3 (S.D.N.Y. 1991) (holding that a sex discrimination plaintiff is bound by agreement); *Malison v. Prudential-Bache Sec., Inc.*, 654 F. Supp. 101, 103-05 (W.D.N.C. 1987) (mandating arbitration in an employment contract claim); *cf. Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60, 63 (2d Cir. 1996) (requiring securities employer to arbitrate dispute with employee, even though employee had signed contract waiving any right to arbitration); *Farrand v. Lutheran Bhd.*, 993 F.2d 1253, 1253-55 (7th Cir. 1993) (holding arbitration of employment related disputes not arbitrable pursuant to NASD provision). *See generally* Margaret A. Jacobs, *Riding Crop and Slurs: How Wall Street Dealt With a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1 (trading-room secretary required to arbitrate claim for sexual harassment, having signed a very long agreement with small print, and lost claim apparently because arbitrators were unfamiliar with the law).

employee to arbitrate her Fair Labor Standards Act claim even though the rules making such a claim arbitrable did not come into effect until after the employee's discharge.¹¹²

ii. Was the Agreement Fraudulently Procured?

Some courts have been so eager to allow cases to be arbitrated that they have rejected fraud claims where an agent was alleged to have falsely stated that signing the agreement would not compromise any rights.¹¹³ Courts have also rejected consumers' fraud claims where company representatives allegedly lulled them into signing the agreement by stating that it was "a mere formality,"¹¹⁴ that it was no

112. See *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (justifying application of new rule to employee on ground that employee agreed to be bound by NASD rules "as may be amended from time to time" and that loss of jury-trial right is not substantive and thus may be extinguished retroactively). The analysis in *Kuehner* fails to consider how an employee may legitimately waive a constitutional right pursuant to rules that have not even been written as of the time of her employment. See also *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997) (interpreting a federal civil rights statute, Title VII, to prohibit waivers of litigation rights that were not "knowing," and thus holding that employees who signed a Form U-4 that did not explicitly require arbitration of discrimination claims would not be required to arbitrate such claims, even though clause bound employee to arbitrate listed disputes "as may be amended from time to time"); *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613 (DLC), 1996 WL 44226, at *5 (S.D.N.Y. Feb. 5, 1996) (holding employee bound by arbitration provision even though she signed only a general agreement setting out "principles of employment" and was not actually provided with a copy of the arbitration agreement prior to signing the "principles").

113. See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988) (noting that reliance on an alleged misrepresentation is not reasonable, and thus not actionable, where the party could, by reading the contract, have ascertained the truth of the matter); see also *Snap-on Tools Corp. v. Vetter*, 838 F. Supp. 468, 472 (D. Mont. 1993) (same); cf. *Rush v. Oppenheimer & Co. Inc.*, 681 F. Supp. 1045, 1053 (S.D.N.Y. 1988) (opining that if a broker had actually told a customer "there was no need to read the agreement since [the customer] would not be signing away any constitutional rights, then [the customer] would have a colorable claim of fraud with respect to the making of the arbitration agreement itself").

114. *Smith Barney Shearson, Inc. v. DeFries*, No. 94 Civ. 0020 (WK), 1994 WL 455178, at *2 (S.D.N.Y. Aug. 19, 1994) (holding arbitration clause enforceable, even though broker allegedly told customer that signing agreement was a "mere formality" which would enable him to open the account, where the arbitration clause itself was particularly informative and where the customer was particularly savvy); *Benoay v. E.F. Hutton & Co.*, 699 F. Supp. 1523, 1529 (S.D. Fla. 1988) (although the plaintiff, a securities customer, alleged that the agent had represented that the customer agreement was a mere formality, and that he had failed to inform her of the ramifications of the arbitration clause, the court upheld the clause reasoning that "[a] party who signs an instrument is presumed to know its contents"); *Rush*, 681 F. Supp. at 1053-54 (noting that, even though broker told customer that "there was no need to read [the documents], that they were just a formality and they were just like the documents at Drexel," these statements were not false because the investor had in fact signed a similar arbitration provision at Drexel; and moreover the plaintiff failed to show materiality and justifiable reliance, because there was no evidence that he would have acted differently had the broker not made such a statement).

different than a clause they had previously signed,¹¹⁵ or where they arguably misled consumers as to the nature of the arbitration process.¹¹⁶ Finally, courts have almost uniformly refused to hold company representatives liable for fraud for failing to thoroughly disclose the details or significance of an arbitration clause, no matter how great the difference in knowledge or power between the parties.¹¹⁷

115. In *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694 (8th Cir. 1994), the court upheld an arbitration clause even though the brokerage sent it to customers some time after they had opened their account, under cover of a letter stating that, because the SEC and IRS required updated information, the customers must sign the application, even if they had previously executed a similar form. The court stated that, assuming that the letter was a misrepresentation concerning only the arbitration clause, "[r]eliance on implied misrepresentations is unjustifiable, for purposes of a fraud claim, if a written contract provision explicitly states a fact completely contradictory to the claimed misrepresentation." *Id.* at 695-96. See also *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659 (11th Cir. 1987) (opining that, although the plaintiffs contended that broker's agent had indicated that investor's consent to the Customer Agreement was a mere formality and that broker never informed investor about the arbitration, the plaintiffs' claim of fraud goes to the entire contract and thus must be heard by the arbitrators rather than the court).

116. See *Engalla v. Permanente Med. Group, Inc.*, 43 Cal. Rptr. 2d 621, 633-42 (Cal. Ct. App. 1995) (finding no fraud where arbitration clause said that neutral arbitrator should be appointed within 60 days and that arbitration can be concluded in several months, though company's dilatory behavior prevented either, where there was no showing of reliance or material falsity), *rev'd*, 64 Cal. Rptr. 2d 841 (Cal. 1997), *modified*, No. 3048811, 1997 WL 426233 (Cal. June 30, 1997).

117. See, e.g., *Wasil v. Snap-On Tools Corp.*, 951 F.2d 351 (6th Cir. 1991) (table), No. 91-3381, 1991 WL 270810, at *2 (6th Cir. Dec. 19, 1991) (reversing lower court's determination that supplier had duty to inform dealer of meaning and ramifications of arbitration clause, and observing that a person entering a contract has a duty to investigate the terms); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) (finding no fraud merely because broker's representative failed to disclose arbitration provision to customers, in that the "law presumes that one has read that which he has signed"); *Rosen v. Waldman*, No. 93 Civ. 225 (PKL), 1993 WL 403974, at *3 (S.D.N.Y. Oct. 7, 1993) (explaining that broker's failure "to disclose or explain an arbitration clause to a client cannot constitute fraud, because stockbrokers owe no such affirmative duty to disclose" and because permitting a party to avoid arbitration on such ground "would undermine the strong federal policy favoring arbitration"); *Gershman v. Goldman, Sachs & Co.*, Civ. A. No. 92-2488, 1992 WL 392612, at *3 (E.D. Pa. Dec. 14, 1992) ("It is absurd to think that the election of [the securities customers] to sign the agreement without first reading it constitutes a failure to disclose on the part of [the] Defendants."); *Vetter*, 838 F. Supp. at 471 (rejecting dealer's claim that supplier failed to explain significance of arbitration clause and noting: "I specifically find that no special relationship or fiduciary duties existed between Snap-On and Vetter."); *Federowicz v. Snap-On Tools Corp.*, Civ. A. No. 91-3425, 1992 WL 55723, at *3 (E.D. Pa. March 12, 1992) (rejecting dealer's claim that supplier violated its fiduciary duty by failing to explain terms of arbitration clause where, even assuming dealer relied completely on Snap-On's advice, such reliance alone does not create a fiduciary relationship); *Curtis v. Newhard, Cook & Co.*, 725 F. Supp. 1072, 1074 (E.D. Mo. 1989) (securities customers' claim that broker defrauded them by imposing arbitration clause rejected, where plaintiffs "do not allege that they were prevented from reading the Client Agreement or that defendants affirmatively misrepresented the contents of the Client Agreement"); *Rush*, 681 F. Supp. at 1055 (holding that broker does not have fiduciary duty to inform customer of significance of arbitration clause, because broker's duty is limited to

iii. Was the Agreement Entered Into Voluntarily?

Consumers and employees have often challenged arbitration "agreements" on the ground that they did not accept the term voluntarily, using this lack of voluntariness to support a defense of duress, adhesion, or procedural unconscionability.¹¹⁸ Courts have often rejected these claims on legal grounds, holding that the mere adhesive nature of a contract does not render it invalid.¹¹⁹

Even more significant, courts often appear so taken with the myth of voluntary arbitration that they fail to look realistically at whether the protesting party actually had an option to reject the agreement. For example, in *Geldermann v. Commodity Futures Trading Commission*,¹²⁰ the Seventh Circuit insisted that a commodity broker had voluntarily accepted arbitration mandated by the federal government, in the sense that the broker could have chosen a different business endeavor if it did not wish to arbitrate.¹²¹ Claims of

matters relevant to affairs entrusted to her). *But see* *Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963 (S.D.N.Y. 1996) (refusing to reject, without discovery, brokerage employee's claim that he signed arbitration clause due to fraud and misrepresentation, where he contended that he was misinformed as to the nature of the form, was given only five minutes to fill out the application and was never provided with the manual which fully explained the scope of the clause).

118. Two federal circuit courts have also raised a question as to whether "voluntariness" in acceptance of arbitration may be required by federal employment discrimination statutes. *See* *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129-30 (7th Cir. 1997) (stating that knowing and voluntary arbitration agreements are advantageous but refusing to resolve whether such consent is mandatory under federal employment statutes); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761 n.10 (9th Cir. 1997) (refusing to reach question of whether agreements to arbitrate must be voluntary under Title VII).

119. *See, e.g.*, *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) (finding adhesion contracts are not automatically void but rather are void only if they are also shown to be unconscionable); *Adams*, 888 F.2d at 700 (holding that even if investment contract were shown to be a contract of adhesion it would not be unenforceable unless it were also shown to be unconscionable); *Surman v. Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir. 1984) (noting that brokerage contracts are not unenforceable because, even assuming they were adhesive, there is nothing inherently unfair about arbitration). *But see* *Bell v. Congress Mortgage Co.*, 30 Cal. Rptr. 2d 205 (Cal. Dist. Ct. App. 1994) (en banc) (opining that contracts of adhesion are unenforceable where they do not fall within the reasonable expectation of the weaker party or where they are unduly oppressive).

120. 836 F.2d 310 (7th Cir. 1987).

121. *See id.* at 317-18; *cf.* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 991-92 n.414 (1988) (criticizing *Geldermann*'s conception of waiver as rising to the level of coercion and stating: "to call this a 'waiver' is to render the concept meaningless"). In another decision that is notable for its departure from reality, the Seventh Circuit upheld an arbitration clause that was first conveyed to the customer when it was placed in a box containing the customer's new computer and software. The court found that the customer had agreed to arbitration by failing to inquire as to the existence of an arbitration clause prior to shipment, and by failing

involuntariness frequently arise in the securities and commodities industry where, although brokers typically require all customers and employees to sign arbitration agreements,¹²² many courts have refused to void such clauses as either adhesive or unconscionable.¹²³ In another noteworthy rejection of reality, one court upheld an arbitration agreement that was thrust upon a hospital patient, already “undressed

to return the computer within 30 days once it arrived with the arbitration clause. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-50 (7th Cir.), *cert. denied*, 1997 WL 250455 (1997). The court dismissed as irrelevant any inconvenience or expense the consumers might have faced in attempting either to investigate a clause they had no reason to believe existed or in returning a rather large item. *See generally* Jean R. Sternlight, *Recent Decision Opens Wider Gateway to Unfair Binding Arbitration*, 8 WORLD ARB. & MED. RPT. 129 (1997).

122. With respect to commodities trading, 7 U.S.C. § 7a(11) (1997) provides:

Each contract market shall—

....

provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided*, That (A) the use of such procedure by a customer shall be voluntary, (B) the term “customer” as used in this paragraph shall not include another member of the contract market, and (C) in the case of a claim arising from a violation in the execution of an order on the floor of a contract market, such procedure shall provide to the extent appropriate

See also 17 C.F.R. § 180 (1997) (the regulation implementing this statutory provision). There is no like statute for the securities markets, but most securities broker/dealers place binding arbitration clauses in their customer agreements as a common practice. *See generally* Poser, *supra* note 19.

123. *See, e.g., Dillard*, 961 F.2d at 1154-55 (rejecting securities customer's claim that arbitration clause was adhesive on ground that adhesion contracts are not void unless they are also unconscionable, where the term was nonnegotiable and the majority of brokerage firms use such clauses); *Cohen v. Wedbush, Noble Looke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (finding agreements to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law); *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613, 1996 WL 44226, at *5 (S.D.N.Y. Feb. 5, 1996) (requiring brokerage employee to arbitrate employment discrimination claim where she was asked to sign “Principles of Employment” generally noting existence of an arbitration process as part of the hiring process); *Lockhart v. A.G. Edwards & Sons, Inc.*, Civ. A. No. 93-2418-GTV, 1994 WL 34870, at *2 (D. Kan. Jan. 25, 1994) (rejecting brokerage employee's claim that mandatory signature of Form U-4, containing arbitration clause, was void as adhesive or unconscionable); *Sharpe v. Kidder Peabody & Co.*, Civ. No. 4-88-164, 1988 WL 60795, at *2 (D. Minn. June 13, 1988) (noting that, given liberal federal policy favoring arbitration, use of a standard form agreement to impose arbitration in the securities context is not impermissible). In *Rush v. Oppenheimer & Co.*, 681 F. Supp. 1045 (S.D.N.Y. 1988), the court stated:

Unlike arbitration provisions in such other commercial contracts as asset purchase agreements, distribution agreements, licensing agreements, and joint venture agreements, the agreement to arbitrate contained in a securities account agreement has not been negotiated between the customer and the broker and cannot reasonably be deemed to represent a *quid pro quo* exchange between two parties.

Id. at 1051-52.

and in her surgical clothing,” reasoning that the patient could later have backed out under a revocation clause.¹²⁴

iv. Was the Agreement Substantively Unfair?

Challengers of arbitration agreements often allege that the agreements are substantively unfair and thus unconscionable in that they will provide their opponent with a distinct litigation advantage.¹²⁵ Following the lead of the Supreme Court, lower courts have typically rejected such challenges, stating that, “by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for

124. *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) (upholding agreement despite finding of procedural unconscionability, because the patient could have read and acted upon a fourteen-day revocation clause once she was released from surgery). Contrary to modern contract analysis, a revocation clause was also found to give rise to an agreement in *Hill*, 105 F.3d at 1148-49. See also *C.H.I., Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762, 764 (9th Cir. 1991) (enforcing arbitration clause between two commercial entities although one claimed it signed under duress because of commitments to third parties dependent on receipt of the product); *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783 MHP, 1993 U.S. Dist. LEXIS 11333, at *10-*11 (N.D. Cal. Aug. 4, 1993) (finding arbitration clause imposed by bank on consumers not procedurally unconscionable even though the consumers were given no opportunity to alter its terms, its consequences were not explained, and the clause was buried in a bundle of documents); *Federowicz v. Snap-On Tools Corp.*, Civ. A. No. 91-3425, 1992 WL 55723, at *2 (E.D.B. Mar. 12, 1992) (upholding arbitration clause contained in dealer's termination agreement although dealer claimed he was required to sign the agreement because of economic duress); *Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 810-811 (Iowa 1991) (holding that “no one compelled FCC to become a commodities broker” and thus subject to binding arbitration); *Guralnick v. Supreme Court of New Jersey*, 747 F. Supp. 1109, 1116 (D.N.J. 1990) (finding that attorney waived Seventh Amendment jury trial right as to client fee disputes by joining the New Jersey Bar), *aff'd*, 961 F.2d 209 (3d Cir. 1992). But see *Broemmer v. Abortion Servs.*, 840 P.2d 1013 (Ariz. 1992) (reversing lower court's conclusion that woman had chosen arbitration voluntarily where, upon arriving at the abortionist's office, she was required to fill out and sign numerous forms including an arbitration provision). Although the lower court in *Broemmer* opined that “[t]he petitioner, not confronted with a medical emergency, could have obtained an elective abortion elsewhere at countless other health facilities in the metropolitan area,” *Broemmer*, 821 P.2d 204, 207 (Ariz. Ct. App. 1991) (quoting *Sanchez v. Sirmons*, 467 N.Y.S.2d 757, 759 (N.Y. Sup. Ct. 1983)), the court failed to cite any evidence supporting the availability of arbitration-free abortion, and also failed to consider the emotional stress likely involved in the procedure. See also *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 565-67 (Cal. Ct. App. 1993) (refusing to enforce arbitration clause imposed by bank on borrowers who stated their belief that they would not have been able to qualify for an alternative loan); *Bell*, 30 Cal. Rptr. 2d at 208-09 (refusing to enforce arbitration clause imposed by lender on individual homeowners, and emphasizing that “the borrowers are generally elderly, unsophisticated and financially distressed individuals who relied upon the good graces of skilled sales persons from a substantial corporate lender”).

125. Approaching this issue from a law-and-economics standpoint, it can be seen that adhesive arbitration clauses raise a “moral hazard” problem. The drafters of the clause can use their superior knowledge to draft a clause that places them at a great advantage. In such a situation, the free market will not necessarily ensure an optimal distribution of resources. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 108 (4th ed. 1992).

the simplicity, informality, and expedition of arbitration.”¹²⁶ Courts have applied this test to require that challengers present clear empirical evidence that the arbitration procedure will work to their disadvantage.¹²⁷ As applied by the courts, this test is extremely difficult to meet, as no one possesses a crystal ball that could literally be used to demonstrate the unfairness of a future proceeding, and as courts often show great optimism in concluding that the process will work fairly.¹²⁸

Whereas the Supreme Court developed this “knowing exchange” rationale in *Mitsubishi*, a case where two sizable businesses negotiated a large sales contract,¹²⁹ in many of the cases in which courts have subsequently applied the rationale, it is not at all clear that the parties knowingly exchanged their litigation rights for arbitration.¹³⁰ Instead, often in these cases a large company may have used its superior knowledge and power to impose an arbitration clause providing the company with a dispute-resolution advantage consisting of biased

126. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); see also *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1186 (Cal. 1976) (opining that speed, economy and simplicity of arbitration may prove helpful to the plaintiff).

127. See, e.g., *Gilmer*, 500 U.S. at 30 (rejecting generalized attacks on arbitration as resting on outmoded suspicions of arbitration); *Dillard*, 961 F.2d at 1154-55; *Cohen*, 841 F.2d at 286; *Adams v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 888 F.2d 696, 700 (10th Cir. 1989). In the securities context, courts have observed that federal regulatory oversight performed by the SEC helps ensure that agreements to arbitrate securities claims are not unconscionable as a matter of law. See *Dillard*, 961 F.2d at 1154-55; *Cohen*, 841 F.2d at 286; see also *Gilmer*, 500 U.S. at 30-33 (noting SEC approval of New York Stock Exchange Rules in failing to find such rules inherently unfair).

128. See *Gilmer*, 500 U.S. at 30-31 (finding no necessary unfairness in allowing brokerage employee's age discrimination claim to be heard by brokerage managers); *Sosa*, 924 P.2d at 361-62 (finding no necessary unfairness in requiring patient's medical malpractice claim against orthopedic surgeon to be heard by panel of board-certified orthopedic surgeons).

129. See *Mitsubishi*, 473 U.S. at 616-17. Although, in *Mitsubishi*, the party protesting the arbitration clause was an automobile dealer, and not a mere consumer, an argument can be made that such dealers also warrant special protection. As Justice Stevens noted in dissent, when Congress in 1956 enacted special legislation to protect automobile dealers from bad-faith franchise terminations, it emphasized the need to protect automobile dealers from “overreaching by car manufacturers.” *Id.* at 665 (Stevens, J., dissenting) (discussing the Automobile Dealer's Day in Court Act, 15 U.S.C. § 1221-25 (1997)).

130. See, e.g., *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613, 1996 WL 44226, at *6 (S.D.N.Y. Feb. 5, 1996) (applying *Mitsubishi* concept to stock brokerage employee who was required to sign “Principles of Employment” mentioning arbitration as part of hiring process); *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783, 1993 U.S. Dist. LEXIS 11333, at *10-13 (N.D. Cal. Aug. 4, 1993) (applying “trade” rationale to consumers who obtained home loans, while recognizing that they may well not have read or understood the contract).

arbitrators;¹³¹ the opportunity for substantial delay;¹³² in terms of geography or cost, a forum that is much more favorable for the opponent;¹³³ limitations on discovery,¹³⁴ damages,¹³⁵ injunctive

131. Compare *Gilmer*, 500 U.S. at 30 (concluding stock exchange employee had failed to present sufficient evidence that New York Stock Exchange arbitration panel would be biased against his age discrimination claim); *Sosa*, 924 P.2d at 361 (finding patient had failed to show bias in arbitration agreement requiring that medical malpractice claim be heard by panel of board-certified orthopedic surgeons) and *Bakri v. Continental Airlines, Inc.*, No. CV 92-3476 SVWC(K), 1992 WL 464125, at *3 (C.D. Cal. Sept. 24, 1992) (rejecting employee's claim that arbitration was biased, where all of the panel members were required to be company employees, and observing that employee would have to show bias rising to level of corruption to vacate arbitral award) with *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 2d 867 (Cal. Ct. App. 1997) (refusing to enforce, as arbitration agreement, employer policy requiring disputes to be heard by a five-person committee including the members of management and chaired by manager of hotel); *Ditto v. RE/MAX Preferred Properties, Inc.*, 861 P.2d 1000, 1003 (Okla. Ct. App. 1993) (refusing to enforce arbitration agreement that provided that dispute between real estate brokerage and agent would be resolved on a binding basis by three members of the RE/MAX organization selected by the manager, and analogizing contract to one in which foxes are empowered to resolve disputes between rabbits and foxes).

Even where arbitrators are not consciously predisposed to rule for a particular side, arguably their own personal background and employment background may cause them to see one side's position better than the other's. In the securities industry, for example, a U.S. General Accounting Office study found that 89% of the New York Stock Exchange arbitrators are white men, with an average age of 60. See Gen. Acct. Off., *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-17, at 2 (March 1994). The National Association of Securities Dealers reported that its demographics were similar. See *id.* See generally Lisa B. Bingham, *Employment Arbitration: The Effect of Repeat Player*, 1 EMP. RIGHTS & EMP. POL'Y J. (forthcoming Fall 1997) (finding that employees recover less of their claims in Repeat Player cases, where opponent frequently presents claims in arbitration, than in non-Repeat Player cases).

132. In *Engalla v. Permanente Med. Group Inc.*, 64 Cal. Rptr. 2d 843 (1997), the plaintiffs challenged the validity of a mandatory arbitration system imposed on patients by their HMO. The plaintiffs contended, *inter alia*, that defendant Kaiser had engaged in a dilatory course of conduct to prevent arbitration from occurring prior to the claimant's death. See *id.* at 848. Specifically, the plaintiffs asserted that the defendant had used its power to delay appointment of a neutral arbitrator for 144 days, almost three months more than the 60-day period discussed in the arbitration agreement, and that by the time the neutral arbitrator was finally appointed the plaintiff had died. See *id.* at 852. The plaintiffs also submitted an independent statistical study showing that in only 1% of cases is a neutral arbitrator appointed within 60 days, and that on average claimants must wait 677 days for appointment of a neutral arbitrator. See *id.* The California Supreme Court found that the plaintiffs had presented sufficient facts to support their claim that Kaiser had knowingly defrauded them as to the timeliness of the process, such that the issue must be remanded to the trial court for resolution of the parties' factual disputes. See *id.* at 857-62; see also Hiltzik & Olmos, *supra* note 21.

133. Compare *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 565-66 (Cal. Ct. App. 1993) (refusing to enforce arbitration clause imposed by financing organization on California consumers that apparently required arbitration be heard in Minneapolis, Minnesota and required the plaintiffs to pay substantial fees to file an arbitration claim, have their claim heard, or obtain discovery, written findings or an expedited hearing; observing that while procedures might be fair as applied to business entities they

relief,¹³⁶ opportunity to form class actions¹³⁷ or appellate review;¹³⁸ a shortening of the statute of limitations;¹³⁹ or a one-sided agreement that

were unfair as applied to unsophisticated borrowers of limited means) *with* Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 980-81 (2d Cir. 1996) (refusing to void as unconscionable a franchise agreement that required Illinois Subway sandwich shop franchisee to travel to Connecticut to arbitrate claim), *and* Webb v. Investacorp, Inc., 89 F.3d 252, 255-59 (5th Cir. 1996) (refusing to void mandatory clause requiring Texas employee to arbitrate dispute in Florida, as well as to pay all of the company's attorney fees, forum fees, and other collection costs). *See also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (upholding arbitration clause, given that employee would not have to pay any portion of arbitrator's fees or expenses).

134. *See Gilmer*, 500 U.S. at 31 (refusing to void arbitration agreement that allowed for more limited discovery than would be allowed in federal court); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1278-79 (finding mere allegation that discovery will be inadequate insufficient to void agreement, where arbitrators have authority to subpoena witnesses and documents). *See generally* Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 608-09 (1995) (discussing employees' critical need for discovery in suits against employer).

135. *Compare DeGaetano*, 1996 WL 44226, at *5-*6 (holding arbitration agreement valid even though it precluded employee bringing Title VII sex discrimination action from obtaining attorney fees or punitive damages); *Rosen v. Waldman*, No. 93 Civ. 225, 1993 WL 403974, at *3 (S.D.N.Y. Oct. 7, 1993) (finding fact that arbitration agreements frequently impact on opportunities of the parties to recover for legal wrongs or to obtain punitive damages does not invalidate an arbitration agreement, even when a party entered the agreement unaware of such consequences), *and* *Federowicz v. Snap-On Tools Corp.*, Civ. A. No. 91-3425, 1992 WL 55723, at *3 (E.D. Pa. March 12, 1992) (refusing to void arbitration clause as unconscionable where the damages-limiting clause applied equally to both parties), *with* *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (holding that arbitration agreement conflicted with terms of federal Petroleum Marketing Practices Act, where agreement would have precluded the plaintiff from recovering exemplary damages or attorneys fees), *and* *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997) (rejecting as unconscionable arbitration which, *inter alia*, precluded employee from obtaining any relief other than actual damage). Some commentators argue that, where an arbitration clause precludes the assertion of a claim for certain damages, the party ought to be permitted to bring a subsequent claim in court to procure such relief. *See* Thomas Stipanowich, *Punitive Damages and the Consumerization of Arbitration* (forthcoming) (manuscript on file with author). However, even if courts permit such claims, the bifurcated process will make it much more expensive and difficult for the plaintiff to secure full relief.

136. *Compare Gilmer*, 500 U.S. at 32 (refusing to void arbitration agreement where arbitrators did have "power to fashion equitable relief"), *with DeGaetano*, 1996 WL 44226, at *6 (employee required to arbitrate Title VII sex discrimination claim even though agreement prohibited arbitrators from awarding injunctive relief or from ordering reinstatement unless monetary damages would not suffice).

137. Courts are split on whether class actions can be pursued in arbitration. *Compare* *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 U.S. Dist. LEXIS 10122 (N.D. Cal. July 18, 1994), *and* *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D. Minn. 1993) (refusing to permit class actions in arbitration), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994), *with* *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 964-66 (Pa. Super. Ct. 1991), *and* *Izzy v. Mesquite Country Club*, 231 Cal. Rptr. 315, 321 (Cal. Ct. App. 1986) (allowing class actions in arbitration). *Cf. Gilmer*, 500 U.S. at 32 (noting that, even if class actions could not be brought in arbitration, mandatory arbitration of age discrimination claims would be permissible where collective actions could be brought by Equal Employment Opportunity Commission).

requires one party to arbitrate all its claims but allows the other the chance to take certain claims to court.¹⁴⁰

Thus, while courts have proved somewhat more willing to void arbitration agreements for these kinds of substantive unfairness than they have been to void agreements for procedural reasons,¹⁴¹ in general they have, once again, allowed themselves to be swayed by a mythical vision of consensual arbitration, rather than by reality.

138. See *Gilmer*, 500 U.S. at 32 n.4 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)) (“[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute . . .”). But see *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) (compelling arbitration of federal employment discrimination claims although employee was required to agree to arbitration, but stating that appellate review in such cases must be sufficient to ensure that arbitrators “have properly interpreted and applied statutory law”).

139. See *Graham Oil*, 43 F.3d at 1247-48 (holding arbitration clause void under federal PMPA in part because clause shortened statute of limitations from 1 year to 90 days).

140. Compare *Gibson v. Neighborhood Health Claims, Inc.*, 1997 WL 474419 (7th Cir. 1997) (rejecting, due to lack of consideration, purported arbitration agreement that sought to require current employees to arbitrate their disputes with employer while failing to place similar restriction on employer), and *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997) (rejecting as unconscionable arbitration clause which allowed the employer but not the employee to litigate certain disputes), with *Doctor’s Assocs., Inc. v. Stuart*, 85 F.3d 975, 980-81 (2d Cir. 1996) (rejecting Subway sandwich shop franchisee’s claims of fraudulent inducement or unconscionability based on lack of mutuality of arbitration clause, undisclosed high filing fees, travel costs, arbitrator’s fees, and alleged arbitrator bias, where franchisee should have been aware of clause’s implications and where franchisee failed to present evidence of bias); *Driscoll v. Smith Barney, Harris & Upham Co.*, 815 F.2d 655, 658-59 (11th Cir. 1987) (rejecting investors’ claim that brokerage arbitration clause was inherently unfair or oppressive or lacking in mutuality, where in return for agreement Smith Barney agreed to perform brokerage investment services and also agreed to submit any controversy to arbitration), and *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783, 1993 U.S. Dist. LEXIS 11333, at *12-*13 (N.D. Cal. Aug. 4, 1993) (arbitration clause not substantively unconscionable even though bank, but not consumers, was allowed to pursue certain remedies in court, including proceedings for foreclosure). See generally *Sternlight, Panacea*, *supra* note 25, at 677-97 (arguing that large companies can use arbitration clauses to take advantage of consumers and employees).

141. See, e.g., *Graham Oil*, 43 F.3d at 1247 (voiding arbitration agreement under federal PMPA that limited opportunity to obtain statutorily mandated relief and that shortened statute of limitations); *Stirlen*, 60 Cal. Rptr. 2d at 138 (voiding arbitration clause where employee was precluded from obtaining certain remedies and where employer was still permitted to litigate many claims); *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 867 (Cal. Ct. App. 1997) (refusing to enforce employer policy requiring disputes to be resolved, on binding basis, by committee comprised primarily of management); *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (Cal. Ct. App. 1993) (voiding arbitration agreement imposed by lender on unsophisticated borrowers, where arbitration procedures were deemed unconscionably expensive); *Ditto v. RE/MAX Preferred Properties, Inc.*, 861 P.2d 1000, 1003 (Okla. Ct. App. 1993) (voiding as substantively unconscionable arbitration clause that would deny one party any voice in selecting arbitrators).

III. THE COURTS' AND CONGRESS'S PREFERENCE FOR BINDING ARBITRATION IS UNCONSTITUTIONAL

A. *State Action Exists to the Extent Congress or the Courts Are Imposing a Preference for Binding Arbitration*

To establish "state action" a party must show that either the federal or a state government played a role in the alleged constitutional violation.¹⁴² Where a state or federal entity explicitly requires private parties to engage in binding arbitration it should be simple to prove state action.¹⁴³ A strong argument that state action exists can also be made where a federal or state agency compels arbitration in a less direct fashion. In *R.J. O'Brien & Assoc., Inc. v. Pipkin*, the Seventh Circuit held that state action existed where the federal Commodity Exchange Act delegated the broker registration function to a private association that required arbitration, thereby indirectly requiring brokers to arbitrate industry disputes.¹⁴⁴ In the securities industry, similarly, it may be argued that the Securities and Exchange Commission is sufficiently intertwined with the private dealer associations that require arbitration to give rise to state action.¹⁴⁵ To

142. See *TRIBE*, *supra* note 27, § 18-1 at 1688.

143. As Professor Tribe observes, "[i]f litigants challenge a federal or state statute . . . in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." *Id.* (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

144. 64 F.3d 257, 262 (7th Cir. 1995). *But see* *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96-97 (7th Cir. 1986) (finding no state action with respect to certain arbitration mandated by Federal Railway Labor Act, where finding state action would undercut efficiencies of arbitration).

145. A plaintiff has presented precisely this argument in *Duffield v. Robertson, Stephens & Co.*, Civ. Action No. C95-0109 (N.D. Cal. Jan. 11, 1995), currently pending on appeal before the Ninth Circuit as Appeal No. 97-15698. In this action for sexual discrimination and sexual harassment, plaintiff attorneys Cliff Palefsky and Michael Rubin argue that there is sufficient intertwining between the federal government and the securities industry to constitute state action. See Plaintiff's Complaint for Declaratory Judgement, Injunctive Relief, and Damages ¶ 32-36, *Duffield v. Robertson, Stephens & Co.*, Civ. Action No. C-95-0109 (N.D. Cal. Jan. 11, 1995) (on file with author) [hereinafter *Duffield* Complaint]. The plaintiff emphasizes that the securities industry itself, attempting to void arbitral awards of punitive damages, had previously claimed that agency entwinement was sufficient such that securities arbitrators engaged in state action. See *id.* ¶ 44(g). The National Association of Security Dealers, Inc. (NASD) asserted that the arbitrators were engaged in state action in the context of presenting an argument opposing arbitrators' award of punitive damages without sufficient appellate protection. See NASD Notice to Members 94-54, NASD Solicits Public Comment on Approaches Governing Award of Punitive Damages in Arbitration (July 1994), available in 1994 NASD LEXIS 52, at *34-*36. The plaintiff also emphasized that a 1993 federal regulation requires all securities traders to register with the securities exchanges of which their firms are members. See 17 C.F.R. § 240.15b7-1 (1997). While the district court denied the plaintiff's motion for summary judgment on the state action issue, see August 6, 1996, Order Denying Motion for Summary

establish that such federal or state involvement rises to the level of state action, parties can cite a series of Supreme Court cases holding that where the activities of a private entity are closely intertwined with those of a public body, actions taken by the private group may be considered state action.¹⁴⁶

Most of the cases discussed in this Article, however, do not involve arbitration that is expressly required or even regulated by a governmental agency. Rather, they involve agreements that are reached between two private parties. Here, the only possible state actors are the court that purports to interpret and apply the private agreement and the Congress that drafted the FAA pursuant to which the agreement is interpreted. It is well established that actions taken by a state's highest court, even if not encapsulated in legislation, constitute state action.¹⁴⁷ Under this rationale, it would follow that egregiously biased actions taken by a reviewing court could be challenged on due process grounds. However, where a court merely

Judgment (on file with author), and granted defendant's motion to compel arbitration, it certified the matter for immediate appeal by the Ninth Circuit, where it is now pending, *see* Mar. 13, 1997, Order Granting Defendant's Motion to Compel (on file with author).

146. *See, e.g.,* *Edmunson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (finding state action in private exercise of peremptory challenges in civil cases); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933 (1982) (holding that where a state statute authorized a private party to attach and sequester certain property, and where the state also provided a public official to assist with the sequestration, the private actor could be sued under the Due Process Clause of the Fourteenth Amendment); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that, because a private restaurant was so closely linked to a public parking authority as to be considered a joint venture, the restaurant's refusal to serve African-American customers was actionable under the Constitution). *But see Flagg Bros.*, 436 U.S. at 156-57 (refusing to find state action where state authorized private repossession of goods, emphasizing the lack of participation by any state official); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (refusing to find state action in private club's association with state liquor board). Similarly, the Court has refused to find state action in the activities of either a nursing home or school that received substantial state funding. *See Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (holding that discharge of Medicaid patient did not give rise to state action); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840, 841-42 (1982) (finding that private school's discharge of teacher did not raise constitutional issues). The Court also refused to find state action in decisions made by the National Collegiate Athletic Association or by the United States Olympic Committee, although both organizations have numerous federal connections. *See NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545-47 (1987).

147. The fact that actions by the state's highest court, even if not encapsulated in legislation, constitute state action has been recognized in such cases as *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (holding publishers of defamatory statements strictly liable in tort), and *Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (holding sellers of real property who violate racial covenants liable for damages).

appears to be enforcing a private agreement, courts have concluded that no state action exists.¹⁴⁸

Commentator Richard Reuben has recently presented a strong argument that courts' supervision and enforcement of private arbitration agreements under the FAA does in fact constitute state action.¹⁴⁹ He argues that, even where parties have privately contracted for arbitration, the state is significantly intertwined and entangled in the process and that the state involvement causes harm.¹⁵⁰ Reuben emphasizes that the FAA and equivalent state statutes allow parties to use court processes to compel arbitration, to confirm the private award as a judgment, and then to appeal the arbitrators' findings. Where parties so use the courts to enforce their private agreement it would seem that state action exists.¹⁵¹ Nonetheless, some may argue that the mere neutral enforcement of a private agreement is not sufficient to give rise to state action.¹⁵² Notwithstanding *Shelley v. Kraemer*,¹⁵³

148. See *supra* note 34. Some courts have refused to find state action in private arbitration in part because they fear that constitutionalizing arbitration would "ruin" it, replacing the ease and informality of arbitration with the formality and expense of litigation. This rationale is inappropriate, not only because it represents an unprincipled and circular mode of making state action determinations, but also because the mere recognition of the existence of state action need not substantially change most arbitration. Even if state action exists, much arbitration is quite constitutional. A finding of state action merely allows us to take the next step and consider whether the arbitration passes muster under Article III, the Seventh Amendment, and the Due Process Clause.

149. See generally Reuben, *supra* note 30.

150. See *id.* at 631-41. Reuben relies on such cases as *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (finding state action exists with respect to racially exclusive pre-primary election); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (holding state action exists with respect to company town's exclusion of Jehovah's Witnesses); *Smith v. Allwright*, 321 U.S. 649 (1944) (primary elections give rise to state action, given the duties imposed by state statutes and the nature of the function). But see *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978) (finding no state action where a private warehouse used statutorily authorized self-help procedures to obtain unpaid storage fees); *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (concluding that guarantees of free expression play no role at a private shopping center); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (finding no state action where a private company provided electrical services).

151. See *id.* at 615-29. An argument can also be made that state action exists even where the parties did not use state court facilities to enforce their arbitration agreement or confirm their arbitral award. After all, the very existence of such facilities may have rendered unnecessary the resort to the court. However, full explication of this argument is beyond the scope of this Article.

152. As discussed *supra*, this has been the conclusion of those courts which have considered the issue to date. See also *Ware*, *supra* note 35, at 564; cf. Ira P. Rothken, Comment, *Punitive Damages in Commercial Arbitration: A Due Process Analysis*, 21 GOLDEN GATE U. L. REV. 387, 387-88 (1991) (arguing that, even if most arbitral action is private, arbitrators engage in state action when they award punitive damages).

153. 334 U.S. 1 (1948). Some might contend that *Shelley* supports an argument that state action exists *whenever* an arbitration agreement is brought to a court for interpretation, on appeal, or for enforcement. In *Shelley*, the Supreme Court held that a state court violated

they may assert that mere court enforcement of a private agreement is not sufficient to turn the underlying private conduct into state action.¹⁵⁴ While this Article will not reiterate Reuben's entire argument, it similarly contends that the creation of an elaborate state enforcement mechanism, deliberately designed to allow enforcement of private agreements, does constitute state action. As Professor Reuben has observed, it is not necessary to rely on a broad interpretation of *Shelley* to conclude that state action should be found where the state is dramatically and deliberately intertwined in the arbitral process.¹⁵⁵ At

the Equal Protection Clause by granting injunctive relief to a litigant seeking to enforce a privately negotiated racially discriminatory covenant. *See id.* at 20. Rejecting the argument that the court had simply applied established neutral contract law to a private discriminatory agreement, the Court instead found that the state court's role in enforcing the agreement was unconstitutional. *See id.* at 18-23; *see also* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-79 (1972) (holding that a state acts unconstitutionally by neutrally requiring private club to follow its own by-laws, where such by-laws mandate race discrimination). It can be argued, similarly, that courts act unconstitutionally when they purport to neutrally enforce those private arbitration agreements that would be unconstitutional if imposed by the state.

154. The *Shelley* argument, while promising, is also problematic. As many commentators have noted, *Shelley* is a most troubling and confusing decision in that it threatens to convert private action into state action whenever the private individuals might later seek court enforcement. *See* Tribe, *supra* note 27, at 1697; *see also* Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 788 (1989) (describing *Shelley*'s reasoning as "disconcerting," conclusory, and mysterious); Philip B. Kurland, *The Supreme Court 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143, 148 (1964) (*Shelley* is "constitutional law's *Finnegan's Wake*"). Thus, "courts and commentators have characteristically viewed *Shelley* with suspicion," TRIBE, *supra* note 27, § 18-6, at 1711-12, and refused to apply it outside the race discrimination context. *See* Henry C. Strickland, *The State Action Doctrine*, 18 HASTINGS CONST. L.Q. 587, 602 (Spring 1991); SUNSTEIN, *supra* note 34, at 73 ("[J]udicial enforcement of contracts is ordinarily insufficient to trigger the Constitution."). As the Supreme Court recently put it: "Any argument driven to reliance upon an extension of that volatile case is obviously in serious trouble." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 282 n.14 (1993). This Article asserts that, at a minimum, courts and Congress engage in state action to the extent they impose a preference for arbitration over litigation, or to the extent they engage in an independent constitutional violation by, for example, acting in a biased fashion. State action exists in such instances even if courts do not engage in state action by neutrally enforcing a private arbitration agreement. Courts have failed to draw such a distinction, instead concluding that a court's involvement in contractual arbitration never constitutes state action. *See, e.g.,* *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995) (refusing to extend *Shelley* to private arbitration proceedings); *United States v. American Soc'y of Composers*, 708 F. Supp. 95, 96 (S.D.N.Y. 1989) (distinguishing between a court mandating arbitration and "merely approv[ing] the use of an arbitration procedure by a private party"); *Sportastiks, Inc. v. Beltz*, No. 88 C-9293, 1989 WL 26825, at *4 (N.D. Ill. March 22, 1989). *Cf. Rifkind & Sterling, Inc. v. Rifkind*, 33 Cal. Rptr. 2d 828, 834-35 (Cal. Ct. App. 1994) (holding court's confirmation of arbitration award did implicate Due Process Clause but that only "minimal" due process was implicated, which required just "notice and a hearing" and not judicial review of the arbitral award).

155. *See* Reuben, *supra* note 30, at 629 (asserting that "the argument that arbitration is state action is much more than a call for an extension of *Shelley v. Kraemer*").

the same time, recognizing that many courts may not, at present, accept Reuben's argument, this Article will go on to present a second, less wide-reaching but even more compelling, state action argument.

Assuming that neutral court enforcement of arbitration, alone, is not sufficient to give rise to state action,¹⁵⁶ courts that refuse to find state action because of neutral court enforcement err by falsely assuming that courts necessarily act *neutrally* when they determine that an arbitration agreement exists, is enforceable, and applies to the parties' dispute.¹⁵⁷ Those courts that have refused to find state action presupposed that the parties to the arbitration agreement actually agreed to arbitrate the dispute and that courts acted only neutrally in enforcing the agreement.¹⁵⁸ In truth, however, as discussed earlier, Congress and the courts are often not merely acting neutrally to enforce parties' desires in the arbitration context but rather are placing a thumb on the scale to require arbitration that may not have been voluntarily or knowingly consented to by one of the parties.¹⁵⁹ That is, they are putting the state's imprimatur on arbitration forced by one party upon another.

This Article contends that the Supreme Court engaged in state action when it interpreted the FAA to require courts to favor arbitration over litigation by interpreting ambiguous contracts to state a preference for arbitration rather than litigation.¹⁶⁰ Because it is not

156. See *supra* note 33.

157. The argument presented in this Article bears some similarity to Professor Brunet's argument that the courts have acted to encourage arbitration by their favorable treatment of the FAA. See Brunet, *supra* note 30, at 108-10. However, Professor Brunet does not take the next step of arguing that the court's preference for arbitration raises constitutional concerns.

158. See, e.g., cases cited *supra* note 33 (evinced the results of this supposition).

159. See *supra* notes 93-124 and accompanying text. It is not important to this argument whether the preference for arbitration over litigation was actually intended by Congress when it passed the FAA or whether this preference was later grafted onto the statute by the Supreme Court. See generally Sternlight, *Panacea*, *supra* note 25, at 644-52 (arguing that Congress did not intend for arbitration to be favored over litigation, but only for parties to be allowed to enter arbitration agreements).

160. See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr., Corp.*, 460 U.S. 1 (1983) (demonstrating this interpretation). In *Moses H. Cone*, the Court stated:

[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.

Id. at 24-25; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing federal policy favoring arbitration in holding that claims under the Age Discrimination in Employment Act are arbitrable); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (taking note of federal policy favoring arbitration in holding that

clear (by definition of ambiguity) that the parties wanted arbitration, the state's preference to compel it is, in essence, state action. Thus, when the Tenth Circuit, in *Armijo v. Prudential Insurance Co. of America*,¹⁶¹ applied the federal preferential policy to give an arbitration clause the broadest of two possible interpretations, it engaged in state action.¹⁶² Similarly, the U.S. Supreme Court engaged in state action when it held that the favoritism due arbitration required that defenses to the arbitration contract (such as waiver or delay) should be interpreted narrowly.¹⁶³ Again, when Congress and the Court ruled that the federal policy favoring arbitration required that arbitration agreements only be voided on contractual grounds, and thus common-law challenges to arbitration must be "well supported" by the evidence, they engaged in state action.¹⁶⁴ By so limiting such common-law contractual defenses as fraud, duress, or overwhelming economic power, the Court has imposed arbitration on a party that

securities fraud claims can be arbitrated); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (noting that, given federal favoritism toward arbitration, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting that although "the parties' intentions control . . . those intentions are generously construed as to issues of arbitrability"); *American Recovery, Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92-93 (4th Cir. 1996) (holding that party's request for arbitration may not be denied "unless it may be said with positive assurance that the arbitration clause [does not cover] the . . . dispute"); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990) (interpreting arbitration clause broadly to cover nonsignatories, given strong federal policy favoring arbitration). This preference for arbitration seems inconsistent with the well-accepted principle of requiring that ambiguous contracts be interpreted against their drafter. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (applying presumption to allow investor to recover punitive damages against brokerage firm).

161. 72 F.3d 793 (10th Cir. 1995).

162. As discussed earlier, it is extremely common for courts to rely on the federal preference favoring arbitration in their interpretation of private arbitration agreements. See, e.g., cases cited *supra* in note 109 and accompanying text.

163. See *Moses H. Cone*, 460 U.S. at 24-25; *supra* notes 51-59 and accompanying text; see also *American Recovery*, 96 F.3d at 95 (holding that waiver due to substantial utilization of litigation machinery not lightly inferred).

164. In *Doctor's Assocs. v. Casarotto*, 116 S. Ct. 1652 (1996), the court emphasized that 9 U.S.C. § 2 requires arbitration agreements to be voided only on general contractual grounds. See *id.* In *Mitsubishi*, 473 U.S. at 627, the Court found that such challenges must be "well supported." The Court has frequently repeated this limiting language. See, e.g., *Gilmer*, 500 U.S. at 33 (finding no showing that the plaintiff, "an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application"); *Rodriguez de Quijas*, 490 U.S. at 483-84 (rejecting suggestion that agreement to arbitrate was adhesive in nature as insufficiently supported by the record); *Shearson*, 482 U.S. at 227 (holding that the party opposing arbitration must show that "Congress intended to preclude a waiver of judicial remedies.").

might not have accepted it knowingly or voluntarily.¹⁶⁵ The Court has also held that such contractual defenses must generally be heard by the arbitrators themselves, who are unlikely to divest themselves of jurisdiction.¹⁶⁶

Courts have also stepped beyond a neutral role in defining the scope of the FAA. As noted earlier, courts have found ways to apply the FAA to virtually all workers engaged in interstate commerce, even though section 1 explicitly provides that the Act shall not apply to "any . . . class of workers engaged in foreign or interstate commerce."¹⁶⁷ Most recently, the Supreme Court has also engaged in state action by holding that the FAA preempts states' attempts to protect consumers and others from unfair arbitration agreements.¹⁶⁸ In doing so, it has not only precluded states from requiring certain categories of claims be litigated rather than arbitrated,¹⁶⁹ but it has also

165. As discussed *supra* at text accompanying notes 93-141, lower courts have applied this language even more strictly, sharply limiting parties' ability to attack arbitration clauses on such grounds as fraud, unconscionability or coercion that would normally allow them to void a supposed contract. *See, e.g.,* *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286-88 (9th Cir. 1988) (applying federal policy favoring arbitration to support conclusion that arbitration imposed by brokerage house on the plaintiffs was neither unconscionable nor fraudulent, and observing that "any person possessing a basic education and fluent in the English language" should have been able to comprehend the significance of arbitration clause); *McCarthy v. Providential Corp.*, No. C94-0627 FMS, 1994 U.S. Dist. LEXIS 10122, at *5, *13-*23 (N.D. Cal. July 18, 1994) (quoting *Moses H. Cone*, 460 U.S. at 24) (observing that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," the court rejected senior citizens' challenge on grounds of fraud or unconscionability to arbitration clause signed in connection with reverse mortgage loans, although noting that many persons assume loans without understanding all their terms); *Benoay v. E.F. Hutton & Co.*, 699 F. Supp. 1523, 1529 (S.D. Fla. 1988) (holding that, given federal policy favoring arbitration, court rejects challenges to form of arbitration agreement imposed by securities broker as unconscionable or impermissible contract of adhesion, observing that a party cannot be excused from a contract that she has signed simply because she failed to read or understand its terms by her own doing). *See generally* Stempel, *A Better Approach*, *supra* note 43, at 1397-14 (discussing failure of most contractual defenses to arbitration). *But see* *Bell v. Congress Mortgage Co.*, 30 Cal. Rptr. 205 (Cal. Ct. App. 1994) (invalidating arbitration clause where it was clearly unconscionable and a contract of adhesion).

166. It is up to the arbitrators, rather than the courts, to hear challenges made to the contract as a whole, as opposed to challenges to the arbitration clause in particular. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *supra* notes 84-92 and accompanying text. While very limited appeals are permitted, courts have also held that the policy of favoritism toward arbitration requires the issue of whether arbitrators exceeded their jurisdiction to be resolved in favor of arbitration. *See* *Dole Ocean Liner Exp. v. Georgia Vegetable Co.*, 84 F.3d 772, 775 (5th Cir. 1996).

167. 9 U.S.C. § 1 (1997). *See supra* notes 60-64 and accompanying text.

168. *See Doctor's Assoc.*, 116 S. Ct. at 1656-57.

169. *See supra* notes 65-66; *see, e.g.,* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984); *Perry v. Thomas*, 482 U.S. 483, 491 (1987).

prevented states from requiring companies to provide consumers with fair notice that they are waiving their jury-trial and due process rights in favor of arbitration.¹⁷⁰

In sum, the Supreme Court, lower courts and Congress are not merely neutrally enforcing the preferences of the parties to an arbitration agreement. By adopting a preference for arbitration over litigation, and by using this preference as a rule of construction, Congress and the courts are restricting parties' access to litigation or other forums no less than if Congress had enacted a statute requiring private parties to take disputes to arbitration.¹⁷¹

Of course, in many instances a party has genuinely agreed to arbitrate the particular dispute. Where they have so agreed, and where they were not subject to fraud, coercion or duress, no state preference for arbitration is needed to assure enforcement of an arbitration clause, and no state action will exist under this argument. But where, absent the state "preference," a court would have found arbitration inappropriate on normal contractual grounds, the party is entitled to challenge the constitutionality of the arbitration that has been imposed by the state. Specifically, given such state action, and absent a waiver, the arbitration that is imposed must comply with constitutional dictates set out in the Seventh Amendment, Article III, and the Due Process Clause.

B. Waiver of Constitutional Rights Should Not Be Easily Inferred

Courts' willingness and even eagerness to conclude that parties have, by accepting binding arbitration, waived their constitutional rights cannot be reconciled with the protective attitude usually

170. State law is now relevant only where the transaction is exclusively intrastate, *see Allied-Bruce*, 513 U.S. at 281-82, or where the parties express a selection of state law and the state law does not unduly interfere with the purposes of the FAA. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989).

171. A metaphor may help illustrate this point. Imagine that the state has a policy favoring marriage over nonmarital sexual relationships and that courts have applied this policy of "favoritism toward marriage" to require that all persons who engage in a sexual relationship shall be held to have married one another. State law further prohibits divorce. Now, imagine that *A* coerces *B* into engaging in a sexual relationship. *A* then asks a court to hold that *A* and *B* are married. *B* protests, arguing that she did not agree to the sexual relationship and that by forcing her into marriage the state has violated her due process liberty interest. The court holds that *A* and *B* are married, noting that the policy of favoritism toward marriage requires that such defenses as coercion be interpreted narrowly. In these circumstances, should an appellate court refuse to address the constitutional argument, holding that *B* "agreed" to the sexual relationship and that the state played no role in forcing her to marry *A*? Of course not. It was the state's policy of "favoring marriage" that turned *A*'s coercive act into a deprivation of *B*'s constitutional rights.

displayed by courts toward the waiver of constitutional rights.¹⁷² Whereas the Supreme Court has treated the waiver concept very carefully in other areas, in the arbitration context lower courts are using the waiver concept aggressively to void parties' claims that they have been denied their rights to have their claims heard by a jury, by an Article III judge, and according to the requirements of due process.¹⁷³ In fact, courts generally seem to forget that arbitration has a constitutional dimension. This Article argues that arbitration does raise constitutional concerns and that many lower courts have erred in failing to take account of factual variations that the Supreme Court has found crucial to a waiver analysis and that make sense as a matter of policy.¹⁷⁴ In particular, lower courts have failed to consider the visibility and clarity of the purported agreement, the relative strength and knowledge of the parties, the voluntariness of the agreement, and the substantive fairness of the agreement. Rather than ignoring these factual variations, courts should use them to craft a balancing test to determine whether parties waived their constitutional rights by agreeing to arbitration. It is wrong to stretch contractual interpretations to uphold a purported arbitration agreement where such an agreement would waive constitutional rights.

172. Outside of the arbitration context, legislatures have often taken steps to protect consumers and others from ignorantly waiving nonconstitutional rights as well. For example, in *Alexander v. Gardner-Denver*, 415 U.S. 36, 51 (1994), the Supreme Court stated: "[T]here can be no prospective waiver of an employee's rights under Title VII." Also, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1997), and section 2-316 of the Uniform Commercial Code, U.C.C. § 2-316(2)(1995), both require that a disclaimer of a warranty be conspicuous to be valid. Similarly, the Older Worker Benefit Protection Act, 29 U.S.C. § 626(f), provides that "[a]n individual may not waive any right or claim under [the Age Discrimination in Employment Act] unless the waiver is knowing and voluntary." The Act specifically requires employers to, at a minimum, draft the waiver in a manner calculated to be understood by an average individual, advise the individual to consult with an attorney, provide the individual at least 21 days to consider the agreement, and allow the individual to revoke the agreement within 7 days. Courts have also read waiver limitations into the common law. They have held that a contractual clause excluding negligence liability must be clear and conspicuous or otherwise drawn to the attention of the individual. *See, e.g.,* *Maynard v. James*, 146 A. 614, 616 (Conn. 1929) (holding that a receipt casually handed to a car's owner at a parking garage did not constitute a contract where it called for a waiver of liability); *Agricultural Ins. Co. v. Constantine*, 58 N.E.2d 658, 661-62 (Ohio 1944) (holding condition on a parking receipt pertaining to limitation of liability is not valid unless the car owner assented to the condition prior to delivering car to the garage); *Anderson v. Ashland Rental, Inc.*, 858 P.2d 470 (Or. Ct. App. 1993) (finding waiver of tort remedy not valid where disclaimer not conspicuous).

173. *See supra* note 35 and accompanying text.

174. One exception is *Moore v. Fragatos*, 321 N.W. 20 781 (Mich. Ct. App. 1981) (refusing to enforce patient's purported agreement to arbitrate medical malpractice claims on grounds that doctor had failed to establish knowing, voluntary, intelligent waiver of constitutional right of access to courts).

1. The Supreme Court's Waiver Jurisprudence

The Supreme Court has long held that many constitutional rights, including the rights to a civil jury trial, to an Article III judge, and to procedural due process, are generally waivable.¹⁷⁵ However, it is equally well established that such waivers are not lightly inferred, and that instead "courts indulge every reasonable presumption against waiver."¹⁷⁶ In assessing whether a person waived a constitutional right, the Court has declared that "a waiver of Constitutional rights in any context must, at the very *least*, be clear."¹⁷⁷ The Court also has provided repeatedly that waivers must be assessed on a very fact-specific basis.¹⁷⁸

In the criminal context, the Court announced in *Johnson v. Zerbst*¹⁷⁹ that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."¹⁸⁰ Applying this

175. The Court has held that, while a party's right to a trial in front of an Article III judge is largely waivable, those aspects of the right that protect public interests are not waivable. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986). See generally Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 478-80, 493-94 (1981) (providing examples of waivable constitutional rights and also observing that no one can waive his right not to be imprisoned nor likely his right to be tried under a "beyond a reasonable doubt" standard).

176. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (finding party's request for directed verdict did not waive party's right to have jury resolve factual issues). *Aetna* is cited favorably in the Court's more recent decision in *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (concluding that consumer did not waive right to due process when she agreed that stove company could repossess merchandise for nonpayment). See also *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 306-07 (1937) (stating: "We do not presume acquiescence in the loss of fundamental rights" and holding that utility company did not waive its right to have the value of its property determined by evidence when it failed to oppose consolidation of two proceedings).

177. *Fuentes*, 407 U.S. at 95 (holding that consumer did not waive her due process rights to adequate notice and a hearing by signing a conditional sales contract permitting seller, upon default, to "take back," "retake," or "repossess" the merchandise). As the Court explained, the contracts "included nothing about the waiver of a prior hearing. They did not indicate *how* or *through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods." *Id.* at 96.

178. See, e.g., *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) ("[O]ur holding, of course, is not controlling precedent for other facts of other cases."); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.").

179. 304 U.S. 458 (1938).

180. *Id.* at 464. Professor Rubin notes that *Johnson* did not originate this formulation of the waiver standard, but rather simply rephrased the common-law definition of waiver. See Rubin, *supra* note 175, at 481. For scholarly discussions of waiver in the criminal context, see George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Michael E. Tigar, *The Supreme Court, 1969 Term—*

standard, the Court found that a defendant who failed to ask the court to appoint counsel and who stated that he was ready to proceed to trial had not necessarily waived his right to counsel.¹⁸¹ In *Brady v. United States*,¹⁸² the Court used slightly different phrasing but required the same basic elements as in *Johnson*: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."¹⁸³ While, as Professor Rubin notes, courts have not always applied *Johnson* and *Brady* strictly to require both knowledge and intent, courts have treated the *Johnson* requirements "as a framework for establishing the criteria by which criminal law waivers must be judged."¹⁸⁴ That is, courts have at least examined the facts of criminal waiver cases in terms of both knowledge and intent.¹⁸⁵

For many years, the Court failed to distinguish waivers made in criminal trials from those made in a civil setting. Criminal cases such as *Johnson* cited civil cases, including *Aetna Insurance Co. v.*

Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1 (1970); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978); Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977); Kenneth A. Goldman, Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CAL. L. REV. 1262 (1966).

181. See *Johnson*, 304 U.S. at 468-69. The Court therefore remanded the case so that the district court could consider whether or not the defendant had waived his constitutional right. See *id.* at 469.

182. 397 U.S. 742 (1970) (upholding guilty plea as meeting standard of voluntary, knowing and intelligent waiver, even though the defendant argued that he pleaded guilty to avoid the possibility of a harsher sentence if he were convicted after a trial).

183. *Id.* at 748.

184. Rubin, *supra* note 175, at 491.

185. Courts have relied on the *Johnson/Brady* standard to require both knowledge and intent in connection with purported waivers of the right to counsel, the right to a formal indictment before trial, the right to trial, and the right to trial by jury. See also *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring suspect be informed of both the right to counsel and the right not to incriminate herself prior to commencement of interrogation). Courts have not required knowing waiver, however, in connection with the rights to avoid self-incrimination or to be present at one's trial, instead allowing defendants to waive these rights merely by failing to raise an objection or by taking an action contrary to the right. See, e.g., *Harrison v. United States*, 392 U.S. 219, 222 (1968) ("A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to testimony he gives . . ."); *United States v. Schwartz*, 535 F.2d 160 (2d Cir. 1976) (holding that defendant who fled waived right to be present at trial). See generally Rubin, *supra* note 175, at 496-98 (citing cases including *Henderson v. Morgan*, 426 U.S. 637 (1976) (voiding plea where nature of crime not explained to defendant); *Boykin v. Alabama*, 395 U.S. 238 (1969) (right to trial); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) (right to trial by jury); *Saddler v. United States*, 531 F.2d 83 (2d Cir. 1976) (voiding plea where defendant mentally incompetent); *Turner v. United States*, 325 F.2d 988 (8th Cir. 1964) (right to indictment before trial by jury)).

*Kennedy*¹⁸⁶ and *Ohio Bell Telephone Co. v. Public Utilities Commission*,¹⁸⁷ in defining waiver, without even taking note of the fact that the cases were civil rather than criminal.¹⁸⁸ However, in *D.H. Overmyer Co. v. Frick Co.*,¹⁸⁹ in 1972, the Court observed that the “standard for waiver in a corporate-property-right case of this kind” might be different from the standard applicable to waiver in the criminal setting.¹⁹⁰ Unfortunately, neither *Overmyer* nor any subsequent Supreme Court decision spelled out in detail either the standard for accepting waivers in the civil context or a justification for why waivers of constitutional rights should be treated differently depending on whether a criminal or civil loss is at stake.¹⁹¹

D.H. Overmyer involved a contractor who, after repeatedly failing to make payments that were due to a subcontractor for installation of a refrigeration system, agreed to sign a cognovit or confession-of-judgment clause in order to continue the contractual relationship.¹⁹² When, upon allegation of nonpayment, the subcontractor took steps to confess the judgment, the contractor protested that it had been deprived of due process, specifically notice and a hearing, prior to the entry of judgment.¹⁹³

The Court refused to determine the appropriate standard for assessing the validity of waiver of due process in this civil context, holding instead that, even applying the *Brady* “voluntary, knowing and intelligent” standard or the *Johnson* “intentional relinquishment or abandonment of a known right” standard, the contractor had waived its due process rights to notice and a hearing.¹⁹⁴ The Court looked closely at the factual circumstances of the case. Examining the contractor’s degree of savvy, the Court found no unequal bargaining power or overreaching. It stated: “Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel

186. 301 U.S. 389 (1937).

187. 301 U.S. 292 (1937).

188. See *Johnson*, 304 U.S. at 464 nn.12 & 13 (citing *Aetna*, 301 U.S. at 393, and *Ohio Bell*, 301 U.S. at 307).

189. 405 U.S. 174 (1972).

190. *Id.* at 185.

191. As Edward Rubin observed 15 years ago, despite the “ubiquity and significance [of waivers] there exists no general theory of waiver. Precisely the same term with precisely the same effect is used in both criminal and civil law, yet no theory of waiver bridges these two areas.” Rubin, *supra* note 175, at 479.

192. See *Overmyer*, 405 U.S. at 179-80.

193. See *id.* at 184. Overmyer argued that “it is ‘unconstitutional to waive in advance the right to present a defense in an action on the note.’” *Id.* at 184 (quoting Trans. of Oral Arg. at 17).

194. See *id.* at 185-87.

in the Ohio post-judgment proceeding stated, it has built many warehouses in many States and has been party to 'tens of thousands of contracts with many contractors.'"¹⁹⁵ With respect to knowing waiver, the Court similarly emphasized that both Overmyer and its attorney were aware of the significance of the cognovit.¹⁹⁶ The Court also assessed the process by which the contract was reached, concluding that the agreement was not a contract of adhesion, but rather had been the subject of lengthy negotiations between the two companies.¹⁹⁷ Initially, Overmyer did not sign a cognovit, and it eventually did so only after repeatedly having failed to make required payments and in order to preserve the business relationship.¹⁹⁸ Finally, the Court examined the substance of the contract. It emphasized that Overmyer had received consideration for signing the cognovit¹⁹⁹ and that if in a future case "the debtor receives nothing for the cognovit provision, other legal consequences may ensue."²⁰⁰

Although *Fuentes v. Shevin*,²⁰¹ decided just a few months after *Overmyer*, again failed to fully analyze the standard for waivers of constitutional rights in a civil context, the decision still provides some guidance. The case involved a woman, Margarita Fuentes, who purchased a gas stove and stereo from Firestone Tire and Rubber Co. for a total of approximately \$500 under conditional sales contracts requiring her to make monthly payments.²⁰² As a condition of the sales, Fuentes was required to sign a form sales contract providing that "in the event of default of any payment or payments, Seller at its option may take back the merchandise."²⁰³ When, following disputes over servicing of the stove, Fuentes allegedly failed to make some of

195. *Id.* at 186. The Court specifically stated that the outcome might have been different had there been a "great disparity in bargaining power." *Id.* at 188. Justices Douglas and Marshall, concurring, similarly emphasized that Overmyer had accepted the clause "voluntarily and understandingly self-inflicted through the arm's length bargaining of these corporate parties." *Id.* at 189 (Douglas, J., dissenting).

196. *See id.* at 186-87.

197. *See id.*

198. *See id.* at 186-87. Again, the Court stated that the result might have been different had the contract been one of adhesion. *See id.* at 188.

199. The Court found that in return for signing the clause Overmyer obtained "substantial benefits and consideration," including the release of mechanic's liens, as well as monetary relief as to amount, time and interest rate on future payments. *Id.* at 186-87.

200. *Id.* at 188.

201. 407 U.S. 67 (1972).

202. *See id.* at 70. Actually, the *Fuentes* case that was heard by the Supreme Court consolidated both Ms. Fuentes' claim and some very similar claims arising out of Pennsylvania. *See id.* at 71-72. For the sake of simplicity, this Article focuses on the facts of *Fuentes* itself, as did the Court.

203. *Id.* at 94.

her payments, Firestone used Florida law to obtain a writ of replevin allowing it to seize the disputed goods.²⁰⁴ Fuentes filed an action in federal court, arguing that the seizure had denied her due process of law by allowing Firestone to obtain her property without adequate notice or an opportunity to challenge issuance of the writ.²⁰⁵

The Court rejected Firestone's argument that, even assuming that Florida's replevin statute did not comport with the Due Process Clause of the Fourteenth Amendment, Fuentes waived her procedural rights by signing the conditional sales agreement. The Court emphasized that "[t]he facts of the present cases are a far cry from those of *Overmyer*."²⁰⁶ It observed that, whereas in *Overmyer* the cognovit clause was negotiated between two corporations, was specifically bargained for and drafted by the parties' attorneys, and was not a contract of adhesion,²⁰⁷ the *Fuentes* situation was quite different:

There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.²⁰⁸

Nonetheless, while the Court reiterated the significance of such factors as disparity in bargaining power, nonnegotiability of the contract, and lack of consideration as in *Overmyer*, it found that it did not need to spell out the standard for when waivers of constitutional rights are permissible in the civil context. Rather, the Court rejected Firestone's waiver argument solely on the ground that the contract signed by Fuentes did not clearly waive her rights to adequate notice and a hearing under the Due Process Clause.²⁰⁹ The Court emphasized that, while the contract provided the seller with a right to repossess the stove, it did not specify that such retrieval would be without notice and a hearing, and the contract therefore did not waive Fuentes'

204. *See id.* at 70-71.

205. *See id.* at 71. Fuentes was represented by Legal Services of North Florida. *See generally* C. Michael Abbott & Donald C. Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955 (1972).

206. *Fuentes*, 407 U.S. at 95.

207. *See id.*

208. *Id.*

209. The Court stated: "We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id.*

constitutional rights.²¹⁰ Thus, the Court did not reach the issue of whether, had the waiver clearly allowed retrieval without notice, it nevertheless would have been invalidated as involuntary or unintelligent.

While *Overmyer* and *Fuentes*, both decided in 1972, are the Court's most recent decisions directly addressing the waiver of constitutional rights in a civil context, the Court's 1991 decision in *Carnival Cruise Lines, Inc. v. Shute*²¹¹ also provides insight into how the Court would assess the constitutionality of an arbitration clause imposed by a company on weaker parties, such as consumers. The case addressed the question of whether consumers, by accepting cruise tickets containing a forum-selection clause in fine print, waived what would otherwise have been their right as plaintiffs to sue in any permissible venue where they could secure due process over the defendant.²¹² Significantly, *Carnival Cruise* did not involve waiver of an accepted constitutional right, in that the Court has never found that plaintiffs have a constitutional right to sue in a convenient jurisdiction.²¹³ Instead, the issue was whether, having previously proclaimed in *THE BREMEN v. Zapata Off-Shore Co.*,²¹⁴ that reasonable²¹⁵ forum selection clauses could be acceptable where they were

210. See *id.* at 96.

211. 499 U.S. 585 (1991).

212. See *id.* at 587-88.

213. Courts have, however, frequently stated that the plaintiff is the "master of the case" and therefore traditionally is allowed to sue in any forum not violative of the defendant's constitutional right to due process nor of statutory venue requirements. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) (holding that the plaintiff's choice of forum is generally entitled to deference, although it is entitled to less deference when the plaintiff is a foreign citizen). Some have argued that the plaintiff's right to choose a forum should be constitutionally protected. See *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 325 (1964) (Black, J., dissenting) ("The right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum is as ancient as the Magna Charta."). See generally Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 363-67 (1992) (arguing that personal jurisdiction concerns should cover plaintiffs as well as defendants). But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (rejecting argument that class action violated due process rights of out-of-state class members).

214. 407 U.S. 1 (1972).

215. As the Court itself observed in *Carnival Cruise*, the *BREMEN* decision "did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause." *Carnival Cruise*, 499 U.S. at 591. Nor did the Court clearly define this caveat in *Carnival Cruise*. See Mullenix, *supra* note 213, at 346 ("[W]ith regard to elucidating . . . a reasonableness standard, [*Carnival Cruise*] is hopelessly vague, elliptical, ambiguous, and internally contradictory.").

negotiated knowingly by two companies in the international context,²¹⁶ a different rule should be applied in the consumer context.²¹⁷

The Court opened its analysis in *Carnival Cruise* by emphasizing the factual differences between the case at hand and *Bremen*. It noted that, whereas *Bremen* involved a “far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment [across three oceans],”²¹⁸ *Carnival Cruise* involved a purely routine contract between cruise passengers and the cruise line.²¹⁹ The Court observed:

In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.²²⁰

Nonetheless, having taken note of these differences in knowledge and bargaining process between the two cases, the Court went on to hold the *Carnival Cruise* forum-selection clause was substantively “reasonable” and thus enforceable.²²¹ Many commentators have sharply attacked the Court for its blithe conclusion that the *Carnival Cruise* forum-selection clause would benefit passengers as well as the cruise line.²²²

216. As the Court put it, forum-selection clauses, although not “historically . . . favored,” are “prima facie valid.” *THE BREMEN*, 407 U.S. at 9-10.

217. *See Carnival Cruise*, 499 U.S. at 591-93. Actually, when the Court granted certiorari in *Carnival Cruise*, commentators expected that its decision would focus on the much different question of when a tort may be said to arise from a contact with a forum. This was the issue on which the lower courts and litigants had focused most of their attention. *See Mullenix*, *supra* note 213, at 336-42. Nonetheless, having concluded that the forum-selection clause was valid, the Court chose not to resolve the minimum-contacts issue. *See Carnival Cruise*, 499 U.S. at 589-90 (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

218. *Carnival Cruise*, 499 U.S. at 592 (quoting *THE BREMEN*, 407 U.S. at 13).

219. *See id.* at 593.

220. *Id.*

221. *See id.* at 595. The Court defended the reasonableness of the clause on the grounds that the cruise line had a legitimate interest in limiting the fora in which it could be sued, that the clause would likely benefit all parties by limiting the time and expense of pretrial motions, and that cruise lines would likely pass on their own savings from forum selection clauses to consumers in the form of reduced fares. *See id.* at 593-94. *But see infra* note 222.

222. Commentators have pointed out that the Court’s decision ignores the significant litigation advantages such clauses grant to the stronger party by allowing such party to pick a forum not only likely to yield a more favorable decision on the merits but also sufficiently inconvenient for the opposing party as to prevent litigation or force the opponent to roll over in a settlement. *See Lee Goldman, My Way and the Highway: The Law and Economics of*

2. Applying the Supreme Court's Waiver Jurisprudence to Arbitration Agreements

In assessing arbitration agreements, courts should, as in other contexts, “indulge every reasonable presumption against waiver”²²³ of constitutional rights.²²⁴ Thus, the party asserting that a waiver of constitutional rights has occurred should carry the burden of proof.²²⁵ The courts should also assess all such potential waivers on a very fact-specific basis.²²⁶

A strong argument can be made that the Court should apply the criminal standard in the civil context as well to reject a claim of waiver as to all arbitration agreements that are not made voluntarily, knowingly, and intelligently.²²⁷ The Court has, after all, never explained why constitutionally protected rights should be afforded any

Choice of Forum Clauses in Consumer Form Contracts, 86 NW. U. L. REV. 700, 711-12 (1992); Mullenix, *supra* note 213, at 363-66. Professor Mullenix notes the irony of the contrast between, on the one hand the Court's incredible willingness to postulate that savings will be passed along to the consumers absent any empirical data whatsoever, and on the other hand the Court's refusal to credit the appellate court's conclusion that the Shutes would be physically and financially disadvantaged by the requirement to pursue their suit in Florida. *See id.* at 343-44.

223. *Fuentes v. Shevin*, 407 U.S. 67, 95 n.31 (1972) (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

224. Although the remainder of this section focuses on whether or not, by agreeing to arbitration, parties have waived their *constitutional* rights, I also believe that this analysis will prove helpful to courts seeking to define “knowing and voluntary” waiver of statutory rights. *See, e.g., Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761 & n.10 (9th Cir. 1997) (waiver of right to litigate federal employment discrimination must be knowing and perhaps also voluntary).

225. *See, e.g., Moore v. Fragatos*, 321 N.W.2d 781, 785 (Mich. Ct. App. 1981) (party asserting that opponent waived right of court access by agreeing to arbitration bears burden of proof). *Cf. Schneekloth v. Bustamonte*, 412 U.S. 218, 223-26 (1973) (noting that prosecution bears burden of proof to demonstrate voluntariness of consent). *But see K.M.C. v. Irving Trust Co.*, 757 F.2d 752, 756-57 (6th Cir. 1985) (noting that, where express contractual waivers are involved, the objecting party ought to shoulder the burden of showing that the waiver was not voluntary). *See generally* Edward W. Cleary, *Presuming and Pleading: An Essay in Juristic Immaturity*, 12 STAN. L. REV. 5, 11-13 (1959) (arguing that court should assign burden of proof to protect policy interests as well as to further interests of fairness).

226. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) (opining that the result might have been different with different facts); *Fuentes*, 407 U.S. at 95 (emphasizing factual distinctions between purported waiver in instant case and in *Overmyer*); *National Equip. Rental, Ltd. v. Szukent*, 375 U.S. 311, 326 (1964) (Black, J., dissenting) (emphasizing particular facts opposing waiver).

227. *See supra* notes 186-191 and accompanying text. Several federal circuit courts have done so. *See, e.g., K.M.C.*, 757 F.2d at 754-56 (upholding magistrates' refusal to enforce contractual waiver of jury-trial right, and concluding that application of “knowing and voluntary” standard was appropriate); *National Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 257-58 (upholding court's grant of jury trial, despite jury-trial waiver “buried in the eleventh paragraph of a fine print, sixteen-clause agreement,” stating that jury trial can only be waived knowingly and intentionally).

less protection in the civil context than in the criminal context.²²⁸ Applying the criminal waiver standard would void most of the arbitration agreements contained in form consumer or employment contracts in that a company would be hard-pressed to show that the typical consumer was aware of the clause, much less understood it or intended to waive her right to proceed to trial.

However, rather than urge the adoption of the criminal waiver standard, this Article accepts the apparent trend of Supreme Court precedent and instead urges the Court to apply to arbitration agreements the civil waiver standard it has begun to develop in such cases as *Fuentes* and *Overmyer*.²²⁹ These cases implicitly adopt a four-factor balancing test for when courts should recognize the validity of a constitutional right in the civil context. Specifically, they call upon courts to examine the visibility and clarity of the waiver itself,²³⁰ the relative knowledge and economic power possessed by the parties,²³¹ the degree of voluntariness of the purported agreement,²³²

228. See Rubin, *supra* note 175 (urging courts to adopt a unified approach toward criminal and civil waivers). Those who defend the use of two different standards would likely argue that criminal sanctions are greater than civil, and thus warrant greater protection against waiver. However, loss of the civil right to take a claim to trial might conceivably cost a party millions of dollars, whereas some criminal fines could be minuscule.

229. See *Fuentes*, 407 U.S. 67; *Overmyer*, 405 U.S. 174.

230. See *Fuentes*, 407 U.S. at 94-96 (rejecting waiver where statements that seller could take back property in event of default appeared in relatively small type as part of pre-printed form, were unaccompanied by any clarifying explanation, and did not specify that customer would not be entitled to hearing when property was returned); *Overmyer*, 405 U.S. at 186 (accepting waiver where cognovit provision was drafted by attorney of party now protesting that provision); see also *Szukhent*, 375 U.S. at 326-27 (Black, J., dissenting) (noting that forum-selection clause should not be enforced where disguised as "innocent-looking provision"); *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, 211 Cal. Rptr. 62, 66 (Cal. Dist. Ct. App. 1985) ("In light of the importance of the jury trial in our system of jurisprudence, any waiver thereof should appear in clear and unmistakable form We cannot elevate judicial expediency over access to the courts and the right to jury trial in the absence of a clear waiver."). Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991) (forum-selection clause enforced where consumers conceded that they had adequate notice).

231. See *Fuentes*, 407 U.S. at 95 (rejecting waiver where parties had unequal bargaining power and there was no showing that Ms. Fuentes was actually aware or made aware of the significance of the fine print); *Overmyer*, 405 U.S. at 186 (accepting waiver where not a case of unequal bargaining power because *Overmyer* is a corporation with a complicated structure and widespread activities whose attorney prepared the cognovit provision); see also *Szukhent*, 375 U.S. at 326 (Black, J., dissenting) (emphasizing difference in bargaining power between nationwide equipment rental company and father and son farmers in Michigan). Cf. *Carnival Cruise*, 499 U.S. at 593 (enforcing forum-selection clause although "an individual purchasing the ticket will not have bargaining parity with the cruise line").

232. See *Fuentes*, 407 U.S. at 95 (rejecting purported waiver that was a necessary condition of the sale); *Overmyer*, 405 U.S. at 186 (accepting waiver where there was no refusal to deal absent cognovit, but rather, protesting party had suggested cognovit to

and the substantive fairness of the purported agreement.²³³ In *Overmyer*, having concluded that the cognovit provision was very explicit, negotiated by the attorney of a corporate entity, voluntarily accepted by the business entity, and clearly beneficial to the corporation, the Court upheld the waiver as valid.²³⁴ In *Fuentes*, while the Court based its refusal to uphold the waiver of a due process hearing on the vagueness of the purported agreement, the Court also emphasized that Ms. Fuentes was an ignorant consumer and that there was no actual negotiation with respect to the form contract, which was a condition of the sale.²³⁵

Courts should use this four-factor test to assess the validity of purported arbitration agreements.²³⁶ This four-factor test is not only supported by precedent but also desirable as a matter of policy to protect against the inappropriate waiver of constitutional rights. In an ideal world of perfect information and zero transactional costs, it would be sufficient to require that the arbitration agreement be clear and that it not be imposed through duress. Knowledgeable parties could then decide whether they wished to waive their constitutional right in order to secure some greater return. In the real world,

continue relationship after having defaulted on prior obligations); *see also Szukhent*, 375 U.S. at 326 (Black, J., dissenting) ("It is hardly likely that these Michigan farmers, hiring farm equipment, were in any position to dicker over what terms went into the contract they signed"). *Cf. Carnival Cruise*, 499 U.S. at 593 (enforcing forum-selection clause although it is unreasonable to assume that cruise passenger would negotiate terms of forum-selection clause).

233. *See Fuentes*, 407 U.S. at 95 (quoting *Overmyer* language emphasizing importance of whether party received something in return for waiver); *Overmyer*, 405 U.S. at 186-88 (noting that, although waiver accepted where *Overmyer* obtained "substantial benefits and consideration" in return for signing cognovit, consequences might have been different had debtor received nothing for signing cognovit); *see also Szukhent*, 375 U.S. at 327 (Black, J., dissenting) (arguing that forum-selection clause was designed to make it "as burdensome, disadvantageous, and expensive as possible for lessees to contest actions brought against them"). *Cf. Carnival Cruise*, 499 U.S. at 594 (enforcing forum-selection clause where Court found that it would benefit passengers as well as cruise line).

234. *See Overmyer*, 405 U.S. at 184-88.

235. *See Fuentes*, 407 U.S. at 94-96.

236. In practice, the proposed test would likely have results similar to those of the waiver standard Professor Rubin has proposed to govern both criminal and civil situations. *See RUBIN, supra* note 175, at 538. Rubin urges that, for all adjudication-related waivers, "courts should require that the functional equivalent of due process protection be provided in the interaction between parties." *Id.* In particular, in order for the waiving party to receive the functional equivalent of both notice and a fair hearing, "[e]ach party must be aware of the right that is being waived, and there must be some process of negotiation or bargaining connected with that right." *Id.* at 539. Rubin further asserts that, in order for this bargaining process to be fair, it "must be free of threats or subtle use of force . . . [and] all participants [should be entitled] to obtain the assistance of counsel or other experts." *Id.* Finally, Rubin contends that judges should most closely scrutinize those waivers that involve the greatest loss of adjudicatory decisionmaking. *See id.* at 540.

however, information is far from perfect, and transaction costs may be high.²³⁷ Even a requirement of a clear agreement and a restriction on duress may not be sufficient to protect ignorant employees and consumers from unwittingly waiving their rights to a jury trial, an Article III judge, and due process. As I have explained elsewhere, such parties may neither be aware of nor understand a clause that is buried in a contract.²³⁸ A court should take into account these real-world problems by determining the relative knowledge and power of the parties when considering whether an arbitration clause is sufficiently clear. A clause that might well pass muster as applied to a large company represented by an attorney might not be sufficient to apprise a consumer, and particularly a consumer with little education, poor English skills, or who is engaging in a small financial transaction, of the meaning of an arbitration agreement.²³⁹ Moreover, it must be recognized that no matter how large the notice or how clear the terms, certain people simply will not read or understand the arbitration clause that has been drafted by the company. It is appropriate to protect such persons from unwittingly waiving their constitutional rights by, at least, preventing them from entering into an agreement that is so unfair that no rational person would accept it. The unfair contract might, for example, allow the company to appoint biased arbitrators or require that the hearing be held in a location so inconvenient for the consumer that the arbitration would not be feasible. While a court might enforce such a clause as applied to a large company, which presumably knew or should have known what it was agreeing to, it should not enforce such a term as applied to a party that lacked adequate information.²⁴⁰

237. As the Michigan Court of Appeals stated in *Moore*, the presumption that a person has read and understood a contract which they have signed rests upon "procedural convenience" rather than reality. Such a presumption can not and should not stand against the presumption opposing waiver of constitutional rights. See *Moore v. Fragatos*, 321 N.W.2d 781, 785 (Mich. Ct. App. 1981).

238. See Sternlight, *Panacea*, *supra* note 25, at 688-90. Nor, given their risk preferences, may such consumers even believe it worthwhile to investigate the existence of such a clause. See *id.*; see also Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212-25, 239-48 (1995) (discussing informational lapses and limits to human cognition, and arguing that, given these limits, form contracts should not necessarily be enforced according to their terms).

239. It is reasonable to expect that a person who is participating in a large transaction will read an agreement more carefully than will a person involved in a small transaction, although the person involved in the small transaction may ultimately wish to file a large claim, such as for personal injury.

240. In economic terms, such an unfair contract can be rejected on the ground that it creates a "moral hazard" by providing one party with unfair control over the outcome of the transaction. Just as insurance contracts may give rise to "moral hazard," for example, where a person who knows she is about to die procures life insurance, similarly arbitration agreements give rise to moral hazard where they allow one party substantial control over the

In short, where, as in *Overmyer*, a knowledgeable business entity voluntarily chooses to accept a clear arbitration clause that is fair, the agreement should be upheld. Where, on the other hand, a business entity requires an ignorant consumer or employee to sign an arbitration agreement that is vague or unclear as well as substantively unfair, courts should not find that such a party waived its constitutional rights.²⁴¹ In many cases, the four factors may not all point in the same direction. Where they do not, courts should assess whether a strong showing with respect to certain of the factors is sufficient to outweigh a weak showing on others. That is, the arbitration agreement may be extremely clear, but the party challenging the clause may be an ill-informed consumer who was required to accept the clause in order to obtain a particular service. In such cases, the courts should focus on the fourth factor—substantive fairness—in determining whether the consumer waived her rights. Where the clause places the consumer at a substantive disadvantage, by, for example, requiring her to arbitrate in a distant forum, selecting an arbitrator likely to be biased against the consumer, or denying her certain substantive rights to recovery, courts should probably reject the waiver. Where, on the other hand, the clause requires both parties to arbitrate all their claims against each other, ensures that the arbitrators will be impartial, and provides the consumer with adequate discovery, courts may conclude that the consumer has waived her constitutional rights. More generally, where one or more factors weigh strongly against waiver, courts should determine whether another factor weighs strongly enough in favor of waiver to serve as a counterbalance.²⁴²

outcome or the process. See Poser, *supra* note 19, at 108; see also Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 994 (1972) (suggesting that unfairness of arbitration clauses should lead court to be suspicious of bargaining process).

241. The court would not be required to void an arbitration clause merely because it found the protesting party had not waived her constitutional rights to a trial and due process. Rather, if state action exists, for example, because the court is employing a “preference” for arbitration over litigation, the court would go on to determine whether the purported agreement actually violates any constitutional provision. Where it does not, for example, because the party had no constitutionally protected jury-trial or Article III right, and because the agreement provided adequate due process, the arbitration clause would not be unconstitutional.

242. The detailed implications of this fact-specific test can best be spelled out by courts on a case-by-case basis. Indeed, while no court has yet constitutionalized its waiver analysis, some courts are beginning to weigh contractual defenses using a very similar factual framework. See, e.g., *Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963 (S.D.N.Y. 1996) (allowing the plaintiff opportunity for discovery to support claims of misrepresentation and fraud that would void arbitration agreement).

In applying this balancing test, the courts should, however, follow the absolute rule set out by the Supreme Court in *Fuentes* and refuse to base a waiver on an arbitration clause that is so vague or unclear that it does not actually constitute an agreement to arbitrate.²⁴³ For example, courts should generally refuse to find that a securities brokerage employee waived her right to bring an employment-discrimination action against her employer in court merely by signing a U-4 registration statement in connection with applying for a position.²⁴⁴ As discussed earlier, such statements merely provide that the employee will arbitrate disputes required to be arbitrated by certain trading organizations' rules. Even assuming that the employee was aware of the waiver itself, such provisions do not give the employee any clear idea of which disputes are arbitrable.²⁴⁵

Nor does *Carnival Cruise*, for all its flaws, undermine the above analysis or prevent consumers from defeating a waiver argument in the arbitration context. Initially, it bears reemphasis that, because *Carnival Cruise* and *THE BREMEN* did not involve the waiver of a recognized constitutional right,²⁴⁶ those decisions must be viewed as setting a floor, but certainly not a ceiling, on the appropriate standard to apply with regard to constitutional waivers. Moreover, even the minimal "reasonableness" standard set out in *Carnival Cruise* might well allow consumers to void an arbitration clause based on its lack of clarity, fraud, lack of bargaining equality, or substantive unfairness. First, the *Carnival Cruise* Court emphasized that, because the Shutes conceded that they had proper notice of the forum-selection clause, the Court would not address the issue.²⁴⁷ While the accuracy of the

243. See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (stating that a waiver must, at the very minimum, be clear). That is, a court should never find that a party waived its constitutional right in a case such as *Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995), in which, although the court recognized the total ambiguity as to whether the arbitration clause covered the parties' dispute, it nonetheless found that arbitration was required. See *id.* at 798; cf. *K.M.C. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985) (upholding magistrates' refusal to find that jury trial had been waived, because, even applying mere "clarity" standard of *Fuentes*, waiver was not appropriate where party opposing waiver testified that he had been told that waiver would not be enforced).

244. See *supra* notes 19, 110-112 and accompanying text.

245. See *supra* notes 107-112 and accompanying text. Such a clause might, however, be enforceable if the employer could establish that the employee possessed sufficient knowledge that the seemingly vague clause was in fact clear to the particular employee. See, e.g., *Feinberg v. Bear, Stearns & Co.*, No. 90 Civ. 5250 (JFK), 1991 WL 79309 at *3 (S.D.N.Y. May 3, 1991) (holding that securities industry employee who signed U-4 had waived her right to litigate employment discrimination claim, where such employee had taken an examination that required her to understand scope of arbitral waiver).

246. See *supra* notes 211-222 and accompanying text.

247. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991).

Court's characterization is somewhat questionable,²⁴⁸ the notice issue remains ripe for argument in future cases.²⁴⁹ Second, the Court noted that it found no evidence that the cruise line had secured the plaintiffs' agreement through fraud or overreaching.²⁵⁰ Plaintiffs who could make such a showing could therefore presumably void an arbitration clause.²⁵¹ Third, the Court based its opinion on the conclusion that plaintiffs "retained the option of rejecting the contract with impunity."²⁵² While the Court did not explain what it meant by this phrase,²⁵³ certainly consumers upon whom an arbitration clause was imposed in a nonnegotiated setting could distinguish *Carnival Cruise* by showing that they could not have rejected the clause "with impunity."²⁵⁴ Fourth, the Court concluded that the plaintiffs failed to make a factual showing that the waiver was unfair by demonstrating that the forum-selection clause would prove a great financial or physical hardship.²⁵⁵ Again, one can infer that, should plaintiffs in the

248. The Court only stated that the respondents "essentially have conceded" the notice point. *Id.* Respondents' Brief actually stated: "The respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated." *Id.* Certainly, the Court could have found a problem with the notice, had it so desired.

249. See Mullenix, *supra* note 213, at 349-53 (discussing possible argument regarding lack of notice).

250. See *Carnival Cruise*, 499 U.S. at 595.

251. The FAA already provides that arbitration agreements may be voided on common-law contractual grounds, which courts have interpreted to include fraud and duress. However, as discussed earlier, it has in fact proven quite difficult to overturn arbitration clauses on these grounds. See *supra* notes 93-141 and accompanying text.

252. *Carnival Cruise*, 499 U.S. at 595.

253. Specifically, it is not clear whether the Court means that the customers could have rejected the clause but still gone on the cruise (which is rather unlikely, unless the cruise line employees were so badly trained that they ignored the fact that customers had refused to accept the clause), or whether it meant that the consumers could have rejected the clause but received back their full payment, thereby suffering "only" the inconvenience of a canceled cruise to Mexico. Actually, there is some question whether the Shutes would have received a refund had they decided they could not agree to the forum-selection clause. As the Court recognized, the Shutes paid for their trip through a travel agent and only later received the tickets which, in small print, informed them of the arbitration provision. See *id.* at 587-88. Justice Stevens observed in his dissent that this same ticket also contained a clause providing that "the Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger." *Id.* at 597 (Stevens, J., dissenting). Justice Stevens further observed: "Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute." *Id.* (Stevens, J., dissenting).

254. *Id.* at 595.

255. See *id.* at 594. Here, as well, the Court's determination is open to criticism. As Professor Mullenix has observed, there were facts in the record showing that litigating in

arbitration context be able to show that the arbitration clause reduced their likelihood of success,²⁵⁶ the results might be different. The Court also found no evidence that the clause would give the cruise line an unfair advantage over the customers, concluding instead that the clause would benefit all parties and that there was no evidence that the clause was used “as a means of discouraging cruise passengers from pursuing legitimate claims.”²⁵⁷ By contrast, it is easy to imagine consumers who are required to take their claims to arbitration arguing that the particular type of arbitration chosen would unfairly benefit the company and that the imposition of the clauses were intended to discourage claims from being brought at all.²⁵⁸

It is useful to apply the proposed *Fuentes/Overmyer* balancing test to the facts of some actual cases to see how the court should have resolved a waiver issue, had it been presented.²⁵⁹ In *Broemmer v. Abortion Services*,²⁶⁰ a case involving a woman who was required to sign an arbitration clause by her abortionist, the court should have refused to find a waiver of constitutional rights.²⁶¹ First, the doctor provided his patient with an arbitration clause that was not particularly clear. While the clause provided that a dispute as to fees or services would be settled by binding arbitration, it did not specify that the patient was giving up her right to a trial or that her right to obtain discovery or appeal would be limited.²⁶² Second, there was a definite disparity in the level of knowledge of the two parties. Whereas the

Florida “would be prohibitively burdensome both financially and physically.” Mullenix, *supra* note 213, at 332 (quoting Declaration of Eulala Shute).

256. It seems likely that companies are at least trying to use arbitration clauses to reduce consumers’ likelihood of success. See Sternlight, *Panacea*, *supra* note 25, at 680-86.

257. *Carnival Cruise*, 499 U.S. at 595. As discussed earlier, the Court concluded that the clause would benefit passengers by reducing litigation costs and ticket prices. See *id.* at 593-94.

258. Some claims along these lines have already been filed. See *supra* note 131 and accompanying text. See generally Sternlight, *Panacea*, *supra* note 25, at 677-97.

259. While many of the cases discussed here did not actually consider a waiver argument, it is useful to use the facts of these cases to examine how the proposed balancing test would work.

260. 840 P.2d 1013 (Ariz. 1992) (holding an arbitration clause unenforceable in that it was a contract of adhesion falling outside patient’s reasonable expectations). But see *Broemmer v. Otto*, 821 P.2d 204 (Ariz. Ct. App. 1991) (noting lower court decision in same case holding arbitration clause enforceable).

261. *Broemmer* did not actually address the constitutional waiver issue, presumably because the plaintiff did not argue that her constitutional rights had been violated, but only that the arbitration clause was void on common-law grounds.

262. See *Broemmer*, 840 P.2d at 1014-15; *Broemmer*, 821 P.2d at 205-06. No one in the doctor’s office explained the significance of the form, and it was provided to Ms. Broemmer with two other documents—a consent to treatment and a detailed request for medical history. See *Broemmer*, 840 P.2d at 1014-15.

doctor was likely well aware of the meaning of the arbitration clause that he required patients to sign, the patient likely was not. She was just twenty-one years old, sixteen or seventeen weeks pregnant, and had gone with her mother to seek an abortion.²⁶³ Surely she was acting under considerable confusion and stress. Third, while the appellate court blithely concluded, without evidence, that Ms. Broemmer signed the clause voluntarily and that she could simply have refused to sign the clause and sought an abortion elsewhere,²⁶⁴ the Arizona Supreme Court properly found that the clause was not negotiated but prepared by the doctor and presented on a "take-it or leave-it basis."²⁶⁵ Reality suggests that it would not have been so easy for Ms. Broemmer to pick herself up and find another abortion clinic that did not require patients to sign an arbitration clause. Certainly, the doctor should have been required to make a contrary showing. Finally, the clause was unfair in that it required disputes to be heard by a doctor specializing in obstetrics/gynecology.²⁶⁶ Again, while the appeals court found no evidence that such an arbitrator would be biased,²⁶⁷ the Arizona Supreme Court viewed the bargaining process with greater suspicion.²⁶⁸

The court should also have refused to find a waiver in *DeGaetano v. Smith Barney, Inc.*²⁶⁹ In that case, the plaintiff, a recent college graduate, was required by a brokerage house to sign an agreement titled "Principles of Employment" as part of the hiring process.²⁷⁰ While the agreement mentioned that employment disputes would be subject to binding arbitration, it did not explain that the

263. See *Broemmer*, 840 P.2d. at 1014.

264. See *Broemmer*, 821 P.2d at 207 n.1.

265. *Broemmer*, 840 P.2d at 1015, 1016.

266. See *id.* at 1017.

267. See *Broemmer*, 821 P.2d at 209.

268. See *Broemmer*, 840 P.2d at 1017. The Arizona Supreme Court found the arbitration clause unenforceable on the ground that it was a contract of adhesion that did not fall within the plaintiff's "reasonable expectations." The dissent disagreed, contending that a party may reasonably expect an arbitration clause and that such clauses benefit all parties. See *Broemmer*, 840 P.2d at 1018-22 (Martone, J., dissenting).

Sosa v. Paulos, 924 P.2d 357 (Utah 1996), is a similar, but somewhat closer, case. Although the patient was required to sign an arbitration clause while she lay in the hospital awaiting surgery, and although the clause required any medical-malpractice claim to be decided by board-certified orthopedic surgeons, the clause did at least specifically note the waiver of a jury-trial right and allow for revocation within fourteen days. This author would, nonetheless, hold that the waiver was invalid, considering the totality of the circumstances. The court did not address a waiver argument but did uphold the arbitration agreement, conditioned upon the lower court finding on remand that the patient had actually been provided with a copy of the agreement to take home when she left the hospital.

269. No. 95 Civ. 1613 (DLC), 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996).

270. See *id.* at *1.

employee would be waiving her right to a jury trial, nor did it note that she would be giving up the right to certain substantive relief.²⁷¹ Instead, the document that the employee signed simply referred her to some company handbooks which apparently were not provided at the time of her hire.²⁷² In terms of voluntariness, while the employee was not literally forced to sign, she was given a very limited period of time in which to review the agreement²⁷³ and presumably would have hesitated to jeopardize her job by refusing to sign. Finally, the agreement was substantively unfair in that it purported to deny the plaintiff the opportunity to obtain attorneys' fees, punitive damages, or injunctive relief that would have been available had she brought her suit in court.²⁷⁴

However, in other cases it would be entirely appropriate for a court to find that parties had waived their constitutional rights to a trial or due process. For example, in *Smith Barney Shearson, Inc. v. DeFries*,²⁷⁵ the brokerage used a clear arbitration provision that specifically explained the consequences of selecting arbitration over

271. See *id.* at *1-*2.

272. The arbitration clause stated that the employee would be required to acknowledge receipt of the handbooks when she began work, see *id.* at *1, but the employee stated that she did not believe that she was provided with the handbooks prior to signing the clause. See *id.* at *5; cf. Fisk, *supra* note 98, at 198-99 n.169 (describing law professor's unsuccessful attempt to obtain information regarding benefit plan before signing contract).

273. See *DeGaetano*, 1996 WL 44226, at *5.

274. See *id.* at *5. Another case in which the court should, if called upon, have refused to find a waiver of constitutional rights is *McCarthy v. Providential Corp.*, No. C94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 18, 1994). In that case the plaintiffs, various senior-citizen homeowners, obtained reverse mortgage loans entitling them to monthly payments financed by the equity in their house. While the deeds of trust contained arbitration clauses covering disputes arising out of or relating to "loan documents," these provisions did not specifically note that the homeowners were giving up their jury-trial rights. See *id.* Nor was it entirely clear that the clause covered the plaintiffs' federal Truth in Lending Act claim. See *id.* at *4. With respect to the nature of the parties and voluntariness, the court was willing to accept that the borrowers were "financially distressed, elderly and 'unsophisticated' folks." *Id.* at *19. Although the plaintiffs did not allege that the term was substantively unfair, a court should not find waiver of constitutional rights given these facts. Courts should also refuse to find a waiver given the facts of *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 47 (1997). There, the customer was not even apprised of the existence of an arbitration clause when her new computer arrived. The computer contained, together with many boxes of software, a list of terms including an arbitration clause. See *id.* at 1148-49. To avoid entering into the arbitration agreement, according to the court, the customer should have returned the computer within 30 days. See *id.* at 1150. Constitutionally, this clause was neither clear enough nor voluntary enough to constitute a waiver of the right to jury trial. See Jean R. Sternlight, *Recent Decision Opens Wider Gateway to Unfair Binding Arbitration*, 8 WORLD ARB. & MED. RPT. 129 (1997).

275. No. 94 Civ. 0020(WK), 1994 WL 455178 (S.D.N.Y. Aug. 19, 1994).

litigation.²⁷⁶ The document that the customer signed also contained a notice referring to the arbitration clause that was placed directly above the signature blank.²⁷⁷ In terms of the relative power of the parties, the customer was an officer, director, and shareholder of a Swiss corporation. At minimum, the customer intended to invest \$18,000, a fairly significant sum.²⁷⁸ While there was some evidence of involuntariness, in that the customer asserted that the brokerage had informed him that the contract he was required to sign was a "mere formality,"²⁷⁹ the plaintiff made no showing that the arbitration process itself was substantively unfair in any respect. On these facts, it would appear that the plaintiff waived his right to challenge the arbitration clause on constitutional grounds.²⁸⁰

Some of the cases involving dealers and franchisees are good examples of close cases that would probably require additional factual development to permit a court to make a finding on waiver. In *Doctor's Associates, Inc. v. Stuart*,²⁸¹ DAI, the franchisor for Subway sandwich shops, included an arbitration clause in the franchise agreement. While the clause itself was reasonably clear, stating that any controversy arising out of the contract would be settled by arbitration and that commencement of arbitration was a condition precedent for the commencement of legal action, the entire transaction

276. The clause warned investors that arbitration was final and binding, that the parties were waiving their right to seek remedies in court including a jury trial, that discovery is generally more limited in arbitration than in court, that arbitrators' awards are not required to include factual or legal findings, that appellate rights are strictly limited, and that the panel of arbitrators would typically include some arbitrators who were affiliated with the securities industry. *See id.* at *1.

277. *See id.*

278. *See id.* Shearson claims that DeFries asked Shearson to buy \$1.8 million worth of securities on his behalf. *See id.*

279. *See id.* at *2.

280. A court would also have been warranted in finding waiver given the facts of *C.H.I., Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762 (9th Cir. 1991). In that case, the president of a California corporation accepted purchase-order confirmations, sent by a New York corporation, which contained an arbitration clause selecting New York as the place of arbitration. *See id.* at 763. The provision was fairly clear, in that it mentioned arbitration immediately above the signature line. Although the clause did not spell out in detail the consequences of selecting arbitration over litigation, both parties were corporate entities and should reasonably have been aware of these consequences. While C.H.I. claimed that it acted involuntarily, in that it had already made commitments based on the expected shipment of fabric, C.H.I. admitted that it was aware that Marcus would not ship until it had received back the signed confirmations. *See id.* Finally, while the arbitration was to be held in New York, there was apparently no evidence that this would cause great hardship to the California company, nor that the arbitration clause was unfair in any other way. *See id.* at 764.

281. 85 F.3d 975 (2d Cir. 1996); *see also* *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996) (reversing Montana Supreme Court decision that voided another Subway franchise arbitration agreement as inconsistent with a Montana notice provision).

created some confusion in that the sublease that the franchisee was required to sign did not contain an arbitration clause.²⁸² In terms of the relative knowledge of the two parties, while Stuart was engaged in a business transaction and was not a mere consumer, franchisees have traditionally been found to require protection from the more powerful franchisors.²⁸³ As to voluntariness, Stuart contended that he was fraudulently induced to sign the arbitration clause on the understanding that the franchisor, as well, would be required to arbitrate all its claims.²⁸⁴ In fact, however, the franchisor had reserved the right to use summary evictions to remove the franchisee from its lease in the event of a violation of the contract.²⁸⁵ Finally, with respect to substantive fairness, the franchisee alleged that the arbitration clause was unfair, not only because the franchisor reserved the right to use litigation for certain claims, but also because the arbitration would be quite costly for the franchisee and biased against the franchisee.²⁸⁶ To convince the court of the validity or invalidity of this waiver, the parties would likely want to present the court with more specific information on the franchisee's degree of business expertise and economic well-being, as well as regarding the fairness or unfairness of the process.²⁸⁷

282. See *Stuart*, 85 F.3d at 977-78.

283. See, e.g., *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 665 (1985) (Stevens, J., dissenting) (noting Congress' expressed intent to protect automobile franchises from bad-faith franchise terminations); *Graham Oil Co. v. Arco Prod. Co.*, 43 F.3d 1244, 1246 (9th Cir. 1995) (observing that federal Petroleum Marketing Protection Act was passed primarily to protect franchisees and to correct the great bargaining disparity between franchisors and franchisees). See generally Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957) (discussing special concerns as to franchise contracts).

284. See *Stuart*, 85 F.3d at 979.

285. See *id.*

286. The franchisee complained of the following: (1) a filing fee of as much as \$5,000; (2) the high cost of arbitrating in Connecticut (the franchise was located in Illinois); (3) the requirement of paying substantial fees for the arbitrators' time; and (4) the arbitrators' likely bias, due to their reliance on Doctor's Associates for repeat business. See *id.* at 980.

287. Another example of a case that might reasonably go either way with respect to a waiver finding is *McCall v. Snap-On Tools Corp.*, Civ. No. 91-4082-JLF, 1991 WL 328468 (S.D. Ill. Aug. 9, 1991). The case involved a hardware dealership termination agreement that contained an arbitration clause. While the court did not discuss the clarity of the clause itself, the dealer did complain that he had been assured that the entire termination agreement was a mere formality. See *id.* at *2. In terms of the nature of the parties, although the dealer was engaged in a business transaction, he did allege that he was in dire financial straits. See *id.* He may not have had a great deal of education or business expertise. The dealer also claimed that he had no real choice but to sign the clause, in that the wholesaler would not buy back his inventory until he signed the termination agreement, including the arbitration clause. See *id.* at *1. The dealer, however, made no claim that the clause was substantively unfair in any respect. Again, a court would likely require more facts to make a finding on waiver.

Some may protest that this proposed four-factor balancing standard is too ad hoc and that it will therefore be difficult for courts to apply and confusing for companies to adhere to. However, in decision after decision the Supreme Court has already specified that waiver decisions must be made on a fact-specific basis.²⁸⁸ The proposed standard, focusing on four particular factors, actually provides more guidance than would a less-structured general factual analysis. Further, given this standard, a company can take clear steps to make sure that its arbitration provision will be upheld, even against consumers or employees.

First, the company should ensure that the clause is as clear as possible. It should appear in large type in a highly visible location and should inform customers or employees not only that by signing the arbitration clause they are giving up their right to a trial before a judge or jury, but also that discovery will be more limited, evidentiary rules relaxed, and appellate rights minimized. The company should also be precise as to which kinds of claims will be covered by the arbitration clause.²⁸⁹ Ideally, the company would inform the consumer or employee orally about the clause, but at a minimum it would not make any fraudulent or lulling statements regarding the insignificance of the clause.

Second, while to some extent the company cannot control the existence of power or knowledge disparities, it should be sure not to take advantage of such disparities. Third, the company should ensure that the consumer has an adequate opportunity to read, consider, and understand the clause. It should not, for example, present consumers with a clause as they are boarding the ship nor present patients with a clause as they are lying in a hospital bed awaiting surgery.

Finally, the company should strive to make the clause substantively fair, for example, by providing for impartial arbitrators, holding the arbitration in a location that is not unduly expensive for the other party, and refraining from using the arbitration to eliminate any of the other party's substantive rights. It would not be difficult for a company to adhere to these guidelines, and most commentators would agree that structuring arbitration in this manner would be desirable from a policy perspective. There is no reason to believe that these

288. See, e.g., *D.H. Overmyer Co. v. Frick Co.*, 407 U.S. 174 (1972) (disclaiming precedential value of the case in other situations); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (stating that waiver analysis must be fact-specific).

289. Smith Barney Shearson has apparently begun using a clause of this nature. See *Smith Barney Shearson, Inc. v. DeFries*, No. 94 Cir. 0020(WK), 1994 WL 455178, at *1 (S.D.N.Y. Aug. 19, 1994) (describing very clear and detailed arbitration provision).

steps would in any way undermine the vaunted efficiency of either arbitration or the use of form contracts.

In sum, where state action is present based on a governmental preference for arbitration or based on governmental involvement in the arbitration process, courts should use the four-factor balancing test to assess whether parties have waived their constitutional rights.²⁹⁰ Assuming that no waiver has been made, the question remains whether the arbitration process deprives persons of their constitutional rights to a jury trial, an Article III judge, or due process. If a particular arbitration clause does not infringe on any constitutionally protected right, it should not be stricken on constitutional grounds, even if state action exists and no waiver has been made. The following sections will address these issues.

C. *The Congressional and Supreme Court Preference for Binding Arbitration Over Litigation Often Violates Parties' Seventh Amendment Jury-Trial Right*

The Seventh Amendment to the United States Constitution provides that "the right of trial by jury shall be preserved" in all "[s]uits at common law, where the value in controversy shall exceed twenty dollars."²⁹¹ As the Supreme Court has repeatedly observed, "[t]he trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."²⁹² Commentators have praised the jury system not only for bringing common sense to bear on the facts,²⁹³ but also for serving as a check upon the power of the sovereign.²⁹⁴

290. Even absent state action, a similar analysis may be appropriate to determine whether a party has voluntarily and knowingly waived a statutory right. *See, e.g., Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997).

291. U.S. CONST. amend. VII. *See supra* note 1 for the complete text.

292. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.)). The Court in *Terry* held that the right to a civil jury trial is "so fundamental and sacred to the citizen that it should be jealously guarded by the courts." *Terry*, 494 U.S. at 581 (Brennan, J., concurring in part, concurring in judgment) (quoting *Jacob v. New York City*, 315 U.S. 752, 753-53 (1942)).

293. *See* 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 348-50 (7th ed. 1956).

294. *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1035 (1992). *See generally* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653 (1973). Of course, some commentators have also criticized juries. *See, e.g.,* David W. Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455, 455 ("The cause of delay is the jury system"); JEROME FRANK, *COURTS ON TRIAL* 123 (1949) ("To my mind a better instrument than the usual jury trial could scarcely be imagined for achieving uncertainty, capriciousness, lack of

The Supreme Court has interpreted the Seventh Amendment to preclude Congress or the courts from denying a jury trial to parties in federal court actions "at common law."²⁹⁵ To assess whether an action is "at common law," a court first performs an historical analysis, determining whether the right at issue historically entitled parties to a jury trial in eighteenth-century England.²⁹⁶ Where this analysis is indecisive, the court examines the nature of the remedy sought and orders a jury trial where the claim is "legal" and denies a jury where the claim is "equitable."²⁹⁷ Significantly, however, the Seventh Amendment is one of the few amendments in the Bill of Rights that the Court has thus far failed to apply to the states via "incorporation" in the Due Process Clause of the Fourteenth Amendment.²⁹⁸ While many state constitutions contain a provision that similarly protects the right to trial by jury,²⁹⁹ it would seem that a federal statute would be permitted to trammel a mere state constitutional right.³⁰⁰

uniformity, disregard of the R[ule]s, and unpredictability of decisions."); LEON GREEN, JUDGE AND JURY 353 (1930) ("As a scientific method of settling disputes the general verdict rates a little higher than the ordeal, compurgation or trial by battle.").

295. See *Tull v. United States*, 481 U.S. 412, 417-18 (1987).

296. See *id.* at 417-20.

297. See, e.g., *Terry*, 494 U.S. at 563 (holding that Seventh Amendment entitled the plaintiff to jury trial in statutory-duty-of-fair-representation action against union and employer, because back pay remedy is essentially legal); *Tull v. United States*, 481 U.S. 412 (1987) (holding a party entitled to jury trial in action brought under federal Clean Water Act); *Curtis v. Loether*, 415 U.S. 189 (1974) (finding party entitled to jury trial on fair-housing claim brought pursuant to Title VIII of the Civil Rights Act of 1968). Note that either the plaintiff or the defendant may demand a jury trial, see *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959), and that a jury trial may be available on a counterclaim as well as on a claim in chief. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962).

298. See, e.g., *Curtis*, 415 U.S. at 192 n.6 ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."); *Chicago, Rock Island & Pac. Ry. Co. & P.R. Co. v. Cole*, 251 U.S. 54, 56 (1919) (Holmes, J.) (indicating that nothing in the Constitution requires states to maintain familiar line between functions of court and jury or even to provide for jury trial at all); *Hawkins v. Bleakly*, 243 U.S. 210, 216 (1917) (upholding constitutionality of Iowa's mandatory administrative hearing regarding worker's compensation in part on ground that Seventh Amendment does not apply to the states); *Minneapolis & St. L. R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (holding that Seventh Amendment does not mandate use of juries in state court, even where claim brought pursuant to federal statute); see also *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972) (refusing, in extensive analysis, to hold Seventh Amendment applicable in state court), *aff'd sub nom. Davis v. Edwards*, 409 U.S. 1098 (1973).

299. The author of one article found that 48 states generally provide for a right to jury trial in their own constitution. See Martin H. Redish, *Legislative Response to Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 797 (1977) [hereinafter Redish, *Legislative Response*]. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State*, 550 N.E.2d 919 (N.Y. 1990) (considering whether New York mandatory lemon-law arbitration violated car manufacturers' and importers' rights to a jury trial under the state constitution, and concluding that it did not); *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903 (Ohio Ct.

Many of the claims currently being tried before private arbitrators would entitle parties to a trial by jury if they were to be heard in federal court.³⁰¹ Thus, on its face, mandatory binding arbitration of many claims would appear to be inconsistent with the Seventh Amendment.³⁰² However, two major exceptions to the jury-trial right have already been discussed. First, if a court finds that the state had no involvement in the imposition of certain arbitration, the court should not void such arbitration clause for violating the Seventh Amendment.³⁰³ Second, because it is well recognized that parties may voluntarily waive their right to a jury trial,³⁰⁴ if a court applied the four-factor test

C.P. 1976) (finding that compulsory arbitration of medical-malpractice claim violates state jury-trial right). Cf. *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (opining that mandatory nonbinding arbitration does not violate state jury-trial provision); *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992) (en banc) (holding that statute mandating binding arbitration of personal injury protection benefit disputes does not violate jury-trial right, where state constitution contains no such guarantee and where state rule of civil procedure mandating jury trials does not apply to arbitral proceedings); *In re Smith*, 112 A.2d 625 (Pa. 1955) (same). But see *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980) (holding that mandatory binding medical-malpractice arbitration violates state jury-trial right where process results in significant delay).

300. See U.S. CONST. art. VI, § 2 (the Supremacy Clause). A state arbitration statute would not, however, be permitted to interfere with a state constitutional right.

301. For example, tort claims and breach-of-contract claims are legal claims that would typically entitle a party to a jury.

302. This Article focuses on *mandatory* binding arbitration because, as discussed earlier, it contends that many consumers, employees and others are not choosing arbitration voluntarily but rather are being forced to arbitrate their claims. Mandatory *nonbinding* arbitration has not been held to interfere with jury-trial rights provided by state constitutions, even where appeal from arbitration is not free. See, e.g., *In re Smith*, 112 A.2d 625 (Pa. 1955) (upholding compulsory nonbinding arbitration where parties entitled to de novo review, even though payment of costs required prior to appeal).

303. See *supra* notes 142-171 and accompanying text.

304. A party may, for example, waive its jury-trial right in federal court simply by failing to demand the jury-trial within the time provided by the Federal Rules of Civil Procedure. See FED. R. CIV. P. 38(b), 38(d); see also *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932) (noting that Congress may provide courts with jurisdiction to enforce arbitration agreements accepted by the parties); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924) (refusing to reject as unconstitutional voluntary agreement to arbitrate admiralty claim); *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783 MHP, 1993 U.S. Dist. LEXIS 11333, at *14 n.6 (N.D. Cal. Aug. 4, 1993) (rejecting the plaintiffs' attempts to avoid arbitration clause and observing that the plaintiffs had, in any event, waived their jury-trial right by failing to serve a timely demand as required by the Federal Rules of Civil Procedure); *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 291 (N.Y. 1921) (finding no violation of state's constitutional requirement of trial by jury where parties waived such right by consent). As discussed earlier, some cases have used the waiver concept to defeat a Seventh Amendment argument in circumstances many might find coercive. See, e.g., *Geldermann v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987) (noting that commodities brokerage waived Seventh Amendment right to jury trial by becoming licensed brokerage); *Guralnick v. Supreme Court of New Jersey*, 747 F. Supp. 1109, 1116 (D.N.J. 1990) (holding that attorney waived Seventh Amendment right to jury trial with

discussed earlier and found that a party had waived its Seventh Amendment right, the absence of a jury trial would not violate the Constitution.³⁰⁵

Third, even given state action and absent a waiver, some might argue that arbitration participants are not constitutionally entitled to a jury trial. The Supreme Court has held that certain matters may legitimately be assigned by Congress to a non-Article III court, for example to an administrative hearing, and that where such assignments are legitimately made the parties are not entitled to a jury.³⁰⁶ The Seventh Circuit has found, similarly, that by assigning a particular category of claims to arbitration Congress can entirely avoid the strictures of the Seventh Amendment.³⁰⁷ The scope of this exception and its limitations will be analyzed below.

1. Congress May Assign Congressionally Created "Public Rights" to Be Heard by a Non-Article III Court, Rather Than a Jury

The Supreme Court held in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*³⁰⁸ that where a congressionally created "public" right is at stake, Congress may order disputes regarding such right to be heard by a non-Article III court, such as an administrative agency, and thereby avoid the jury-trial requirement of the Seventh Amendment.³⁰⁹ The Court subsequently went on to

respect to client fee disputes by becoming attorney), *aff'd*, 961 F.2d 209 (3d Cir. 1992); *supra* notes 120-123 and accompanying text.

305. See *supra* notes 223-290 and accompanying text.

306. See generally Colleen P. Murphy, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459 (1986) (discussing the way in which the Court applies Seventh Amendment differently depending on whether forum is adjudicative or administrative, and arguing that, because this differing analysis is unjustifiable, jury trial should be denied for all claims based on federally created rights).

307. See *Geldermann*, 836 F.2d at 311-12, 321-24 (holding that, where commodities broker claimed that mandatory binding arbitration of consumer's claims at consumer's option violated broker's Seventh Amendment right, court rejected claim in part on ground that Congress had power under Article III to send such claim to binding arbitration); see also *Board of Educ. v. Harrell*, 882 P.2d 511, 522-23 (N.M. 1994) (finding no violation of state constitution's jury-trial requirement where employee's termination claim required to be resolved through arbitration).

308. 430 U.S. 442 (1977).

309. See *id.* at 460-61. The Court held that, where Congress had created a new cause of action permitting the federal government to bring an administrative action against an employer with respect to unsafe working conditions, no jury trial need be provided to the employer. The Court stated:

At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not

expand on the definition of “public right.” It held in *Thomas v. Union Carbide Agricultural Products Co.*³¹⁰ that a private right might be “so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”³¹¹ It later applied a waiver concept to hold in *Commodity Futures Trading Commission v. Schor* that a private-law counterclaim brought in conjunction with an administrative claim might be heard by an administrative agency, rather than a court.³¹² While recognizing that the requirements of Article III are not solely a personal right subject to waiver,³¹³ the Court held that allowing the agency to hear the claim would in no way threaten the institutional integrity of the judicial branch and was therefore constitutionally permissible.³¹⁴

prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Id. at 450. The Court distinguished *Crowell v. Benson*, 285 U.S. 22 (1932), which it characterized as an admiralty case holding that, where only ‘private rights’ were at stake, an administrative agency could make a factual finding “without intervention by a jury, only as an adjunct to an Art. III court.” See *Atlas*, 430 U.S. at 450 n.7 (citing *Crowell*, 285 U.S. at 51-65); see also *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) (noting that Congress could, but did not, deny a jury trial to disputants in a landlord-tenant action in the District of Columbia by creating a new cause of action that referred the matter to an administrative agency). The Court has traced this doctrine to such cases as *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), where no violation of the Constitution was found when customs officer assessed taxes without trial in front of a judge. See also *Motor Vehicle Mfg. Ass’n v. State*, 550 N.E.2d 919, 923 (N.Y. 1990) (holding that New York Supreme Court’s jurisdiction not unconstitutionally infringed where New York constitution gives the legislature the power to award jurisdiction to other tribunals).

310. 473 U.S. 568 (1985).

311. *Id.* at 594 (holding that, although the government was not a party to the action, no Article III judge was required where one pesticide chemical manufacturer sought compensation from another for work done in connection with pursuing federal pesticide registration).

312. 478 U.S. 833, 847-57 (1986) (concluding that, where a commodities customer voluntarily chose to pursue his claim against his broker administratively, rather than in court or through arbitration, and where the customer had insisted that the broker bring its counterclaim administratively, Article III did not prohibit the CFTC from hearing the broker’s private-law claim regarding a balance that was allegedly due).

313. See *id.* at 850-51.

314. See *id.* at 851-57. In holding the interference with Article III to be insubstantial, the Court emphasized that the CFTC deals only with a single subject area, that the CFTC has limited procedural powers, and that the process allowed for court review of CFTC decisions. See *id.* at 852-53. It explained that legal rulings are subject to de novo review and that factual determinations are subject to review under the “weight of the evidence” test. See *id.* at 853. Although the parties did not assert a jury-trial right in either *Thomas* or *Schor*, the Court’s subsequent decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), has made clear that the Article III “public right” analysis must also be used to assess Seventh Amendment cases. See *id.* at 51-52 (discussing *Atlas Roofing*, 430 U.S. at 450-55).

2. Congress Cannot, Absent a Narrowly Focused Public Policy, Deny a Jury Trial as to "Private Rights"

Notwithstanding these expansive decisions, it is still clear that where a "private" right is at stake Congress cannot, absent a waiver or narrowly focused public policy, deprive litigants of their Seventh Amendment right by mandating that the matter be heard by an administrative agency or other non-Article III judge. Initially in 1982, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³¹⁵ a plurality of the Court held unconstitutional under Article III the portion of the bankruptcy code that purported to allow a debtor to bring private-law claims, such as breach of contract, against a creditor in bankruptcy court before a non-Article III judge.³¹⁶ The Court rejected appellants' argument that the delegation of broad jurisdiction to the bankruptcy judges was justified by Congress' authority, under Article I, to establish non-Article III tribunals in specialized areas having particularized needs.³¹⁷ A few years later, in *Granfinanciera, S.A. v. Nordberg*,³¹⁸ the Court reiterated its decision in *Northern Pipeline* and clarified the link between its Article III and Seventh Amendment jurisprudence, holding that, where a bankruptcy trustee sued a party in bankruptcy court with respect to a private right,³¹⁹ the respondent was entitled to a jury trial by the Seventh Amendment. The Court explained that, because the action was a "legal" action

315. 458 U.S. 50 (1982).

316. The Court explained that, because the debtor's actions for breach of contract and misrepresentation were quintessentially private-law claims, arising out of state law and not involving the government, *see id.* at 84, and because bankruptcy judges did not enjoy the life tenure required to be afforded to Article III judges, *see id.* at 60-61, the bankruptcy statute violated Article III. *See also id.* at 89-91 (Rehnquist & O'Connor, J.J., concurring) (finding that these state claims do not fall within "public right" exception).

317. *See id.* at 72-74. Instead, a plurality of the Court held that this Article I power was essentially limited to cases involving public rights. *See id.* at 71. In addition to the "public rights" exception, the Court found exceptions for territorial courts and courts martial. *See id.* at 64-66. The concurring justices critiqued the plurality for reaching out farther than they needed to in order to find three "tidy exceptions" to the limits of Article III. *See id.* at 91 (Rehnquist & O'Connor, J.J., concurring).

318. 492 U.S. 33 (1989).

319. Recognizing that "the issue admits of some debate," the Court concluded that a "bankruptcy trustee's right to recover a fraudulent conveyance . . . [can] more accurately [be] characterized as a private than public right." *Id.* at 55. It explained that such actions closely resemble common-law actions for breach of contract, which are themselves "paradigmatic private rights." *Id.* at 55-56 (citing *Northern Pipeline*, 458 U.S. at 71). The Court cited Justice Rehnquist's characterization of the plurality's decision in *Northern Pipeline*, as well as the majority's decision in *Thomas*, to support the proposition that suits at common law lie at the "protected core" of Article III judicial power [*sic*]." *Granfinanciera*, 492 U.S. at 55-56 (citing *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 587 (1985), and *Northern Pipeline*, 458 U.S. at 70 n.25).

normally entitling a party to a jury trial in federal court, a court must next determine “whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.”³²⁰ This latter analysis, reiterated the Court, depends on whether the right at stake is public or private in nature.³²¹ The Court further explained:

Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment’s guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forbears. The Constitution nowhere grants Congress such puissant authority.³²²

The Court explained that, while a right might be categorized as “public” even if the federal government was not a party to the action, the crucial question in such a case is “whether ‘Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly “private” right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.’”³²³ The Court further rejected the denial of a jury trial to the

320. *Id.* at 42.

321. *See id.* at 42 n.4. Justice White noted in his dissent that the Court’s interpretation of the Seventh Amendment is somewhat illogical, in that whereas cases brought in state court are never subject to the Seventh Amendment, the majority’s holding provides that Congress could never assign a state-law breach of contract claim to be heard by anybody other than an Article III court. *See id.* at 79 n.5 (White, J., dissenting); *see also* Bruff, *supra* note 30, at 471 (citing Martin H. Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 208-11 (1983)) (questioning why “Congress may shift federal questions out of the courts more readily than diversity cases”). Justice Brennan, writing for the majority in *Northern Pipeline*, responded to this concern by noting that the principle of separation of powers is threatened only where Congress assigns judicial responsibility to non-Article III federal courts, and not where Congress allows cases to be resolved by state courts. *See Northern Pipeline*, 458 U.S. at 64 n.15. *See generally* Fallon, *supra* note 121, at 917-18 (arguing that the public/private test should be replaced by a theory requiring adequate appellate review for all claims).

322. *Granfinanciera*, 492 U.S. at 51-52 (footnote and citation omitted).

323. *Id.* at 54 (quoting *Thomas*, 473 U.S. at 593-94) (alteration in original).

respondent in *Granfinanciera*, concluding that it cannot be shown that the jury trial would “go far to dismantle the statutory scheme.”³²⁴

3. The Court's Preference for Binding Arbitration Over Litigation May Violate the Seventh Amendment

Given the contours of the Supreme Court's Article III and Seventh Amendment jurisprudence, the Supreme Court's interpretation of the FAA to prefer binding arbitration over litigation is constitutionally flawed as applied to parties who would have been constitutionally entitled to a jury trial in litigation. First, it seems beyond cavil that Congress could not constitutionally use its Article I authority to avoid the jury-trial requirement of the Seventh Amendment by expressly mandating that all federal court disputes be resolved through binding arbitration rather than by a federal district court judge and jury.³²⁵ Such a requirement would, as *Granfinanciera* put it, “eviscerate the Seventh Amendment's guarantee.”³²⁶ The hypothetical statute would deny access to an Article III judge and jury with respect not only to “public” but also the most “private” disputes, as it would cover all disputes brought in federal court. Even the Court's decision in *Commodity Futures Trading Commission v. Schor*,³²⁷ which accepted denial of an Article III court in one context, recognized that a broad denial of the Article III jurisdiction might well be unconstitutional even if parties had waived their rights. The Court stated:

[I]f Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities . . . [even selection by the parties would not] . . . necessarily save the scheme from constitutional attack.³²⁸

324. *Granfinanciera*, 492 U.S. at 61 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454 n.11 (1977)). The Court found, instead, that Congress had expressly provided for the use of jury trials in certain aspects of bankruptcy proceedings. See *Granfinanciera*, 492 U.S. at 63. While the Court did not address whether, if such a showing could be made, Congress might be permitted to assign a dispute over a “private right” to a non-Article III forum, it would seem that relying on this factor so heavily would allow Congress to eviscerate the Seventh Amendment.

325. See Golann, *Bank*, *supra* note 20, at 504-05 (arguing that unless a common-law claim is transformed into a claim that no longer carries a jury trial, mandatory binding arbitration is impermissible); Redish, *Legislative Response*, *supra* note 299, at 797-98 (arguing that legislature may not impose binding ADR for medical-malpractice claims, because such claims exist at common law).

326. *Granfinanciera*, 492 U.S. at 52.

327. 478 U.S. 833 (1986).

328. *Id.* at 855.

If Congress passed a law requiring binding arbitration of *all* federal court disputes it could not very well be argued that particular policy considerations justified mandatory arbitration in all such cases. Moreover, binding arbitration as typically constituted lacks the substantial appellate review upon which the Court has often relied to justify denial of an Article III proceeding.³²⁹

While Congress has not, of course, expressly mandated binding arbitration of all federal court claims, its purported preference for arbitration over litigation³³⁰ often has the same effect and thus violates the Seventh Amendment for the same reasons. Where Congress requires a lower court to interpret an ambiguous contract to require arbitration rather than litigation,³³¹ or where it requires lower courts to interpret contractual defenses very narrowly,³³² it is imposing arbitration on a party who may not voluntarily have selected arbitration over a jury trial. This “preference” is imposed on the most private of rights, including common-law claims for tort and breach of contract. Moreover, rather than employ the preference narrowly, in certain categories of cases where Congress has found arbitration particularly appropriate, courts have found that the preference applies in virtually every category of case.³³³ Thus, the Supreme Court’s conclusion that there is a Congressional “preference” for arbitration over litigation clashes with the Seventh Amendment where a party

329. Pursuant to the FAA rules, binding arbitration determinations are reversible only in the most extreme situations. *See supra* note 43 and accompanying text. The administrative proceedings accepted by the Court generally allowed more substantial appeals. *See Schor*, 478 U.S. at 853 (emphasizing that CFTC orders are subject to de novo review with respect to their legal elements and “weight of the evidence” review with respect to their facts); *Atlas Roofing*, 430 U.S. at 455 n.13 (observing that decision of administrative tribunal on legal issues is subject to de novo review and that factual findings are reviewable under a substantial evidence test); *Crowell v. Benson*, 285 U.S. 22, 45-46 (1932) (holding that agency’s determination on employee compensation may be reversed if legal conclusions are erroneous or if factual findings are not supported by the evidence). While in *Thomas* the appellate review was more comparable to that available in arbitration, *see* 473 U.S. at 592, the Court explicitly noted that due process might have required more extensive review had the parties not waived such a claim. *See id.* Arbitration can, of course, be structured to provide for more meaningful review. *Cf. Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1485-87 (D.C. Cir. 1997) (mandatory arbitration of federal employment discrimination claims is acceptable only to the extent meaningful appeal is available to ensure arbitrators have properly interpreted and applied statutory law).

330. *See supra* note 25.

331. *See supra* note 42.

332. *See supra* note 43.

333. *See supra* notes 51-140 and accompanying text; *cf. Board of Educ. v. Harrell*, 882 P.2d 511, 522-25 (holding that New Mexico Constitution’s equivalent to Article III was not violated where state mandated that certain school employees’ discharge claims be resolved in arbitration).

would have had a right to a jury trial had it litigated the matter in federal court and where the party has not waived the right.

D. The Courts' and Congress' Preference for Binding Arbitration over Litigation Violates Article III

As discussed earlier, the Seventh Amendment provides a right to jury trial only for those federal court claims that either historically would have been decided at law, are analogous to such claims, or provide for legal rather than equitable remedies.³³⁴ Thus, many parties who are required to take their claims to binding arbitration rather than to litigation cannot validly argue that the imposition of arbitration denied them a right to jury trial.

By contrast, *any* person who would have been entitled to bring a claim in federal court, absent arbitration, can argue that the court's imposition of arbitration denied them their right to have their claim heard by an Article III judge.³³⁵ The argument on this point will parallel the previous section's discussion of the Seventh Amendment. Although the Supreme Court has allowed Congress to require that certain disputes as to "public rights" be heard by non-Article III courts,³³⁶ in doing so the Court has also sharply limited Congress' ability to require that "private" claims be resolved outside of an Article III court.³³⁷ While it could conceivably be argued that *Granfinanciera* justifies assignment of even "private right" claims to non-Article III judges where failure to make such assignment would undermine the relevant statutory scheme,³³⁸ this argument cannot be used to justify a general preference for binding arbitration over litigation.³³⁹ Specifically, although some might contend that the "relevant statutory scheme" is the FAA and that requiring appearance in front of an

334. See, e.g., *Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990) (holding that employees have a right to jury trial for their union's breach of duty).

335. The right is significant because a judge, who is appointed for life, may well be less subject to bias than an arbitrator, who relies on parties and their lawyers for repeat business.

336. See *supra* notes 320-323 and accompanying text.

337. See *id.*

338. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55-64 (1989). The Court laid the foundation for such an argument by treating separately the contention that Congress' assignment of fraudulent-conveyance claims to a nonjury setting might be justified if it had undercut the bankruptcy scheme. See *id.*

339. In *Granfinanciera*, the Court repeatedly stated that it would be impermissible to deny parties their right to a jury trial in a "private right" case. See 492 U.S. at 42 n.4, 51, 55 n.10; see also Golann, *Mandatory*, *supra* note 29, at 526-27 (noting that a broad-based ADR program, such as one that required binding arbitration for all claims below a certain amount, would probably violate Article III).

Article III judge would be inconsistent with the FAA's statutory preference for arbitration, this argument proves too much. By the same token, Congress could pass a statute requiring that all claims be heard by judges without life tenure, and a defender of the statute could argue that mandating a hearing in front of an Article III judge would be inconsistent with such a statute. Presumably, the Supreme Court would reject such a statute. It has repeatedly stated that Congress could not, as a general matter, eliminate the jurisdiction of Article III judges and thereby eviscerate the judicial branch of our tripartite government.³⁴⁰ Similarly, Congress may not use a general preference for binding arbitration in all cases to reduce the jurisdiction of federal courts.

Some may argue that the parties to an arbitration agreement waived their Article III rights by accepting arbitration, but this argument has two weaknesses. First, as set forth earlier, waivers of constitutional rights should not lightly be implied, particularly where the waiver is not clear, where there are substantial bargaining inequalities, where the agreement was not voluntary, or where the terms of the waiver are substantively unfair.³⁴¹ Second, as the Court recognized in *Schor*, Article III protects societal as well as individual interests and thus is not necessarily subject to waiver.³⁴² Just as parties cannot by consent confer subject matter jurisdiction on a federal court,³⁴³ so too are they prohibited from allowing their claims to be heard in a non-Article III forum where such waiver would threaten the institutional integrity of the judicial branch.³⁴⁴ Applying a generalized preference for binding arbitration over litigation threatens the existence of the judicial branch by privatizing a substantial number of claims that would otherwise have been heard by Article III courts. While the enunciated preference would not entirely eviscerate the

340. See, e.g., *Granfinanciera*, 492 U.S. at 51-52; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854-55 (1986) (holding that it is impermissible to replace all Article III judges with non-Article III judges).

341. See *supra* notes 229-290 and accompanying text.

342. See *Schor*, 478 U.S. at 850-51.

343. See *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 704 (1982) (noting that subject matter jurisdiction may even be reviewed by appellate court sua sponte).

344. See *Schor*, 478 U.S. at 850.

jurisdiction of the courts,³⁴⁵ it certainly has and will deprive the federal courts of jurisdiction in a substantial number of cases.³⁴⁶

E. Courts' and Congress' Preference for Binding Arbitration Over Litigation May Often Violate Parties' Rights to Procedural Due Process

Assuming that state action can be established and that the parties to an arbitration agreement cannot be shown to have waived their constitutional rights,³⁴⁷ courts must determine whether the imposition of binding arbitration implemented through a "preference" for binding arbitration over litigation violates parties' rights to due process of law pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.³⁴⁸ That is, where parties have not truly consented to arbitrate, and where the state plays a role in imposing the arbitration, courts must review contractual arbitration clauses just as they would review arbitration directly mandated by the state.³⁴⁹ Specifically, they

345. Certain knowledgeable persons would likely always refuse to accept arbitration in cases where they felt it was not appropriate. Thus, unless courts went so far as to require arbitration where parties explicitly refused it, a preference for arbitration would not entirely eliminate litigation.

346. The fact that federal judges themselves may feel relieved rather than deprived at the loss of such cases is not relevant, except to the extent that it should make us more watchful to ensure that courts do not sacrifice the public interest in tripartite government to serve their own more narrow interest in reducing court dockets. *Cf. Palefsky, supra* note 16 (opposing courts' reliance on policy favoring clearing own docket); *Casarotto v. Lombardi*, 886 P.2d 931, 939-40 (Mont. 1994) (Triewiler, J., specially concurring) (arguing that judges should not use arbitration to serve their own interests), *cert. granted and vacated*, 515 U.S. 1129 (1995). *See generally* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982) (discussing importance of Article III in preserving tripartite structure of government).

347. Although rights to procedural due process are generally considered personal, and thus waivable, at some point institutional concerns may preclude certain due process waivers. For example, in *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994), Judge Posner wrote that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." While Judge Posner did not specify whether it was constitutional concerns or public policy that would preclude parties from agreeing to trial by ordeal, the example is a good illustration of the limits to the scope of individual waivers.

348. *But see* *Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 811-12 (Iowa 1991) (refusing to consider due process challenges to arbitration mandated by federal law because matters of procedure are solely within the discretion of the arbitrators).

349. One early reader of this Article queried whether the fact that a court may, upon review, refuse to mandate arbitration, does not ensure compliance with any due process requirement. However, provision of theoretical court review is useless unless such review has content. The purpose of this section is to detail the circumstances under which a reviewing court should refuse to require a party to arbitrate a dispute. Moreover, where, as often currently occurs, courts fail to engage in due process analysis on the ground that the parties have consented to arbitrate, no due process protection is provided.

must assess both whether *all* impositions of binding arbitration necessarily violate due process and also whether, even assuming certain binding arbitration is constitutional, other binding arbitration may be unconstitutional based on its lack of adequate procedural protections.³⁵⁰ In assessing the constitutionality of binding arbitration, it is important to bear in mind that there are “two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.”³⁵¹ Further, to preserve due process it is important to assure not only the reality but also the appearance of fairness.³⁵²

1. Does All Mandatory Binding Arbitration Violate the Due Process Clause?

The Supreme Court has frequently explained that due process analyses must be conducted in two parts. First, a court must determine whether the party challenging the procedure was deprived of a constitutional right to life, liberty, or property. If, and only if, the answer is “yes,” then the court must go on to consider whether the

350. Many organizations, including the ABA Section on Labor and Employment, the American Arbitration Association, and the National Employment Lawyers Association, have endorsed or supported a document entitled *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, ABA LAB. & EMP. L. NEWSL. (Winter 1996). This Protocol calls for such protection as adequate discovery, the right to be represented by counsel, and impartial and diverse arbitrators. The Protocol can also be found on the World Wide Web at <<http://www.adr.org/protocol.html>>. Some commentators, such as Professor Robert Gorman, have similarly urged the “need for formal procedural standards to ensure the fairness of the public-law arbitration.” See Gorman, *supra* note 43, at 635. The U.S. “Dunlop” Commission also recommended that private arbitration be used in the workplace only where it provides such procedural protections as a neutral arbitrator, a fair method of cost sharing, an employee right to independent representation, a range of remedies equal to those available in litigation, a right to a written opinion and sufficient judicial review to ensure consistency of the decision with the law. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 30-31 (Dec. 1994). This Article builds on these analyses, arguing that due process protections are a matter of constitutional right and not merely required by particular substantive statutes or desirable as a matter of policy. Cf. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997) (arbitration of Title VII claims “must be accomplished through the use of neutral arbitrators, adequate discovery, adequate types of relief, and the reassurance that coercion which would allow the revocation of any contract would likewise relieve an employee from an arbitration agreement”).

351. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citing *Carey v. Piphus*, 435 U.S. 247, 259-62, 266-67 (1978)).

352. See *id.*; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (“[T]o perform its high function in the best way, ‘justice must satisfy the appearance of justice.’” (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (“[A]pppearance of evenhanded justice . . . is at the core of due process.”).

party was provided with the procedure that was "due" under the Constitution.³⁵³ It seems clear that mandatory binding arbitration meets the first test in that it deprives persons of a constitutionally protected property right to engage in litigation. The Court's decision in *Zimmerman v. Logan Brush Co.*³⁵⁴ states that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."³⁵⁵ Thus, the only real question is whether binding arbitration is procedurally deficient under the Constitution.³⁵⁶

An argument can be made that all mandatory binding arbitration violates the Due Process Clause. In *Charles Wolff Packing Co. v. Court of Industrial Relations*,³⁵⁷ the Supreme Court held unconstitutional under the Due Process Clause a Kansas state law that required labor disputes between employers and workers in certain areas³⁵⁸ be taken to binding arbitration if the parties could not agree on a contract. The Court found that such a statute, which curtails both the employer's and employee's liberty interest in their freedom to contract, can be justified only by "exceptional circumstances" and that, because no such circumstances existed, the statute was unconstitutional as applied.³⁵⁹ Several lower courts have pronounced

353. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (noting that, once it has been determined that a deprivation of life, liberty or property exists, the Constitution requires that certain process be provided); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (describing "familiar two-part inquiry").

354. 455 U.S. 422 (1982) (holding that court's dismissal of complainant's claim as untimely was unconstitutional, where complainant had met deadlines and where untimely processing of claim was attributable to agency itself).

355. *Id.* at 428 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950)). See also *Martinez v. California*, 444 U.S. 277, 281-82 (1980) ("Arguably [a state tort claim] is a species of 'property' protected by the Due Process Clause."). The Court has not distinguished between "property" as defined in the Due Process Clauses of the Fifth and Fourteenth amendments. See generally *TRIBE*, *supra* note 27, § 10-8, at 679 (treating the two amendments simultaneously).

356. One could argue that arbitration does not deprive a party of her cause of action, but rather merely requires her to pursue the cause of action in an alternative forum. Even accepting this semantic distinction, a court must still reach the same second step of determining whether the process that replaces adjudication is constitutionally sufficient.

357. 262 U.S. 522 (1923).

358. The areas included preparation of food for human consumption, preparation of clothing, and production of fuel. See *id.* at 524.

359. See *id.* at 534-44; see also *Dorchy v. Kansas*, 264 U.S. 286 (1924) (invalidating statute requiring compulsory arbitration of labor disputes as applied to the coal mining industry); *Mengel Co. v. Nashville Paper Prod. & Specialty Workers Union*, No. 513, 221 F.2d 644, 647 (6th Cir. 1955) (observing, in dictum, that "[c]ompulsory arbitration, without right to have the issue determined by court action, is invalid").

that it is unconstitutional to impose binding arbitration on parties without their consent.³⁶⁰

However, while the Court has never expressly overruled *Wolff*, the decision's continuing validity seems questionable in light of subsequent developments with respect to the doctrine of freedom of contract. The Court has upheld the validity of federal labor statutes³⁶¹ and has also upheld many other statutes that were alleged to impinge on parties' freedom of contract.³⁶² Moreover, as discussed below, in *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*,³⁶³ the Court expressly allowed statutorily mandated arbitration with respect to an insurance loss. Further, several states' highest courts have expressly held that statutorily mandated arbitration is not per se unconstitutional.³⁶⁴ Thus, the remainder of this section will address the circumstances under which arbitration that is imposed through a state preference may be said to violate the Due Process Clause.

2. Due Process Requirements

a. Emphasis on Flexibility

Pursuant to the Court's more recent due process decisions, it appears unlikely that the Court would void all mandated binding arbitration. Emphasizing flexibility, such decisions state that, while the Due Process Clause requires adequate notice and an opportunity to be heard,³⁶⁵ its requirements are not fixed, but rather vary with the

360. See, e.g., *Henderson v. Ugalde*, 147 P.2d 490 (Ariz. 1944) (finding that courts declare coercive arbitration agreements unconstitutional); *St. Louis I.M. & S.R. Co. v. Williams*, 49 Ark. 492 (1887) (noting that legislatures lack power to substitute boards of arbitration for the courts); *People ex rel. Baldwin v. Haws*, 37 Barb. 440 (N.Y. App. Div. 1862) (stating in dictum that parties may not be compelled to arbitrate); *In re Smith*, 381 Pa. 223 (1955) (indicating that mandatory arbitration violates due process where arbitration is binding and denies parties opportunity for trial).

361. See *TRIBE*, *supra* note 27, §§ 9-9 & 9-10, at 615-19.

362. See *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945) (upholding a New York statute that suspended certain foreclosures on mortgages); see also *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177 (1980) (determining that the denial of statutorily scheduled retirement benefits was not a violation of equal protection, and failing to apply the Contract Clause protection to assure the retirement benefits); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) (allowing the restriction of contractual rights of certificate holders absent an emergency). See generally *TRIBE*, *supra* note 27, § 9-11, at 619-28 (discussing partial resurrection of the Contract Clause).

363. 284 U.S. 151 (1931). See *infra* notes 371-375 and accompanying text.

364. See *Board of Educ. v. Harrell*, 882 P.2d 511, 516 (N.M. 1994); *Mount St. Mary's Hosp. v. Catherwood*, 260 N.E.2d 508, 517-18 (N.Y. 1970).

365. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

factual circumstances.³⁶⁶ Typically, the Court employs a balancing test, set out in *Mathews v. Eldridge*.³⁶⁷ This test examines the protesting party's interest in adequate process, the risk of erroneous decisionmaking, and the government's interest in expedited decisionmaking, to assess whether the procedures that were provided are adequate under the Constitution.³⁶⁸ In assessing non-courtroom proceedings, the Court has insisted on procedural protections it felt were necessary,³⁶⁹ while refusing to convert all proceedings into adversarial hearings.³⁷⁰ Therefore, it seems likely that the Court would uphold mandatory binding arbitration that is fair, serves governmental interests, and provides parties with adequate notice and an opportunity to be heard, given the factual circumstances.

In fact, the Court employed such a factually intensive due process analysis in 1931 in *Hardware Dealers Mutual Fire Insurance Co. v.*

366. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) ("Due process is flexible and calls for such procedural protections as the particular situation demands."); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) ("[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); see also *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). See generally Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267 (1975) (urging flexibility in application of Due Process Clause); Leonard S. Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976) (asserting that there are alternatives to jury trials which still meet the procedural due process requirement).

367. 424 U.S. 319 (1976).

368. See, e.g., *Mathews*, 424 U.S. at 335 (holding that pretermination hearing need not be provided to social security disability recipient). Some have critiqued *Mathews* and its progeny for focusing exclusively on an instrumental aspect of due process—accuracy of the decisionmaking process—rather than on more intrinsic concerns such as satisfactory participation and decent treatment. See, e.g., TRIBE, *supra* note 27, § 10-7, at 674-77. While this criticism is legitimate, courts should, at minimum, reject those arbitration procedures that fail even under the *Mathews* test.

369. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring informal information exchange between student and administrator prior to suspension); *Morrissey*, 408 U.S. at 483 (mandating hearing prior to revocation of parole); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (mandating that welfare recipient be allowed to present evidence orally and to cross examine witnesses with assistance of counsel, if desired, before termination of benefits).

370. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (refusing to void statutory ten-dollar cap on fee veterans could pay to attorneys who assisted them in obtaining veterans benefits, where the plaintiffs failed to show informal process was unfair and where Congress sought to protect veterans from having to share benefits with attorneys); *Parham v. J.R.*, 442 U.S. 584 (1979) (rejecting challenge to state's informal nonadversary process for determining whether child should be voluntarily committed to a mental institution by her parents); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13-14 (1979) (rejecting claim that Due Process Clause mandates formal parole procedures in part to prevent "a continuing state of adversary relations between society and the inmate" that might undercut rehabilitation efforts); *Mathews*, 424 U.S. at 335-49 (refusing to require evidentiary pre-termination hearing prior to termination of disability benefits where recipient received other pretermination and post-termination protections).

Glidden Co.,³⁷¹ upholding application of a Minnesota statute that required the use of binding arbitration to determine the amount of loss when a party filed a fire insurance claim. The Court stated:

The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.³⁷²

The Court found the arbitration imposed in *Glidden* to be acceptable in that it was likely to allow speedy decisions and reliance on expert opinion.³⁷³ The Court also noted that the arbitration statute at issue required that the arbitrators be “competent, disinterested and impartial”³⁷⁴ and that neither party charged that the process itself was unfair in any respect. While the mandatory arbitration upheld in *Glidden* might be distinguished from broader private arbitration agreements on the ground that only the amount of loss, and not the entire claim, was required to be arbitrated, it seems likely that today’s Court would employ a similar mode of analysis in assessing more complete arbitration schemes.³⁷⁵

b. Adequate Notice

To protect the appearance and reality of both fairness and evenhandedness, the Court has insisted that persons who are at risk of being deprived of life, liberty, or property receive adequate notice of this fact. While the Court has recognized that the specific type of notice required varies according to the factual situation, the notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”³⁷⁶

371. 284 U.S. 151 (1931).

372. *Id.* at 158 (citation omitted).

373. *See id.* at 159.

374. *Id.* at 155-56 n.1 (citing Mason’s Minn. Stat. 1927 § 3512).

375. Several authors have recently advocated heightened “due process” protection with regard to arbitration while failing to argue such protections are mandated by the constitution. *See, e.g.,* Gorman, *supra* note 43, at 660-64; Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y. L. SCH. J. HUM. RTS. 1, 16 (1994) (arguing that due process rights are implicit in FAA). Several organizations have also urged their members to arbitrate only if the arbitration scheme is consistent with a Due Process Protocol. *See supra* note 350.

376. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus, the Court found that the state’s interest in resolving claims quickly and cheaply should be

Pursuant to the Due Process Clause, parties must be provided with reasonable notice that they are entering into an arbitration agreement. As discussed earlier in the waiver context, persons may not constitutionally be held to have exchanged their day in court for binding arbitration where they were not provided with clear, conspicuous notice of the waiver.³⁷⁷ Under the *Mullane* "reasonableness" test, the degrees of conspicuousness and clarity that are required will depend on the degree of savvy of the parties. While a very clear and conspicuous notice provision, such as that provided in *Smith Barney Shearson, Inc. v. DeFries*,³⁷⁸ will suffice as applied to most parties, a less clear or less visible clause may be constitutional as applied to a knowledgeable business party.³⁷⁹

Moreover, even where a party has agreed to arbitration, the Due Process Clause provides that parties to arbitration are entitled to fair notice of the claims brought against them, as well as of the procedures they must follow to protect their rights, absent clear waiver of such rights.³⁸⁰ While the specific nature of such notice may again vary depending on the background of the disputants, at a minimum, the claimant should make a reasonable attempt to notify a respondent of the pending arbitration and its specifics before laying claim to an

weighed against the individual's interest in being adequately informed, and found that notice by publication was allowable only where the bank did not have the addresses of account holders. *See id.* at 318-19 (allowing notice by publication to beneficiaries whose addresses or interests were unknown, but requiring actual notice to beneficiaries whose addresses and interests were known). The Court applied a similar balancing test in *Greene v. Lindsey*, 456 U.S. 444 (1982) (holding that, given the likelihood that eviction notices may be removed from doors of public housing apartments, due process required that the notices be mailed to residents rather than merely posted). The Court has also held that a proper notice must include a summary of the nature of the allegations being made and the evidence to be presented. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262-64 (1987) (concluding that a statute provided due process when notice of allegations and relevant supporting evidence was given); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (holding utility's cutoff notice invalid under Due Process Clause where it failed to advise customers of the procedures for protesting a cutoff).

377. *See supra* notes 209-210, 230 and accompanying text.

378. No. 94 Civ. 0020, 1994 WL 455178, at *1 (S.D.N.Y. Aug. 19, 1994).

379. *See supra* note 239 and accompanying text. A provision that was fraudulently imposed would not be valid under the Due Process Clause.

380. One court held that an arbitration statute would likely be unconstitutional if it allowed a party to be denied its right to challenge the validity of an arbitration agreement merely because it failed to file a motion for stay of arbitration within ten days of receiving notification of the opponent's intent to arbitrate, where the informal notification did not even warn of such consequences. *See Schafran & Finkel, Inc. v. M. Lowenstein & Sons, Inc.*, 19 N.E.2d 1005 (N.Y. 1939); *cf. Maltby, supra* note 375, at 22 (opining that due process requires that arbitration parties receive advance notice of issues).

arbitration victory.³⁸¹ Fair notice requirements will generally pass muster under the second part of the *Mathews* test, in that they serve parties' interests without imposing any great fiscal or other cost on the government. Thus, a court could probably not constitutionally require arbitration where a company promulgated an arbitration clause that allowed it to state an arbitration claim against a consumer merely by publishing a notice of the claim in an obscure newspaper two days prior to the arbitration hearing.³⁸²

c. Fair Hearing

i. Unbiased Decisionmaker

The Court has consistently held that the Due Process Clauses entitle parties to an unbiased decisionmaker.³⁸³ This requirement ought to apply to binding arbitration proceedings as well as to litigation.³⁸⁴ Thus, a legislature likely could not constitutionally

381. See, e.g., *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 896 (2d Cir. 1991) (finding New York's mandatory "lemon-law" arbitration constitutional despite challenge by manufacturer, where "manufacturer must be given notice of a consumer's request for arbitration within five days of the filing date and may respond in writing within fifteen days of the filing date"); *Country-Wide Ins. Co. v. Harnett*, 426 F. Supp. 1030, 1033-34 (S.D.N.Y. 1977) (holding New York's compulsory binding no-fault insurance arbitration constitutional where, inter alia, it provided for adequate notice).

382. While it could be argued that a party, in signing an arbitration agreement providing for poor notice, waived her right to notice, a court would have to assess whether there was in fact waiver of this specific right using the four-factor analysis set out earlier. Mere signing of an arbitration clause containing a poor notice provision would not necessarily be sufficient to constitute a waiver.

383. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (vacating state supreme court's decision where judge who apparently cast decisive vote had brought similar suit of his own); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (finding violation of due process where decisionmakers, optometrists in private practice, had personal stake in precluding optometrists who were employed by business corporations from providing services); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (holding that decisionmaker bias is grounds for reversal); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (holding that Due Process Clause was violated where Ohio statute authorized mayors to sit as judges in traffic offense cases, where the city benefits from imposition of fine); *Tumey v. Ohio*, 273 U.S. 510, 531-32 (1927) (finding that the Due Process Clause prohibits a town from granting the mayor, who served as judge, court costs levied against convicted defendants). Cf. *Schweiker v. McClure*, 456 U.S. 188, 196-97 (1982) (finding no violation of due process where plaintiffs failed to establish bias in allowing insurance carriers, who would be reimbursed by federal government, to conduct reviews on validity of claims asserted); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980) (stating that, while Due Process Clause requires decisionmaker be unbiased, no impermissible bias shown merely because the Department of Labor receives back a portion of fine assessed against violators of child-labor laws).

384. Cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31 (1991) (affirming submission of federal statutory age discrimination claim to arbitration where the plaintiff failed to provide evidence that arbitrators would be biased); Maltby, *supra* note 375, at 18 (noting that due process requires complete impartiality of arbitrators).

mandate arbitration where a company provided that disputes would be heard by its own president. Admittedly, most arbitration agreements will not be so obviously biased. To resolve closer cases, courts should again apply the *Mathews* factors and assess the private cost and the public benefit, if any, of using the potentially biased decisionmakers. In the context of the private arbitrations discussed in this Article, it is hard to see how the public would benefit from a company's imposition of potentially biased arbitrators on its customers or employees.

Several lower court decisions have addressed the question of what a claimant must show to demonstrate bias in violation of the Due Process Clause in connection with arbitration or mediation. In *Narumanchi v. Board of Trustees of Connecticut State University*,³⁸⁵ the Second Circuit held that, while the Fourteenth Amendment prevented a public employee from being deprived of his job through an arbitration process that was biased, the plaintiff had failed to present evidence that the grievance process specified in his union contract was constitutionally inadequate.³⁸⁶ While *Narumanchi* failed to establish bias, several appellate courts in Michigan held that a state-mandated medical-malpractice procedure violated the Due Process Clause by mandating that a doctor or hospital administrator would serve as one of the three arbitrators.³⁸⁷ Citing the Supreme Court's numerous decisions mandating fairness by a judge, the court in *Murray v. Wilner*³⁸⁸ held that arbitrators, too, must be unbiased and also must satisfy the appearance of justice.³⁸⁹ This same reasoning might easily

385. 850 F.2d 70 (2d Cir. 1988).

386. The court stated: "[The plaintiff] has not asserted any reasonable basis for finding the grievance procedures inadequate. His assertion of inevitable bias and partiality in a forum whose composition is specified by the terms of a collective bargaining agreement is unsupported." *Id.* at 72; *see also* *Jackson v. Temple Univ.*, 721 F.2d 931, 933 n.2 (3d Cir. 1983) (finding that, although public employee was entitled to an arbitral process that comported with due process, here he failed to show that the arbitration would have been biased against him); *cf.* *Parham v. J.R.*, 442 U.S. 584, 615-16 (1979) (rejecting due process challenge to Georgia's process for allowing parents to civilly commit their children, where the plaintiffs failed to show hospital administrators were biased in favor of admission).

387. *See* *Murray v. Wilner*, 325 N.W.2d 422, 427 (Mich. Ct. App. 1982), *rev'd*, 348 N.W.2d 6 (Mich. 1984); *Strong v. Oakwood Hosp. Corp.*, 325 N.W.2d 435, 437 (Mich. Ct. App. 1982), *vacated*, 347 N.W.2d 695 (Mich. 1984). *But see* *Morris v. Metriakool*, 344 N.W.2d 736, 738-41 (Mich. 1984) (no bias established sufficient to violate Due Process Clause); *Harte v. Sinai Hosp. of Detroit*, 375 N.W.2d 782, 784 (Mich. Ct. App. 1985) (finding no violation of due process due to arbitrator bias, where the plaintiffs had agreed to submit actions to arbitration and thus there was no state action); *Gale v. Providence Hosp.*, 325 N.W.2d 439, 441 (Mich. Ct. App. 1982) (finding no violation of due process due to bias merely because one member of panel must be a doctor or a hospital administrator); *Horn v. Cooke*, 325 N.W. 2d 558, 562 (Mich. Ct. App. 1982) (same).

388. 325 N.W.2d 422 (Mich. Ct. App. 1982), *rev'd*, 348 N.W.2d 6 (Mich. 1984).

be applied to hold unconstitutional a court decision that mandated or "preferred" arbitration of a medical-malpractice claim in front of a particular kind of medical specialist³⁹⁰ or that required employees in the securities industry to bring their employment-discrimination claims before a panel made up primarily of securities firm managers.³⁹¹ Courts should not place an impossibly high evidentiary burden on parties seeking to establish bias by requiring such parties to show not only a predisposition but also that the arbitrators will not be able to act fairly despite their background.³⁹²

ii. Right to Present Evidence

The Court has also held that due process generally requires that persons cannot be deprived of their life, liberty, or property without the opportunity to present evidence,³⁹³ and that parties should usually be allowed to confront and cross-examine adverse witnesses.³⁹⁴ Thus, the

389. The court found: "The pertinent issue is not whether a particular group or profession is or is not fair-minded, but whether the function and frame of reference of such persons may be expected to make them partisan to their fellows." *Murray*, 325 N.W.2d at 427 (citing *Crampton v. Dep't of State*, 235 N.W.2d 352 (1975)). While the Michigan Supreme Court rejected the appellate court's finding of bias, it did not reject the concept that arbitrators, like judges, must be unbiased. *See Morris*, 344 N.W.2d at 738-41.

390. *Cf. Broemmer v. Abortion Servs.*, 840 P.2d 1013, 1017 (Ariz. 1992) (holding unconscionable arbitration clause that required claim to be heard by a specialist in obstetrics/gynecology). While *Broemmer* was decided on unconscionability rather than due process grounds, the reasoning is similar.

391. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31 (1991); *see also Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 867 (Cal. Ct. App. 1997) (refusing to require employee to have her employment claim resolved, on a binding basis, by committee where three of five members were management).

392. *See, e.g., Sosa v. Paulos*, 924 P.2d 357, 361 (Utah 1996) (refusing to void arbitration clause on ground that it required claim to be heard by a panel of board certified orthopedic surgeons, and observing that the plaintiff had failed to show medical professionals would be biased in favor of malpractice defendants). *See generally Gilmer*, 500 U.S. at 30-31 (refusing to presume that arbitration panel chosen pursuant to New York Stock Exchange rules would be biased against the customer).

393. *See Morgan v. United States*, 304 U.S. 1, 18 (1938) (holding that the right to a "full hearing" implies a right to present evidence), *rev'd*, 313 U.S. 409 (1941); *see also American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (noting that due process requires party be given "opportunity to present every available defense"); *cf. Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) (stating that, although the Due Process Clause generally requires that parties be allowed to present evidence, this opportunity may be denied in certain circumstances, such as where allowing prisoners to present evidence would interfere with the functioning of a penal facility).

394. *See Goldberg v. Kelly*, 397 U.S. 254, 261, 268 (1970) (holding that violation of due process to allow termination of AFDC without allowing recipient opportunity to present evidence orally and confront any adverse witness); *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959) (finding that denial of due process to deny security clearance without allowing subject to confront and cross-examine witnesses alleging he would be security risk); *cf. Mathews v. Eldridge*, 424 U.S. 319 (1976) (finding no violation of due process to terminate social

Due Process Clause should also invalidate procedures where parties are unfairly denied the opportunity to present relevant evidence at a mandatory binding arbitration. The Second Circuit apparently adopted this position when, in *Shafii v. PLC British Airways*,³⁹⁵ it held that, where an arbitrator allegedly refused to hear certain testimony or consider certain documents because his plane was scheduled to depart at six p.m., the matter should be remanded to the district court to consider whether such conduct violated the Due Process Clause.³⁹⁶ Other courts have held that particular arbitration proceedings withstood due process attack in part because the procedures allowed for adequate presentation of evidence.³⁹⁷

iii. Right to Representation by Counsel

The Court has found that a party's entitlement to be represented by an attorney depends on the context of the hearing itself, ruling that, whereas an attorney can be essential in an adversarial context,³⁹⁸

security disability payments without providing recipient pretermination evidentiary hearing, where recipient was provided with opportunity to review and dispute written record prior to cutoff, and where recipient was also entitled to post-termination nonadversary evidentiary hearing as well as to review within social security administration and by court).

395. 22 F.3d 59 (2d Cir. 1994). *Shafii* assessed the validity of binding arbitration held pursuant to the Railway Labor Act (RLA), 45 U.S.C. §§ 151-164 (1994). The RLA mandates that disputes between public carriers and their employees be resolved through arbitration, but allows the parties to choose between presenting their claims to the Railway Adjustment Board and presenting them to a private arbitrator, as was done in this case. See generally Penelope Hopper, Note, *Railroading Essential Rights: The Status of Judicial Review of Alleged Due Process Violations in Arbitration Hearings Under the Railway Labor Act*, 1995 J. DISP. RESOL. 169 (1995).

396. See *Shafii*, 22 F.3d at 60-61, 64-65. In reaching this conclusion, the Second Circuit rejected the airline's argument that the Supreme Court's decision in *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89 (1978) (per curiam), precluded a party from attacking a Railway Labor Act arbitration decision on due process grounds. Instead, the Second Circuit interpreted *Sheehan* as having rejected a particular due process challenge but not having refused to consider all future due process attacks. See *Shafii*, 22 F.2d at 63-64; see also *Edelman v. Western Airlines*, 892 F.2d 839, 846 (9th Cir. 1989) (holding that *Sheehan* does not bar due process attacks); *Steffens v. Brotherhood of Ry., Airline, & S.S. Clerks, Inc.*, 797 F.2d 442, 447 (7th Cir. 1986) (same). But see *Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 n.2 (6th Cir. 1986) (interpreting *Sheehan* to preclude due process review); *Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985) (same); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 911 (3d Cir. 1981) (same).

397. See, e.g., *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 896 (2d Cir. 1991) (upholding lemon-law arbitration where statute provided that "[a]ny relevant evidence may be introduced").

398. See *Goldberg*, 397 U.S. at 268-70 (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)) (observing that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard" and holding that, because "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," welfare recipients must be allowed to be represented by counsel at their benefit-termination hearings); *Lassiter v. Dep't Soc. Servs.*, 452 U.S. 18, 31-32 (1981) (noting that,

existence of an informal nonadversary process may diminish any real need for assistance of counsel.³⁹⁹ However, because arbitrations, while perhaps less formal than litigation, are adversary proceedings, courts should generally find that prohibitions on attorney representation in mandatory binding arbitration violate the Due Process Clause.⁴⁰⁰ During an arbitration, each party presents its position and evidence to a neutral decisionmaker who renders a binding decision. Thus, in contrast to the administrative proceedings at issue in *Walters v. National Ass'n of Radiation Survivors*,⁴⁰¹ where the Supreme Court concluded that no lawyer was necessary because the Veterans Administration was not in opposition to the interests of the veterans,⁴⁰² the participation of an attorney might well be necessary in an arbitration, because of the adversarial posture of the opposing parties. Further, again in contrast to the Court's conclusion in *Walters* that the issues in dispute were generally simple,⁴⁰³ the legal and factual issues at stake in an arbitration may often be complex, so that a party would benefit greatly from the assistance of an attorney.⁴⁰⁴

iv. Right to Present Case in a Fair Geographic Forum

As discussed earlier, many private arbitration agreements specify that arbitration shall take place in a particular geographic forum.⁴⁰⁵

while there is no right to appointed counsel in every case involving a termination of parental rights, appointment of counsel may be required in certain factual situations).

399. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-25 (1985) (stating that, given informal and nonadversary nature of hearings held by Veterans Administration to determine whether veterans are entitled to service-connected disability benefits, statutory provision preventing veterans from paying their attorney more than ten dollars did not violate the Due Process Clause by denying veterans assistance of counsel).

400. Cf. Gorman, *supra* note 43, at 664 (discussing importance of allowing grievants to be represented by counsel in public law arbitration); Maltby, *supra* note 375, at 22 (stating that a fair system of justice requires opposing parties to have roughly comparable counsel).

401. 589 F. Supp. 1302 (N.D. Cal. 1984).

402. The Court rejected the district court's factual conclusion that the proceedings were in fact adversarial in nature. See *Walters*, 473 U.S. at 324 n.11; cf. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1325-27 (N.D. Cal. 1984). The Court also relied on its belief that veterans could secure expert assistance from veterans' organizations in presenting their disability claims. See *Walters*, 473 U.S. at 311. In doing so, the Court rejected the district court's conclusion that nonlawyer volunteers could not adequately represent their clients. See *Walters*, 589 F. Supp. at 1321-22.

403. See *Walters*, 473 U.S. at 323-24. But see *Walters*, 589 F. Supp. at 1310 (concluding that issues in dispute were often complex).

404. Cf. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13-14 (1979) (asserting that requiring prison parole system to become adversarial undercuts the goal of rehabilitation); *Parham v. J.R.*, 442 U.S. 584, 610 (1979) (asserting that requiring children's civil commitment process to become adversarial would undermine children's mental health).

405. See *supra* note 16 and accompanying text.

Where the parties have rough economic equality, and the forum is not clearly better for one party than the other, such forum-selection clauses are not problematic.⁴⁰⁶ Where, on the other hand, a stronger party selects a forum that will place its opponent at a geographic disadvantage, thus greatly increasing the cost of the proceeding, preference of such a clause may violate the Due Process Clause. Although the Supreme Court rejected the plaintiff's claim of geographic unfairness in *Carnival Cruise Lines, Inc. v. Shute*,⁴⁰⁷ the Court based its conclusion in part on the plaintiff's failure to make an adequate evidentiary showing of unfairness.⁴⁰⁸ The Court left open the possibility that it might, in a future case, accept a due process argument based on unfair geographic form if the plaintiff were able to make a stronger factual showing.

v. Right to Adequate Discovery

While courts will likely prove reluctant to hold that one has a constitutional right to substantial discovery, some discovery is arguably required to provide parties with a fair hearing.⁴⁰⁹ Where, for example, one party has substantially greater access to relevant witnesses and physical and documentary evidence, denying the other party any discovery will essentially deny them the opportunity to prevail in an arbitration. The Supreme Court has recognized that adequate discovery may be essential to comply with "basic considerations of fairness." In *Chicago Teachers Union Local No. 1 v. Hudson*,⁴¹⁰ the Court, assessing the constitutionality under the First Amendment of a union's procedure for allowing nonunion members to challenge their required payment of a union fee, held that the existing system was impermissible, in part because it "provided nonmembers with inadequate information about the basis for the

406. See *THE BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

407. 499 U.S. 585 (1991).

408. See *id.* at 596. Of course, as one commentator has pointed out, the Court's opinion did not address the fact that Ms. Shute had in fact submitted an affidavit stating that it would be a hardship to go to trial in Florida. See Mullenix, *supra* note 213, at 332 nn.44-46. Also left unaddressed was the fact that the plaintiffs had focused their energy in the courts below on an entirely different legal issue than that upon which the Supreme Court chose to focus. See *id.*

409. Cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (refusing to invalidate binding arbitration of federal age discrimination claim on grounds that discovery was inadequate, where New York Stock Exchange rules allowed for document production, information requests, depositions and subpoenas). See generally Gorman, *supra* note 43, at 660-64 (discussing the importance of discovery, particularly in public law disputes).

410. 475 U.S. 292 (1986).

proportionate share.”⁴¹¹ The Court explained that it was unfair to give the nonmembers the burden of proof of showing that the fee was inappropriate while “[l]eaving the nonunion employees in the dark about the source of the figure.”⁴¹²

It can similarly be argued that forcing plaintiffs to carry the burden of proof on a highly factual claim where the defendant is likely to possess most of the relevant information⁴¹³ would be unfair and violate the Due Process Clause.⁴¹⁴ In fact, the Court’s *Gilmer* decision, refusing to block arbitration where it found that the plaintiff had failed to show that discovery was inadequate, implies that binding arbitration might have been impermissible had the New York Stock Exchange Rules not provided for document production, information requests, depositions, and subpoenas.⁴¹⁵ While the plaintiff’s argument in *Gilmer* was based on his assertion that adequate discovery was required by the Age Discrimination in Employment Act⁴¹⁶ rather than the Constitution, the Due Process Clause ought to support a similar contention.

vi. Right to Adequate Relief

Some arbitration agreements purport to regulate substantive as well as procedural issues. They may shorten the statute of limitations, preclude the arbitrator from granting injunctive relief or punitive damages, or limit the particular claims that may and may not be

411. *Id.* at 306.

412. *Id.*; see also *Bromley v. Michigan Educ. Assoc.*, 82 F.3d 686, 695 (6th Cir. 1996) (noting that the district court abused its discretion in relying on arbitral award to reject the plaintiffs’ claim of violation of their First Amendment rights without first granting the plaintiffs adequate discovery), *cert. denied*, 117 S. Ct. 682 (1997).

413. One example of such a claim that is frequently brought in arbitration is a claim by a customer that a stock broker “churned” her account. See, e.g., *Rosen v. Waldman*, No. 93 Civ. 225 (PKL), 1993 WL 403974, at *1 (S.D.N.Y. Oct. 7, 1993). A broker engages in “churning” where she makes frequent trades in the account in order to secure hefty commissions for herself, regardless of the consequences for the customer. To prevail on such a claim, the customer would need substantial information regarding the specific trades that were made in the account, as well as the commissions received by the broker and the other trades that were available to the broker. Generally, a customer could not obtain much of this information without substantial discovery.

414. Cf. *TRIBE*, *supra* note 27, § 10-18, at 759. Tribe states:

[I]t would be surprising, and ultimately indefensible, if . . . procedural due process, equal protection, and the first amendment rights of speech and petition—were not in the end woven into a fundamental right of access to a neutral and fair tribunal in which to ventilate such claims of right as one may have under the governing body of substantive law.

Id.

415. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

416. See *id.*

litigated.⁴¹⁷ Where such clauses are biased and unfair, they may be unconstitutional. The Supreme Court has held that the Due Process Clause prohibits certain standards of proof⁴¹⁸ and unreasonably short statutes of limitations.⁴¹⁹ With respect to arbitration, Judge Posner, writing for the Seventh Circuit in *Parrett v. Connersville*,⁴²⁰ held that, while binding arbitration agreements may generally be constitutional, they may also be unconstitutional where they deny the arbitrator the power either to award full common-law damages or to grant injunctive relief to prevent harm from occurring to the grievant.⁴²¹ Courts should apply this same reasoning where one powerful private party uses an arbitration agreement to secure an unfair advantage over its weaker or more ignorant opponent by substantially shortening the statute of limitations or eliminating the right to secure certain types of relief.⁴²²

vii. Right to a Decision

In the litigation and administrative contexts, courts have held that parties are entitled to know something about the basis of a decision rendered in their dispute.⁴²³ While few, if any, would argue that the

417. See *supra* notes 134-140 and accompanying text.

418. See *Santosky v. Kramer*, 455 U.S. 745, 756-58 (1982) (stating that the "clear and convincing" standard must be used in determining whether parental rights should be terminated due to neglect); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (stating that the "clear and convincing" test is sufficient to support a person's involuntary civil commitment).

419. See *Pickett v. Brown*, 462 U.S. 1, 18 (1983) (holding that a two-year statute of limitations violated the Fourteenth Amendment); *Mills v. Habluetzel*, 456 U.S. 91, 100-01 (1982) (holding a one-year statute of limitation violative of the Fourteenth Amendment).

420. 737 F.2d 690 (7th Cir. 1984).

421. See *id.* at 697. *Parrett* involved a police officer who claimed that he was removed from his job in violation of the Due Process Clause and the First Amendment. When the claim was taken to arbitration, pursuant to a collective bargaining agreement, the arbitrator refused to consider certain evidence and also failed to inform the grievant of this decision in a timely fashion. See *id.* The Seventh Circuit held that this decision, combined with the arbitrator's lack of authority to award any relief beyond certain lost pay, failed to satisfy the requirements of due process. See *id.*

422. See, e.g., *Graham Oil v. Arco Prods. Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (voiding arbitration agreement that precluded the plaintiff from recovering exemplary damages or attorneys' fees that would have been available in court action); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997) (holding unconscionable arbitration agreements which precluded employee from recovering any but actual damages).

423. See, e.g., *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962) (determining that the Interstate Commerce Commission's lack of enunciated findings inhibited judicial review and violated the Administrative Procedure Act); cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-33 (1991) (refusing to invalidate arbitration of federal statutory age discrimination claim, where New York Stock Exchange rules required arbitrators to issue written decisions summarizing the issues and describing the award and where these awards were required to be made public). See generally Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982) (articulating constitutional right to obtain reasoned decisions).

Due Process Clause requires arbitrators to draft lengthy opinions summarizing their legal and factual conclusions, a good argument can be made that parties are entitled to know at least something of the arbitrator's rationale. For example, where the state mandates binding arbitration through a policy favoring arbitration, and where the parties have not waived their right, arbitrators should at least be required to enunciate which claim or claims they are granting or denying and whether a sum awarded represents compensatory or punitive damages. Unless the parties are provided with some information regarding the basis for the arbitrators' decision, it will be virtually impossible for them either to appeal or to structure their future behavior to avoid legal sanctions.⁴²⁴

viii. Right to Judicial Review

Where arbitration is imposed on parties, either by an explicit statute or by a "preference" enunciated by the courts, the parties are arguably entitled to judicial review of the arbitrator's decision to ensure that the decision is adequately founded in both law and fact.⁴²⁵ While the Supreme Court has never explicitly held that the Due Process Clause requires judicial review of arbitral awards, it at least left the door open for the argument in *Thomas v. Union Carbide Agricultural Products Co.*⁴²⁶ In that case, the Court observed that, because both parties had stipulated to abandon their due process claims, the Court need not reach the question of whether the limited judicial review of an arbitral decision was sufficient to comply with the clause.⁴²⁷ The Court has also focused on judicial review in determining which agency assignments are acceptable under Article III, rejecting the deferential "clearly erroneous" standard in *Northern Pipeline*,⁴²⁸ but accepting the agency role where the agency legal

424. It might also be argued that private arbitration proceedings infringe on the public's right of access to civil as well as criminal trials. See *TRIBE*, *supra* note 27, § 12-20, at 955-63 & n.56 (arguing that lower courts have tended to uphold a right of access to civil trials). See generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (stating that the First Amendment guarantees access to criminal trials).

425. Cf. Kenneth R. Davis, *When Ignorance of the Laws is No Excuse: Judicial Review of Arbitration Award*, 45 *BUFF. L. REV.* 49 (1997) (arguing that parties should be able to select their own standard of review).

426. 473 U.S. 568, 592-93 (1985).

427. See *id.* at 592 (implying, however, that the review provided for fraud, misconduct, or misrepresentation was sufficient).

428. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85-86 (1982).

decisions were subject to de novo review and where the agency factual decisions were reviewed under a "weight of the evidence" standard.⁴²⁹

If judicial review is required of decisions by administrative agencies, surely it is required of private arbitration decisions as well, to ensure that such decisions reflect law and not merely whim or bias. In a recent and important decision, the D.C. Circuit, in *Cole v. Burns International Security Services*,⁴³⁰ found that the existence of adequate appellate review was critical to the enforceability of an arbitration clause. Specifically, the court held that an employee would be required to arbitrate his Title VII discrimination claim against his employer, pursuant to a mandatory arbitration clause, only assuming that meaningful and rigorous appellate review of the arbitrator's eventual award would be available.⁴³¹ Emphasizing that the appellate grounds listed in the FAA are not exclusive,⁴³² Judge Harry Edwards found that arbitration of statutory claims is valid "only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."⁴³³ The court made it clear that its enforcement of the arbitration clause was contingent upon the availability of such "meaningful judicial review of public law issues."⁴³⁴

While *Cole* is based on federal employment statutes, rather than on the Constitution, several courts have relied on the Constitution to require adequate appeal of arbitral decisions. The highest court in New York found that due process did entitle parties to judicial review of arbitral awards, holding that a labor arbitrator's interpretations of an

429. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852-53 (1986) (arguing that allowing agencies to determine common-law counterclaims does not violate any policy surrounding Article III); *Crowell v. Benson*, 285 U.S. 22, 45-46, 56 (1932) (recognizing danger of providing administrative agencies with final say even on factual matters); cf. *Thomas*, 473 U.S. at 592-93 (accepting administrative finding where the appellate review was more comparable to that available in arbitration, but noting that due process might have required more extensive review had the parties not waived such a claim).

430. 105 F.3d 1465 (D.C. Cir. 1997).

431. See *id.* at 1487. To support its conclusion, the D.C. Circuit relied on the Supreme Court's prior determinations that a party does not forego substantive rights by agreeing to arbitrate a statutory claim, see 105 F.3d at 1487 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 229-30 (1987)), and that judicial review of arbitral decisions is "sufficient to ensure that arbitrators comply with the requirement of the statute." *Burns*, 105 F.3d at 1487 (quoting *Gilmer*, 500 U.S. at 32 n.4, and *McMahon*, 482 U.S. at 232).

432. See *id.* at 1486.

433. *Id.* at 1487.

434. *Id.* at 1487.

existing contract must be assessed under a “substantial evidence” test and that arbitral impositions of a new contract must be examined in terms of whether the award was arbitrary or capricious or failed to meet the public interest.⁴³⁵ As well, the New Mexico Supreme Court held a statute mandating arbitration of certain employees’ discharge claims to be unconstitutional because the statute did not allow reversal of awards not supported by substantial evidence nor in accordance with law.⁴³⁶

In short, where parties have not consented to arbitration, the minimal appellate review required by the FAA is insufficient to meet due process standards.⁴³⁷ As noted earlier, the FAA requires courts to enforce arbitral awards unless they are shown to be the product of corruption, fraud, or arbitrator misconduct.⁴³⁸ Courts have interpreted these standards extremely narrowly, refusing to reverse arbitral awards that they recognized fell outside of the law or even were tarnished by fraud.⁴³⁹ Where arbitration has been mandated, courts should, at a minimum, interpret the Due Process Clause to require reversal of those arbitral awards that reflect a clear abuse of discretion.⁴⁴⁰ Courts should

435. See *Mount St. Mary’s Hosp. v. Catherwood*, 260 N.E.2d 508, 517 (N.Y. 1970). Interpreting a New York statute that mandated binding arbitration of certain labor disputes, the court found that “[d]ue process of law requires . . . that the contract imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith, but in the law and the record before him.” *Id.* at 515. It stated that, “because of due process limitations affecting compulsory arbitration, the arbitrator is necessarily circumscribed by the data or evidence to support the award made by him.” *Id.* at 516. The court found the arbitrary-and-capricious test appropriate where arbitrators write a new contract for the parties, because in that context their action is more “regulatory or quasi-legislative” and must be examined under the standards restricting undue delegation of legislative powers. See *id.* at 515-18.

436. See *Board of Educ. v. Harrell*, 822 P.2d 511, 527 (N.M. 1994).

437. In general, where parties have knowingly consented to arbitration, and thus waived their constitutional rights, they are not entitled to more judicial review than that provided by the FAA. Cf. *Flexible Mfg. Sys. Pty. v. Super Prods. Co.*, 86 F.3d 96, 100 (7th Cir. 1996) (stating that searching appellate review would transform arbitration from commercially useful alternative into burdensome extra step). However, courts may well conclude that certain substantive statutes, such as federal anti-discrimination statutes, preclude employees from waiving their right to a significant appeal. See *supra* note 172.

438. See 9 U.S.C. § 10 (1997); *supra* note 43 and accompanying text.

439. See, e.g., *DiRussa v. Dean Witter Reynolds*, 121 F.3d 818, 822-24 (2d Cir. 1997) (declining to reverse arbitrators’ refusal to grant attorney’s fees to the prevailing plaintiff in age discrimination claim, even though such fees are mandated by federal statute); *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994 (Cal. 1994) (refusing to reverse an arbitral award that all agreed far exceeded the award a court might have ordered had the case been litigated).

440. Courts may conclude that a more searching judicial review, such as a “clearly erroneous” or even “substantial evidence” standard, is required in certain circumstances, for example, where it is clear that one party has imposed arbitration on another weaker party or

also interpret the Due Process Clause to require judicial review of arbitral punitive damages awards where the protesting defendant has not consented to arbitration that precludes such review. The Supreme Court recently held that appellate courts should reverse lower courts' punitive damages awards where they are "grossly excessive,"⁴⁴¹ and this rule should apply to mandatory arbitration no less than to litigation. Where, however, the party that is challenging the punitive damages award is the party that drafted and imposed the arbitration agreement, it should not be permitted to challenge that agreement for its failure to provide sufficient appellate review of a punitive damages award.⁴⁴²

IV. CONCLUSION

While binding arbitration can be an efficient, effective, and constitutional dispute-resolution technique, we must not let its many positive aspects keep us from properly analyzing its constitutionality. Too many courts, perhaps tempted by the docket-clearing benefits of arbitration, have failed to take seriously constitutional challenges to binding arbitration, therefore failing to distinguish between those many arbitration agreements that are constitutionally legitimate and others that are not.

The key to a proper analysis of the constitutionality of binding arbitration lies in drawing appropriate factual distinctions. Whereas an arbitration agreement entered into knowingly by two businesses will generally raise no constitutional issues, an arbitration clause imposed by a business on a consumer, employee, or other weaker party, often as part of a form contract, must be viewed very differently. Rather than assume that all arbitration agreements are private and thus raise no

where the arbitrators appear lacking in expertise. However, varying the appellate standard according to the factual circumstances would probably prove to be unwieldy.

441. *BMW of North Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996) (holding unconstitutional a punitive damages award of \$2,000,000 for a defective automobile paint job when the actual damages were \$4,000); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (holding that, while procedural due process requires courts to review punitive damages awards to ensure that they do not "pose an acute danger of arbitrary deprivation of property," jury award of \$5 million in a case involving injuries sustained in an automobile accident was valid), *cert. denied*, 116 S. Ct. 1847 (1996). One court has recently ruled that the "manifest disregard" standard, already applied by courts in reviewing arbitral awards under the FAA, is sufficient to meet the due process requirement of appellate review of arbitral awards of punitive damages. See *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 138-39 (6th Cir. 1996).

442. See *Davis v. Prudential Sec. Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995) (noting that brokerage may not challenge arbitrator's award of punitive damages where brokerage drafted arbitration clause).

constitutional concerns, courts must look closely at the role of federal and state governments in imposing arbitration on unwilling parties. Where a court has relied on a governmental preference for arbitration to interpret contractual language, or where a governmental entity has been involved with the establishment or enforcement of arbitration, state action should be found. Similarly, rather than assume that all arbitration agreements represent a waiver of constitutional rights, courts should use the same four-factor test applied by the Supreme Court in other civil waiver contexts to assess whether, given the extent of notice, the relative strength of the parties, and the voluntariness and substantive fairness of the agreement, the parties have in fact waived their constitutional rights. The state may not, through legislation or judicial action or inaction, ignore the fact that arbitration agreements are waivers of constitutional rights.

If state action exists and constitutional rights have not been waived, courts must also draw careful distinctions to determine whether a party's right to present a claim to a jury or to an Article III judge has been violated. Certain carefully prescribed mandates or preferences for arbitration may well be constitutional.⁴⁴³ But, where courts apply a broad preference for arbitration to deprive federal court litigants of trial before a life-tenured judge and a jury, they may well be depriving persons of their rights under the Seventh Amendment or Article III.

Finally, in determining whether governmentally encouraged arbitration clauses comply with the Due Process Clause, the courts must also draw factual distinctions. Those agreements that are fundamentally fair and allow for adequate notice and an opportunity to be heard should be upheld. Thus, this Article by no means seeks to turn arbitration into litigation by another name. But, where one party, with governmental assistance, uses binding arbitration to secure an advantage over another weaker party, courts should refuse to enforce such agreement absent clear and legitimate waiver of the constitutional rights. In short, courts must rethink whether their well-meaning imposition of a preference for binding arbitration over litigation has

443. Recall that, if the claim asserted by the party is equitable in nature, no jury trial violation can exist. Also, if the party could not have brought a claim in federal court, even absent an arbitration agreement, then there is no violation of either Article III or the Seventh Amendment. Moreover, whereas a broad governmental requirement or preference for arbitration would be unconstitutional, it may be legitimate for a government to require or encourage arbitration of a particular narrow category of claims. *See supra* notes 337-338 and accompanying text.

not in many cases caused persons to be deprived of their constitutional rights.