HARMONIZING THE LAW IN WAIVER OF FUNDAMENTAL RIGHTS: JURY WAIVER PROVISIONS IN CONTRACTS

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[W]e must never forget, that it is a constitution we are expounding.1

I. INTRODUCTION

Courts generally consider fundamental constitutional rights as sacrosanct, requiring heightened scrutiny before allowing the right to be relinquished.2 The right to a jury trial under the Seventh Amendment to the Constitution is a long-standing tradition and unique guarantee afforded residents of the United States.3 Generally, one who seeks redress under the law has the option to request a trial by jury of one's peers for cases involving more than twenty dollars and for which the common law recognizes a right to a jury trial.4 Although the Seventh Amendment has not been “incorporated” to apply to the individual states, state constitutions generally provide for some form of the right to trial by jury.5

In an effort to avoid trial by jury, some contracting parties include jury waiver provisions.6 According to the needs of the business and the changes in law and economic conditions, the structure of the jury waiver provision changes. With the change in structure of the clause, enforcement standards also change,7 resulting in confusion in the courts and among contracting parties, and prompting controversy among the scholars.8

The terms “jury trial provision” and “jury waiver” as used in this note include any contractual waiver that results in waiver of a jury trial right. “Jury

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3 U.S. CONST. amend. VII.
4 Id. Pertinent text reads “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .” Id.
6 For a discussion of rationales for waiving jury trial rights, see infra Part III.A.
8 At the center of this controversy are Professor Stephen Ware and Professor Jean Sternlight, each advocating alternative views for conforming the analysis for enforcement of jury waiver clauses. Compare Stephen J. Ware, Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights, 67 LAW & CONTEMP. PROBS. 167 (2004), with Sternlight, supra note 7.
trial clause” will refer to a specific clause in a contract that specifically and unequivocally expresses waiver of the right.

Part II of this Note surveys the various forms that jury waivers take and the subsequent standards for enforceability. Courts divide enforcement of jury provisions according to the type of waiver, predispute or postdispute. Predispute waivers are further grouped according to their implicit and explicit construction. Courts will enforce jury waiver provisions according to the category into which the jury waiver provision falls.\(^9\) Differences in enforcement of various jury waivers place the stability and predictability of these waivers into a quagmire.

Part III briefly reviews the need for uniformity and recounts the positions taken by advocates for uniform enforcement. In the interest of judicial efficiency, constitutional integrity, and general predictability, courts must uniformly enforce jury waiver provisions. Some advocate for uniformity of enforcement of jury waivers by arguing for a blanket application of the knowing consent standard generally applied to waiver of constitutional rights.\(^10\) On the other side of the controversy are proponents for a uniform application of contract law to jury waiver provisions,\(^11\) an application that does not require knowing consent.

The analysis in Part IV compares court treatment of contractual waivers of fundamental liberties and constitutional rights with treatment of jury waiver provisions. In addition to those rights identified by other scholars,\(^12\) courts and legislatures require a knowing, voluntary, and intelligent for waiver of other fundamental rights, including waiver of parental rights through surrogacy contracts and the First Amendment right to petition the government. Principles taken from case law and statutes should be uniformly applied to contractual waiver of all fundamental rights, including the right to a jury trial. Part V concludes that a universal standard for enforcement of contractual waivers is necessary for protection of our fundamental liberties.

II. BACKGROUND

A. Types of Jury Trial Waivers

A litigant may waive the right to a jury trial either through a pre-dispute contract provision, or by waiver after a dispute arises. Post-dispute waivers may be performed according to the rules of civil procedure.\(^13\) Federal Rule 38 provides that a party may secure a jury trial by filing a jury trial demand and completing proper service on opposing parties.\(^14\) Parties may waive the right

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\(^9\) See infra Part III.
\(^10\) See Sternlight, supra note 7.
\(^11\) See Ware, supra note 8.
\(^12\) See Sternlight, supra note 7, at 678 n.40 (pointing to the requirement of a knowing, voluntary, and intelligent standard for waiver of due process rights).
by inadvertently or purposefully failing to file, or upon consent of both parties after filing the demand.15

Other post-dispute waivers are made contractually for consideration. Post-dispute jury trial waivers take several forms including releases,16 contracts not to sue,17 and plea negotiations.18 Although the form of each waiver differs and other constitutional rights are potentially involved, the effect is the same: the litigant who obtained a current right to a jury trial waived that right.

Post-dispute jury waivers between parties are enforced almost universally under a voluntary, knowing, and intelligent standard.19 This uniformity of enforcement may be due to the position of the parties once a dispute has surfaced. Parties at odds with one another are more likely to be wary of entering into agreements or relinquishing rights.20

However, parties may also opt to waive their right to trial by jury before a dispute arises in a contractual pre-dispute provision. Business entities constantly seek innovative methods to limit their liability and expense in any given transaction while simultaneously preserving predictability.21 When a dispute arises, a business entity’s best interest dictates that it be able to predictably resolve the outcome in the most economic fashion possible.22 One functional

17 See, e.g., Town of Newton v. Rumery, 480 U.S. 386 (1987) (Plaintiff agreed during criminal plea negotiations not to bring a civil suit in exchange for city dropping criminal charges. Plaintiff filed civil suit after charges were dismissed. Supreme Court held that agreement between city and Plaintiff was valid, implicitly waiving any right to jury trial plaintiff may have had prior to the agreement.).
19 “Almost universally” may be an understatement. I have uncovered no current cases which held a post-dispute release valid under other than a derivative of the knowing, voluntary, and intelligent standard. See, e.g., Rumery, 480 U.S. at 397-98. This applies to an agreement between the parties only. Some courts have explicitly stated that an inadvertent waiver under Federal Rule of Civil Procedure 38 need not be knowing, and intelligent. See, e.g., Hiotis v. Sherman Distributors of Md., Inc., 607 F. Supp. 217, 219 (D.D.C. 1984). However, in a case where a party might have made a jury trial demand and failed, Federal Rule 39 states that a federal court may use its discretion in granting such a right. Fed. R. Civ. P. 39(b). Courts typically should grant a late motion for a jury trial “in the absence of strong and compelling reasons to the contrary.” Hiotis, 607 F. Supp. at 219 (quoting Pinemont Bank v. Belk, 722 F.2d 232 (5th Cir. 1984)).
20 See David H. Taylor & Sara M. Cliffe, Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control, 35 U. Rich. L. Rev. 1085, 1085 & n.2 (2002). The authors point out that after litigation begins, parties rarely have unequal bargaining power and are much more wary of the other, rendering a dispute over the validity of a post-dispute agreement over choice of venue much easier to analyze.
method for accomplishing this task has been to avoid allowing claims to go to a jury.  

Business entities, particularly larger businesses, assume that juries are prejudiced against them and more sympathetic to a class of injured plaintiffs. Although statistics suggest that in civil suits, juries are less likely than judges or lawyers to make large awards to plaintiffs, businesses apparently prefer to follow the misperception by depending on arbitrators and judges for lower awards. In an effort to avoid jury trials, contracts often include clauses that prohibit a litigant's right to a jury trial. These contractual jury trial waivers, when enforceable, may be an effective method of eliminating the potential risks that juries present. Judicial enforcement of these jury waivers is critical to the purposes for which business employ them: predictability and economic efficiency.

Although most courts do not recognize the distinction they have created, they have divided contractual, pre-dispute jury trial waivers into two categories in analyzing whether the waivers are enforceable: explicit jury trial waivers and implicit jury trial waivers. An explicit waiver is just what it purports to be, an explicit phrase in a contract indicating that the parties agree that if a dispute should arise, they agree not to exercise the constitutional right to a jury trial (referred to herein as a "jury waiver clause"). Implicit waivers are more subtle and usually do not contain any type of language indicating that a party is waiving a constitutional right. Although enforcement of the provision effectuates a jury waiver, the direct purpose of an implicit waiver may or may not be forfeiture of a jury trial right. For example, an arbitration clause, the most common form of implicit jury waiver, typically indicates only that a dispute will be subject to arbitration and not that the party actually waives the right to a jury trial. Although some arbitration clauses explicitly waive the right to a jury trial, arbitration clauses nearly always implicitly waive the Seventh Amendment or equivalent state right to a jury trial since they remove a dispute from the jurisdiction of the courts.

23 Id. at 95-96.
27 I am not aware of any court that has knowingly made this distinction in determining whether to enforce a jury waiver provision, although some courts recognize arbitration clauses as an implicit jury waiver. E.g., Marsh v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000).
29 See, e.g., Cooper v. M.R.M Inv. Co., 367 F.3d 493, 506 (6th Cir. 2004) (loss of right to a jury trial is an obvious consequence to enforcement of an arbitration provision).
30 See, e.g., Ware, supra note 8, at 190-91 & n.147.
31 Marsh, 103 F. Supp.2d at 921-22. The Marsh court found that a Seventh Amendment right is not implicated in arbitration clauses since the right is subsequent to the federal court system having jurisdiction over the party. Id. Arbitration clauses remove the right to adjudicate a dispute through the federal forum. Id.
Enforcement of other pre-litigation agreements may also waive the right to a jury trial.\(^{32}\) Professor Stephen J. Ware\(^{33}\) points to several types of clauses and agreements that, when enforced, may have a residual effect of depriving parties of a trial by jury.\(^{34}\) His list of pre-litigation waivers of fundamental rights includes contractual waivers,\(^{35}\) forum-selection clauses, consent-to-jurisdiction clauses, as well as arbitration agreements.\(^{36}\) Other methods of waiving jury trial rights include choice of law provisions standing alone as well as choice of law provisions used in conjunction with explicit jury waiver clauses.\(^{37}\)

Arbitration clauses are the most common form of implicit jury trial waivers because every enforced arbitration clause waives a jury\(^{38}\) whereas a choice of forum clause, choice of law provision, or other implicit jury waiver may result in loss of right to jury trial.\(^{39}\) Since arbitration clauses are the most commonly enforced implicit waivers, a significant volume of case law regarding their enforcement has developed\(^{40}\) while case law analyzing the interaction between forum-selection clauses and jury waivers has not developed as fully. This inherent disparity compels the structure of this analysis to be weighted to arbitration cases.

### B. Enforcement of Jury Waiver Provisions

Most courts enforce contractual jury waivers using either a fundamental rights "knowing consent" analysis or a basic contract law approach.\(^{41}\) Although some courts diverge from these two standards,\(^{42}\) they apply the same general factors as the knowing consent standard or uphold clauses based generally on contract principles. Since knowing consent or contractual standards are utilized most often, the enforcement controversy centers around these two standards\(^{43}\) and comprise the bulk of this survey and analysis.

\(^{32}\) Ware, supra note 8, at 182-98.

\(^{33}\) Stephen J. Ware is a Professor of Law at the University of Kansas.

\(^{34}\) Ware, supra note 8, at 182-98.

\(^{35}\) Id. Professor Ware points out several forms of post-litigation agreements as well, but focuses most of his discussion on the pre-litigation waiver of constitutional rights. Id.

\(^{36}\) Id.

\(^{37}\) Smith v. Lucent Technologies, Inc., No. CIV.A.02-0481, 2004 WL 515769 (E.D. La. Mar. 16, 2004). In Smith, a contract contained a choice of law provision applying New York law as well as a jury waiver clause. In applying New York law, the court held that the jury waiver was valid as to some claims under the terms of the contract, but not to others, such as tort or contract claims not related to the agreement. Id.

\(^{38}\) See Cooper v. MRM Investment Co., 367 F.3d 493, 506 (6th Cir. 2004).

\(^{39}\) By nature, these clauses do not oust jury rights unless the chosen forum or law does not recognize a right to jury in that case. See Ware, supra note 8, at 190.

\(^{40}\) For a general survey of cases enforcing arbitration clauses see Sternlight, supra note 7, and Jean R. Sternlight, The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial, 38 U.S.F. L. Rev. 17, 26-33 (2003).

\(^{41}\) See Sternlight, supra note 7.

\(^{42}\) See Sternlight, supra note 40, at 26-33.

\(^{43}\) See, e.g., Sternlight, supra note 7, and Ware, supra note 8.

The Supreme Court has recognized that the right to a jury trial is a fundamental, constitutional right.\(^{44}\) Courts are hesitant to enforce contractual waivers of fundamental rights unless they are voluntary, knowing, intelligent and intentional or some derivative thereof.\(^{45}\) This test is a result of: 1) the application of the knowing and intelligent standard to criminal waivers;\(^{46}\) 2) the Supreme Court holding and dicta in \textit{D.H. Overmyer Co. v. Frick Co.} that the standard applied to fundamental rights;\(^{47}\) and 3) a presumption against waiver of a constitutional right.\(^{48}\)

In order to determine whether the party knowingly and voluntarily entered a jury trial waiver, a court will analyze various factors\(^{49}\) summarized by Professor Jean R. Sternlight.\(^{50}\) These factors generally include the following: 1) negotiability of the waiver; 2) conspicuousness of the waiver; 3) disparity of bargaining power between parties; and 4) business or professional experience and sophistication of the party opposing the waiver.\(^{51}\) Courts are more likely to


\(^{45}\) Although the Supreme Court has never expressly extended the criminal waiver standard of knowing, voluntary, and intelligent to civil matters, lower courts have done so consistently based on dicta in \textit{D.H. Overmyer Co. v. Frick Co.}, 405 U.S. 174, 185-86 (1972). See Doe v. Marsh, 105 F.3d 106, 111 (2d Cir. 1997) (holding that plaintiff’s knowingly and intelligently waived right to privacy); Lake James Comty. Volunteer Fire Dep’t v. Burke County, 149 F.3d 277 (4th Cir. 1998) (due process rights may be waived when knowing, voluntary, and in the public interest); Gonzalez v. County of Hildago, 489 F.2d 1043 (5th Cir. 1973) (waiver of right to notice and hearing must be knowing and intelligent). \textit{See also} Sternlight, supra note 7, at 678-79 & n.40-49.

\(^{46}\) \textit{D.H. Overmyer Co.}, 405 U.S. at 185-86.

\(^{47}\) Id.


\(^{49}\) Sternlight, supra note 7, at 680-89.

\(^{50}\) Jean R. Sternlight is the Saltman Professor of Law at the University of Nevada, Las Vegas William S. Boyd School of Law. She is also the Director of the Saltman Center for Conflict Resolution.

\(^{51}\) Professor Sternlight discusses each of these factors in a thorough analysis. Sternlight, supra note 7, at 680-89. I have repeated the factors she identified using Morgan Guar. Trust Co. v. Crane, 36 F. Supp. 2d 602 (S.D.N.Y. 1999). Using other cases, she has produced virtually the same factors including: 1) visibility and clarity of the waiver (conspicuousness); 2) knowledge and economic power of the parties in relation to each other (disparity of bargaining power); 3) voluntariness of the agreement (negotiability); and 4) fairness of the agreement (experience and sophistication of the party). Jean R. Sternlight, \textit{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}, 72 Tul. L. Rev. 1, 57-58 (1997). My research has uncovered no additional factors that courts generally consider when performing the knowing consent standard although alterations in facts may warrant additional analysis. \textit{E.g.}, Reggie Packing Co. v. Lazer’s Fin. Corp., 671 F. Supp. 571 (N.D. Ill. 1987) (uses knowing consent standard but includes analysis and explanation of successive contract holders bound by same terms of contract). However, this four-step approach has been critiqued by Professor Richard Reuben as begging the question of voluntariness. Richard C. Reuben, \textit{Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice}, 47 U.C.L.A. L. Rev. 949, 1021-22 (2000). Reuben proposes an alternative three step approach by removing the degree of voluntariness factor leaving: “(1) the visibility and clarity of the waiver . . ., (2) the general contractual environment in which the waiver was secured, and (3) the specific facts and circumstances of the
enforce negotiated and conspicuous clauses between sophisticated parties on equal footing.52

The second approach to enforcement, a contract-based approach, is also recognized by a number of courts enforcing jury waiver provisions.53 The standard for enforcement consists of basic contractual principles: the clause is presumed enforceable unless the party seeking its nullification can show the jury waiver was the result of fraud, duress, or unconscionability.54 This lower standard predictably yields enforcement of many more jury waiver provisions.

2. Enforcement of Jury Waiver Clauses

Unfortunately, enforcement of jury waiver provisions is not uniform based on either a survey of federal and state courts or based on the type of waiver.55 Courts will generally employ both of the enforcement regimes based on the type of provision before it at the moment.56 Fortunately, there is general agreement in federal courts for applying the knowing consent standard to explicit jury trial clauses in both contracts of adhesion as well as negotiated contracts.57 This general uniformity of standard is complexified, however, by a circuit split regarding who bears the burden to show the waiver was knowing and intelligent, the party seeking enforcement or the litigant vying for the jury trial right.58

State courts, in large part, follow the federal analysis for jury waiver clauses, enforcing explicit waivers that are knowing, voluntary, and intelligent.59 At least two states, however, have refused to enforce all explicit, predispute jury waivers.60 The two state supreme courts held jury waiver's per se invalid on generally the same grounds: a constitutional right is inviolate in the absence of explicit state statutes authorizing a predispute jury waiver.61 The Georgia court held all predispute jury waivers invalid because the Georgia Constitution contemplates that jury waiver would be post-dispute in open court.62 The intermediate court in California recognized that the sophisticated parties knowingly entered into the agreement containing an explicit jury waiver actual bargaining over the waiver.” Id. at 1022. The difference between the approaches is almost entirely semantic, Reuben having only generalized the factors for voluntariness rather than specifically identifying the types of considerations.

52 Sternlight, supra note 7, at 680-89.
53 Ware, supra note 8, at 197-98.
54 Id. at 170. Formation is also a requisite, but is so obvious as to evade warranting discussion.
55 Id. Professor Ware’s research indicates that contractual waivers of fundamental rights are upheld on contractual standards as often as a knowing consent standard. Id.
56 See Sternlight, supra note 7.
57 Id. at 693-94.
59 Sternlight, supra note 40, at 24-25 & n.48.
61 Grafton Partners, 116 P.3d at 485 (holding that because the California Constitution allowed waiver in civil trial only as allowed by statute and no statute allowed predispute waivers, any such waiver is invalid); Bank South, 444 S.E.2d at 800.
62 Bank South, 444 S.E.2d at 800.
The intermediate court and supreme court both concluded, however, that the California Constitution barred enforcement of the clause, or any jury trial waiver, except "in the manner to be prescribed by law." The only statute prescribing jury trial waiver "by law" included six prescribed methods for waiving the right to jury trial. The court found that it did not have the constitutional authority to recognize an additional form of waiver, and so could not enforce the explicit jury waiver clause.


Enforcement of implicit waivers has been problematic at best and otherwise quite devoid of consistency. Courts enforce implicit jury waivers other than arbitration clauses almost entirely through general contract law principles. After the Supreme Court decisions in the landmark cases of Carnival Cruise Lines, Inc. v. Shute and M/S Bremen v. Zapata Off-Shore Co., federal courts followed suit by enforcing choice of forum clauses and choice of law clauses according to the standards set out in those cases. In Carnival Cruise the Court enforced a forum-selection clause based on a reasonableness standard citing economic benefit to both cruise line and vacationer.

However, one island of implicit jury waivers that has been preserved by the Supreme Court from enforcement by contractual standards is "property deprivation cases." In D.H. Overmyer Co. v. Frick Co., the Supreme Court enforced an implicit jury waiver provision against a corporation. Several months later in Fuentes v. Shevin, the same Court refused to enforce what amounted to an implicit jury waiver against a consumer. The significant difference between the cases was the bargaining power of the parties seeking to

63 Grafton Partners, 9 Cal. Rptr. 3d at 513.
64 Id. at 514 (quoting CAL. CONST. OF 1849, art. I, § 3).
65 Id. at 516.
66 Id. at 521.
67 See Ware, supra note 8, at 188-97.
70 The Court in Carnival Cruise Lines subjected forum-selection clauses to "judicial scrutiny for fundamental fairness" including factors such as whether the clause appeared reasonable and whether parties were given notice of the clause. 499 U.S. at 595. For a survey of those cases and subsequent court decisions see John McKinley Kirby, Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute, 70 N.C. L. REV. 888 (1992).
71 Carnival Cruise Lines, 499 U.S. at 593-94.
72 Ware, supra note 8, at 182. Professor Ware analyzes Professor Sternlight's interpretation of two Supreme Court cases analyzing property deprivation cases in which a contractual waiver of due process rights could have resulted in the waiver of a jury trial. Id. See Sternlight, supra note 51, at 51; D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972) (plurality opinion).
74 Fuentes, 407 U.S. at 95.
75 Although this is just one of the factors courts typically use to determine enforceability, it is perhaps the most distinctive characteristic of the two cases. See infra notes 49-52 and accompanying text.
nullify the provision implicitly waiving a jury trial.\textsuperscript{76} Despite these proximate cases, the federal courts struggle to apply Supreme Court precedent in a meaningful or consistent manner.

Application of the law to arbitration clauses has, however, been inconsistent among federal and state courts.\textsuperscript{77} Professor Sternlight distinguishes state court’s enforcement of arbitration clauses on the basis of whether courts analyze a fundamental right to jury trial and whether the court upholds the clause.\textsuperscript{78} Courts relying on a fundamental rights analysis to reject arbitration clauses have done so with various standards including knowing and intelligent, voluntary relinquishment, and clear and unambiguous.\textsuperscript{79} Other courts analyze the fundamental jury right, but determine that the right to a jury did not arise either because the Constitution did not grant a civil jury trial right or because the right did not arise since the dispute never “invoke[d] a judicial forum.”\textsuperscript{80} Sternlight calls the latter form of reasoning “clearly circular,” indicating that the courts should use the knowing consent or fundamental rights standard to determine whether parties have knowingly selected an alternative forum.\textsuperscript{81}

Those courts which reject a knowing consent standard or derivative thereof generally apply contract principles to enforcement of implicit jury waivers.\textsuperscript{82} Professor Sternlight points out that state courts avoiding a fundamental rights analysis also generally enforce arbitration agreements under contractual standards.\textsuperscript{83} She suggests that if these courts had considered the fundamental right to a jury trial, the consent to arbitrate clauses would have been upheld in most of the cases involving sophisticated parties since the knowing consent standard presumes that businesses possess sufficient knowledge to be bound contractually.\textsuperscript{84}

Federal enforcement of arbitration clauses is generally more uniform in applying the standards to determine enforceability.\textsuperscript{85} For explicit jury trial waivers, federal courts will normally follow the fundamental rights’ “knowing consent” standard including the basic factors associated with it.\textsuperscript{86} By contrast, in predispute arbitration agreements, federal courts commonly apply a contractual analysis.\textsuperscript{87} However, some federal courts applying the contractual standard analyze at least some of the factors associated with the knowing consent standard including bargaining position of the parties, sophistication of business,

\textsuperscript{76} For a more thorough analysis of these cases, see infra notes 126-35 and accompanying text.
\textsuperscript{77} See Sternlight, supra note 7; Sternlight, supra note 40.
\textsuperscript{78} Sternlight, supra note 40, at 24-33.
\textsuperscript{79} Id. at 26-29.
\textsuperscript{80} Id. at 29-31.
\textsuperscript{81} Id. at 23.
\textsuperscript{83} Sternlight, supra note 40, at 31-33, n.90.
\textsuperscript{84} Id. at 32.
\textsuperscript{85} Sternlight, supra note 7, at 695. Professor Sternlight recognizes that some courts use the federal presumption favoring arbitration to make arbitration enforcement even more lenient than contractual enforcement principles. Id. at 696.
\textsuperscript{86} Id. at 693.
\textsuperscript{87} Id. at 695-96.
and the conspicuousness.\textsuperscript{88} Even after reviewing these factors, the courts applying a contractual standard generally reject unenforceability claims.\textsuperscript{89}

III. \textbf{THREE CHEERS FOR UNIFORMITY}

A. \textit{The Need for Uniformity}

The purpose of predispute agreements, including implicit or explicit jury waivers, is to provide the parties with the best economic, efficient, and predictable dispute resolution possible.\textsuperscript{90} These efficiency purposes of such agreements do not inherently consider the fundamental right to a jury trial as a constitutional principle, but rather as a factor to determine higher costs and level of unpredictability.\textsuperscript{91} The purpose of a choice of law provision, for example, is to employ that choice of law doctrine which will select law likely to resolve disputes in favor of the drafter.\textsuperscript{92} The general underlying rationale, at least for the drafter, is efficiency as it relates to predictability and economics and not merely to avoid a jury.\textsuperscript{93} Simply put, when a dispute arises, a business entity wants to know it is getting the best benefits of the law while preserving the stability of predicting the outcome.

Therefore, perhaps the strongest argument for uniformity is judicial consistency in applying a predictable law. In order to preserve the purpose of these pre-dispute agreements, society needs solidarity, consistency, and predictability in the law. If, for example, a corporation uses an arbitration clause in a form contract, it needs to know that it will be enforced. If it must engage in pretrial litigation to enforce the clause, costs rise. If the agreement is not upheld, the purpose has been negated and the time, research and preparation in preparing the agreement according to the law will have been wasted.

Additionally, common citizens must be able to predict court decisions in order to conform to societal expectations.\textsuperscript{94} One standard for enforcement of constitutional rights is much easier understood and much more likely to be known by the average citizen than separate standards for each type of right and various forms of waiver. Even if in the quest for uniformity, legislatures or courts determine that any contractual waiver of a jury trial is uniformly enforceable, at least such a decision would be comprehensible and functional for all segments of society.

\textsuperscript{88} Id. at 699-705.
\textsuperscript{89} Id.
\textsuperscript{90} See Taylor & Cliffe, supra note 20, at 1085-87.
\textsuperscript{91} Jury trials are often seen as more costly and unpredictable. See supra text accompanying notes 24-26.
\textsuperscript{92} See, e.g., George F. Carpinello, \textit{Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study}, 74\textit{ Marq. L. Rev.} 57, 59 (1990) (using franchise contracts as an example of how franchisors use choice of law clauses to "opt out of the protective legislation" adopted in the local jurisdiction in which the franchise is located).
Another argument for uniformity is judicial efficiency. If a court must wade through piles of inconsistent decisions to determine enforceability of a jury waiver, too much time is spent and efficiency is lost. It must take time to receive briefs on the subject, perhaps hearing argument before a decision can be made. Additionally, if a court must apply contractual standards to implicit waivers, knowing consent standards to explicit waivers, and a more lenient standard to arbitration clauses specifically, more room for error is created as is more judicial inefficiency.

B. The Controversy

Two scholars on opposite sides of the issue have called for uniformity in enforcement of jury trial waivers. Professor Jean Sternlight argues for application of the knowing consent standard to arbitration clauses in particular; Professor Stephen Ware argues to the contrary, that contractual standards should apply to all jury waiver provisions. Additional calls for consistency come from those analyzing the trend of the court. Professor David Schwartz suggests that in order for a Supreme "Court whose majority is supposed to be leading a federalism revival, if not a federalism revolution," the current state of the law—at least in arbitration clauses—is an embarrassment. His call for uniformity is, if nothing else, a call for consistency.

Despite the calls for a consistent application of federalist principles, the main arguments addressed in this Note center around principles of statutory interpretation and historical application of law. The dispute between which standard courts should consistently apply—the knowing consent standard or the contractual standard—revolve around statutory construction, including plain language and legislative history, stare decisis, and constitutional law.

1. Statutory Interpretation

The first point of contention centers around the statutory interpretation of section 2 of the FAA. The entire text reads:

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

95 See generally LeRoy L. Kondo, Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases, 2002 UCLA J.L. & TECH. 1.
96 See Sternlight, supra note 7; Sternlight, supra note 40; Sternlight, supra note 51; Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 WASH. U. L.Q. 637 (1996).
97 See Ware, supra note 8; Stephen J. Ware, Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights, 38 U.S.F. L. REV. 39 (2003).
99 See id.
a. Cannons of Statutory Construction

Professor Ware takes the position that applying a knowing and voluntary consent standard to section 2 would be inconsistent. Taking a plain language approach, he argues that by its terms, section 2 reaches "any contract" and not "any contract calling for waiver of a constitutional right."\(^{101}\) He takes the statutory construction a step further arguing that Congress excluded specific classes from the FAA, thus exhibiting its intent not to exclude contractual waivers of constitutional rights.\(^{102}\) Ware also points out that since Congress recently considered adding more exceptions to the FAA, but declined to do so, it has further expressed its intent not to exclude contractual waiver of constitutional rights.\(^{103}\)

Even tentatively construing this statutory construction argument as valid, Professor Sternlight indicates that if the courts interpret the FAA according to Professor Ware's analysis, the FAA would be unconstitutional since "Congress does not have the power to make binding arbitration agreements immune to attack under the Seventh Amendment."\(^{104}\) Sternlight points out that the real battle over which standard court should use applies mainly to contracts of adhesion since other contracts likely meet the knowing consent standard anyway.\(^{105}\) She finds no problems with applying the knowing consent standard to contractual arbitration clauses since section 2 provides for enforcement "upon such grounds as exist at law or in equity for the revocation of any contract."\(^{106}\) She contends that "[a]ny contract calling for the waiver of a constitutional right, including a jury trial right, must be examined to ensure that it is voluntary, knowing and intelligent."\(^{107}\) Thus, there would be no conflict by interpreting the FAA to include waivers of fundamental rights, so long as the courts analyzed the waiver for voluntariness.

b. Legislative History

Professor Ware calls for a continued interpretation of section 2 consistent with the current trend to enforce arbitration clauses in "sophisticated" contracts as well as contracts of adhesion.\(^{108}\) Although the legislative history indicates an awareness among legislators that the FAA may reach unsophisticated parties through form contracts, Congress did not embody this concern in the Act, an expression of intent not to exclude such contracts.\(^{109}\) He also points out that if courts required the knowing standard of consent, both sophisticated and unso-

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\(^{101}\) Ware, supra note 8, at 177.

\(^{102}\) Id. at 180. He refers to section 1 which excludes "employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2000).

\(^{103}\) Id. at 179-80 & n.75 (citing Marcia Coyle, Anti-arbitration Bills Set Off Classic Brawl, Nat'l L.J., Aug. 12, 2002, at A8).

\(^{104}\) Sternlight, supra note 7, at 718.

\(^{105}\) Id. at 728.

\(^{106}\) Id. at 718.

\(^{107}\) Id.

\(^{108}\) Id. at 717-80.

\(^{109}\) Id. at 179.

phisticated litigants could raise the concern, and not just consumer contract of
adhesion cases.110

Professor Sternlight, however argues that the legislative history of the
FAA and the judicial history of the interpretation of the Act require a knowing
and voluntary standard of consent for waiver of fundamental rights.111 Stern-
light argues that Congress never intended the FAA to be applied in adhesive
contractual situations as reflected in the legislative history.112 Additionally,
early judicial interpretation reflected the view that the Act did not apply to
unknowing consumers who possessed little information compared to the
seller.113 She buttresses this argument by pointing out that for the first thirty-
four years after its adoption, courts considered the act only applicable to federal
courts.114 Finally, the types of cases that would call attention to the disparity in
enforcing adhesion contracts under the contractual standards of the Act did not
arise until the 1980s, thus courts recognized Seventh Amendment jury trial con-
cerns until that time.115

2. Stare Decisis

The debate moves from discussion of FAA enforcement standards to
waiver of fundamental rights, both in the civil and criminal sense. Supporting
the knowing consent standard, Professor Sternlight cites criminal and civil
cases requiring various standards including “words such as knowing, voluntary,
and intentional.”116 Although the Supreme Court has never weighed in on the
issue of what standard should apply for jury trial provisions, it “has consistently
employed the 'knowing, voluntary, intentional standard' for waivers of constit-
tutional rights in the criminal context.”117 She then lists several federal court
decisions which use various derivatives of the knowing consent standard in
reviewing jury trial waivers.118 She does note, however, that the court applies
a knowing and intentional standard to waiver of the right to a jury trial.119

Professor Ware criticizes the assertion that the Supreme Court consistently
uses a knowing consent standard in the criminal context of waiving constitu-
tional rights.120 He points to several rights in the criminal context which do not
require the strict scrutiny of the knowing consent standard including the right to
avoid self-incrimination and the right to be present at one’s trial.121

110 Id. at 180.
111 Sternlight, supra note 7, at 729-30.
112 Sternlight, supra note 96, at 647-49.
113 Id. at 648.
114 Id. at 650.
115 See id. at 653-63.
116 Sternlight, supra note 7, at 678.
117 Id. at 678 n.40.
118 Id. at 678-79.
119 Sternlight, supra note 51, at 51 & n.185.
120 Ware, supra note 8, at 181.
121 Id. Professor Ware quotes Professor Sternlight conceding that courts do not always
apply the knowing consent or similar standard to all fundamental rights in the criminal con-
text. Id. Unfortunately, he notes the wrong article in which she conceded the point (the
correct citation is: Jean R. Sternlight, 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, 72 TUL. L. REV. 1, 50 n.185 (1997)), and fails to
He also distinguishes criminal constitutional rights from civil, indicating that the knowing consent standard as used in criminal law may not apply; rather the Court appears to adjudicate civil waivers using contract principles.\textsuperscript{122} To illustrate this point, Professor Ware draws on examples from several civil cases in which courts upheld implicit waivers of constitutional rights based on contract principles.\textsuperscript{123} As has been mentioned, courts generally use contract principles to enforce forum-selection clauses, consent to jurisdiction clauses, and some property deprivation cases in which jury trial or due process rights are waived.\textsuperscript{124}

Another point of contention between the two sides of the debate are the Supreme Court cases dealing most directly with the explicit issue of contractual waiver of constitutional rights. In \textit{D.H. Overmyer Co. v. Frick Co.}, the Court upheld a contractual waiver of due process rights in a cognovit.\textsuperscript{125} A cognovit allows a creditor to obtain a judgment against a debtor without notice or hearing.\textsuperscript{126} Overmyer signed the cognovit in an effort to renegotiate a loan after defaulting on the loan.\textsuperscript{127} The court “h[e]ld that Overmyer . . . voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to pre-judgment notice and hearing, and that it did so with full awareness of the legal consequences.”\textsuperscript{128} The Court noted that Overmyer was a corporation; the case did not involve unequal bargaining power; and the contract was not one of adhesion.\textsuperscript{129}

In contrast, several months later the Court refused to enforce similar contractual language between a retailer and a consumer.\textsuperscript{130} In \textit{Fuentes v. Shevin}, a form contract entitled the consumer to possession or items purchased unless she defaulted under the terms of the agreement.\textsuperscript{131} Under a claim of default, the merchant obtained a writ of replevin before the consumer received a summons or complaint.\textsuperscript{132} In rendering the possession provision unenforceable, the Court distinguished the facts from \textit{D.H. Overmyer} stating that there was no bargaining over the terms and the consumer was not made aware of the significance of the default clause.\textsuperscript{133} However, the Court refused to explicitly lay out mention that Professor Sternlight’s research indicated that courts failed to apply a knowing and intentional standard to some constitutional rights in the criminal context. Sternlight, \textit{supra} note 51, at 50 n.185. Sternlight points out that the Court has required the voluntary and intelligent standard for some rights including "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." \textit{Id.}

\textsuperscript{122} Ware, \textit{supra} note 8, at 182. Professor Ware properly attributes this argument to Edward Rubin, although he substantiates the argument using contemporary illustrations. \textit{See} Edward L. Rubin, \textit{Toward a General Theory of Waiver}, 28 U.C.L.A. L. Rev. 478 (1981).

\textsuperscript{123} Ware, \textit{supra} note 8, at 182-97.

\textsuperscript{124} \textit{See supra} text accompanying notes 32-37.

\textsuperscript{125} \textit{D.H. Overmyer Co. v. Frick Co.}, 405 U.S. 174, 187 (1972).

\textsuperscript{126} \textit{Id.} at 176.

\textsuperscript{127} \textit{Id.} at 180-81.

\textsuperscript{128} \textit{Id.} at 187.

\textsuperscript{129} \textit{Id.} at 186.

\textsuperscript{130} \textit{Fuentes v. Shevin}, 407 U.S. 67 (1972) (plurality opinion).

\textsuperscript{131} \textit{Id.} at 70.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 95.
the principles of waiver since the language in the contract did not amount to a waiver.\textsuperscript{134}

Relying on \textit{D.H. Overmyer} and \textit{Fuentes} as precedent, Professor Sternlight urges the Supreme Court to adopt the factors test\textsuperscript{135} in order to determine whether some contractual waivers are enforceable.\textsuperscript{136} Professor Ware, on the other hand, argues that the decisions in these cases have subsequently been "curtailed" by later decisions.\textsuperscript{137} He points to \textit{Mitchell v. W.T. Grant Co.} and \textit{Connecticut v. Doehr} to support this contention.\textsuperscript{138} These cases, however, deal explicitly with constitutionality of statutes allowing attachment of liens to property without a pre-deprivation hearing, and give only cursory information about lien-granting contracts.\textsuperscript{139} Additionally, the \textit{Doehr} Court renders unconstitutional the statute allowing attachment with no hearing or due process rights.\textsuperscript{140} Finally, subsequent opinions by Circuit and state courts refer not to \textit{Mitchell} or \textit{Doehr} as precedent, but to \textit{D.H. Overmyer}. Specifically, a plethora of lower court decisions cite \textit{D.H. Overmyer} as the controlling precedent for contractual waiver of constitutional rights,\textsuperscript{141} including waiver of the right to a jury trial.\textsuperscript{142}

3. Opposing Opinions

In light of the several areas of the law which apply contractual standards to enforce contractual jury trial waivers, Professor Ware concludes by arguing that the enforcement of explicit jury waivers ought to conform to the present standard for enforcing other contractual waivers.\textsuperscript{143} Doing so, he asserts, would require overruling no Supreme Court cases and very few lower court decisions.\textsuperscript{144} He states that applying the position Professor Sternlight advo-

\textsuperscript{134} Id.
\textsuperscript{135} See supra text accompanying notes 49-52.
\textsuperscript{136} Sternlight, supra note 51, at 57-58. Professor Sternlight argues that the factors laid out above should be used to determine enforceability of arbitration clauses specifically. Id.
\textsuperscript{137} Ware, supra note 8, at 184-87.
\textsuperscript{139} See Mitchell, 416 U.S. 600; \textit{Doehr}, 501 U.S. 1.
\textsuperscript{140} \textit{Doehr}, 501 U.S. at 24.
\textsuperscript{141} See, e.g., \textit{In re FRG}, Inc., 919 F.2d 850, 856 (3d Cir. 1990) (recognizing \textit{D.H. Overmyer} as the standard for waiver of constitutional rights); Eric Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1094 (3d Cir. 1988) ("[T]he waiver of constitutional rights must be voluntary, knowing, and intelligent"); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 756 (5th Cir. 1985) (knowing and voluntary standard is the proper standard for enforcement of contractual waiver of constitutional rights); Gonzalez v. Hidalgo County, 489 F.2d 1043, 1046 (5th Cir. 1973) (requiring knowing, voluntary, and intelligent standard and high burden of proof for contractual waiver of constitutional right to notice and a hearing); Davies v. Grossmant Union High Sch. Dist., 930 F.2d 1390, 1394 (Cal. 1991) (recognizing knowing, voluntary, and intelligent standard expressed in \textit{D.H. Overmyer}); \textit{cf.}, e.g., Piercy v. Heyison, 565 F.2d 854, 858-59 (3d Cir. 1977) (limiting holding of \textit{D.H. Overmyer}.
\textsuperscript{142} Nat’l Equip. Rental Ltd. v. Hendrix, 565 F.2d at 258 ("It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally.").
\textsuperscript{143} Ware, supra note 8, at 197-98. He also recognizes that perhaps different standards should apply for enforcement of jury waiver clauses and arbitration clauses, maintaining the status quo. Id. at 168 n.10.
\textsuperscript{144} Id. at 205.
cates would require: 1) overruling the holdings of the cases upholding contractual enforcement standards for forum-selection clauses and consent to jurisdiction clauses; 2) casting doubt on case law upholding property-deprivation cases involving waiver of fundamental rights; and 3) holding section 2 of the FAA unconstitutional. When the question arises, he considers it unlikely that the Supreme Court will apply a knowing consent standard to a contractual waiver of the Seventh Amendment right to a jury trial.

Professor Sternlight, on the other hand, recognizes no Supreme Court precedent that need be overruled in order to apply a knowing consent standard to waiver of a fundamental right since the question has not come before the court. Arbitration clauses would not become void or obsolete, rather companies seeking to enforce them in arms-length contracts would likely meet the knowing consent standard, while sophisticated parties seeking to enforce them in contracts of adhesion would necessarily need to restructure the clause to obtain a knowing, voluntary, and intelligent waiver. She concludes by reasserting that the right to a jury trial is a constitutionally protected right and that courts should strike arbitration clauses as unconstitutional.

IV. COMPARE FUNDAMENTAL RIGHTS

Neither the Supreme Court nor Congress has established a universal standard for enforceability of contractual waivers of fundamental civil rights. This failure has resulted in state and lower federal courts addressing these waivers using varying standards, especially in jury waiver provisions. Additionally, state legislatures have enacted contradicting statutes regarding enforcement of contractual waivers of fundamental rights. However, the treatment of fundamental rights, such as the right to petition the government and parental rights to the companionship of their children illustrate several general principles regarding fundamental rights. First, the Supreme Court precedent for enforcement

145 Id.
146 Id.
147 Sternlight, supra note 7, at 730.
148 Id. at 727-28.
149 Id. at 733.
150 I select these rights for both their similarities to and differences from the jury trial right—and because courts have ruled directly on whether these rights can be waived by contract ex ante. The right to petition the government is more like the right to a jury trial and could be described as a procedural, rather than a substantive right, although no Supreme Court decision has done so. Compare United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) (right to petition the government for redress is among the most important rights of the Bill of Rights); Franco v. Kelly, 854 F.3d 584, 588-89 (2d Cir. 1988) (right to petition the government is substantive rather than procedural); and Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407 (5th Cir. 1998) (characterizing constitutional right to jury trial as “substantive rights and procedural complications”); with Adams v. Aiken, 41 F.3d 175, 177 (4th Cir. 1994) (stating that right to a jury trial in criminal proceedings is fundamental procedural right); and Maldonado-Perez v. INS, 865 F.2d 328, 332 (5th Cir. 1989) (in deportation proceedings, alien has Fifth Amendment procedural right to petition the government). Opponents of the knowing, voluntary, and intelligent standard might try to argue that since the right to a jury trial is more procedural, courts need not give it as much protection as a procedural right. While this begs the question of whether a jury trial is purely procedural, Courts are unlikely to follow this approach since the Supreme Court, without
contractual waivers of fundamental rights is a knowing, voluntary, and intelligent standard. Second, courts will not enforce the contractual waiver when it is contrary to public policy. And third, the important right to freedom of contract is secondary to fundamental rights. These principles illustrate that the best and most practicable solution to the disparate treatment of jury waiver provisions is blanket enforcement of contractual waivers of fundamental rights through a knowing, voluntary, and intelligent standard when the waiver is not contrary to public policy.

This section illustrates these principles using judicial treatment of the enumerated constitutional right to petition as well as states’ treatment of surrogacy contracts waiving parental rights. Finally, a hypothetical elucidates the universality of these principles by applying them to a potential waiver of the right to an abortion. The illustrations and hypothetical are intended to demonstrate that the knowing, voluntary, and intelligent standard is universal for all contractual waivers of fundamental rights, including jury waiver provisions.

A. Waiver of the Right to Petition the Government for Redress

A recent example of the federal courts’ treatment of contractual waiver of a constitutional right involves the right to petition the government for redress. In Lake James Community Volunteer Fire Department, Inc. v. Burke County, the dissolution of a volunteer fire department caused concern among some citizens. Certain areas of the larger community petitioned to be included in separate fire districts, due to the inconsistency of the Lake James Fire Department. Later, Burke County contracted with a newly reorganized Lake James Fire Department for fire protection services. Due to the unreliability and problems including breach of contract in the past, the County required a clause in the contract requiring the Fire Department to consent to the previous petitions allowing certain areas of the community to remove themselves from the jurisdiction of control of the Fire Department. The contract

approaching the argument of whether a procedural right lacks substance, has correctly recognized that the right of a jury trial “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Blakely v. Washington, 542 U.S. 296, 305-06 (2004) (Sixth Amendment jury trial right in criminal cases). Even if courts recognized the jury trial right as merely procedural, neither the Constitution nor the courts have expressly characterized procedural fundamental rights as meriting less protection than a substantive right.

The right of parents to the companionship of their children, however, is a purely substantive right. However, it is not enumerated by the Constitution, but has been recognized by courts under the Due Process Clause of the Fourteenth Amendment. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400 (1923). Again, the Supreme Court has not differentiated between enumerated and unenumerated, fundamental, constitutional rights. Thus, I compare the right to a jury trial with the right to petition the government as an enumerated, potentially procedural right and then contrast it with an unenumerated, substantive right. In both cases, case law and prudence suggest using a knowing, voluntary, and intelligent standard for contractual waiver.

151 U.S. CONST. amend. I.
153 Id.
154 Id.
155 Id.
provided that any challenge in the judicial system or challenge to the legality of the "Consent Provision" of the contract would constitute a breach of contract.156

Although the Fire Department objected to the clause, it entered into the contract.157 Five months later in an effort to obtain greater jurisdiction, the Fire Department filed an action for declaratory relief requesting the court to vacate the petitions that released certain areas from the jurisdiction of the Fire Department.158 The County counter-claimed for breach of contract and defended on the ground that the Fire Department had waived its right to petition the court in the matter.159

Although the trial court held the contractual waiver void as unconstitutional, the Fourth Circuit reversed, applying a three-part test.160 In order to be enforceable, "[t]he contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest."161 The Fourth Circuit attributed this test to three Supreme Court cases including D.H. Overmyer.162 Applying the test to the facts of the case, the Circuit Court concluded that the Fire Department knew of the clause and voluntarily entered the agreement with the aid of counsel.163 Additionally, due to the previous unreliability of the Fire Department, the court concluded that the clause was not against public policy as the waiver was intended to promote dependable fire protection to those communities affected by previous difficulties.164

The test for waiving constitutional rights as applied by the Fourth Circuit is a conjunctive test inclusive of both the knowing, voluntary, and intelligent standard as well as contractual enforcement standards according to public policy. This court's use of the knowing, voluntary, and intelligent standard is just an example of the consistent trend of courts using this enforcement standard for contractual waivers of constitutional rights.165 From the standpoint of the constitutional view of the jury trial right, the different treatment for enforcement of jury waiver provisions is inexplicable.

Just as the Fourth Circuit and many other courts have interpreted D.H. Overmyer as the controlling precedent for contractual waiver of fundamental

156 Id.
157 Id.
158 Id.
159 Id. at 279-80.
160 Id. at 280-81.
161 Id.
162 D.H. Overmyer Co., v. Frick Co., 405 U.S. 174, 185 (1972). The court also cited Town of Newton v. Rumery in which prosecutors agreed to drop tampering with a witness charges against Rumery in exchange for a contractual waiver of the right to sue for violation of constitutional rights. 480 U.S. 386, 389-91 (1987). Rumery later sued, but the Supreme Court enforced the contractual waiver since it was not contrary to public policy and Rumery entered the contract voluntarily, with the aid of counsel. Id. at 394, 398. The third case is a criminal case that the Supreme Court remanded in order that the lower court might make a determination as to whether the right involved had been voluntarily waived. Johnson v. Zerbst, 304 U.S. 458, 469 (1938).
163 Lake James, 149 F.3d at 281.
164 Id. at 281-82.
165 See supra text accompanying note 142.
rights, courts should use the same standard for waiver of jury trial rights. Even if the there is an unambiguous public policy preference for enforcement of arbitration clauses, for example, this only fulfills one portion of the test for waiver. No Supreme Court precedent has held that public policy can overcome the knowing, voluntary, and intelligent standard for waiver of a constitutional right.

Additionally, the treatment of contractual waivers illustrates that the important interest of freedom of contract is inferior to fundamental rights.\textsuperscript{166} Since the \textit{Lochner} era,\textsuperscript{167} courts have continually diminished the freedom of the right to contract.\textsuperscript{168} Courts dealing with waivers other than a jury waiver provision treat fundamental rights as more important than enforcing contractual provisions. \textit{Lake James} is just one example of many where the right to contract beholds to a more strict standard than normal contractual enforcement principles.\textsuperscript{169} Treatment of jury waiver provisions as different from other fundamental rights, in fact as subordinate to the "important interest" of freedom of contract, is an unjustified reversion to \textit{Lochner}.

Constitutional jury trial rights should be treated the same as other fundamental rights such as the right to petition the government. By enforcing jury waiver provisions under other standards, courts are ignoring Supreme Court precedent and confounding the issue.

\section*{B. Waiver of Parental Rights}

Parental rights are another good illustration of the principles of contractual waiver of a fundamental right. Certainly there are many differences between parental rights and the right to trial by jury.\textsuperscript{170} However, for the purpose of analogy, this section draws comparisons between the rights as fundamental rights reserved to individuals under the Constitution. Both general analogies to the broad principles underlying waiver of parental rights and specific examples of waiver illustrate that relinquishment of fundamental rights should be limited to a knowing, voluntary, and intelligent standard.


\textsuperscript{167} \textit{Lochner} v. New York, 198 U.S. 45 (1905).


\textsuperscript{169} See supra text accompanying note 142.

\textsuperscript{170} For a discussion of the differences, see supra note 150.
I. Historical Perspective of Parental Rights in Adoption and Surrogacy Contracts

The Supreme Court has recognized the fundamental nature of the right of parents to raise their children since 1923.\textsuperscript{171} Since \textit{Meyer}, the Supreme Court has decided a litany of cases supporting parents’ fundamental rights regarding procreation and child rearing under the protection of the due process clause of the Fourteenth Amendment.\textsuperscript{172} Although recently this liberty been subjected to contractual waiver through the use of surrogacy contracts,\textsuperscript{173} waiver of parental rights through adoption proceedings has been extant for much longer.\textsuperscript{174} Although the Supreme Court has never ruled on the constitutionality of surrogacy contracts, state and federal courts’ treatment of this important liberty should mirror that of other fundamental rights.

Infertile couples who are not able to adopt children are most likely to enter into a surrogacy contract. These couples contract with a surrogate mother to be artificially inseminated with the husband’s sperm or a fertilized zygote. The surrogate mother agrees to carry the baby to term, give birth, and relinquish any parental rights that would have been realized.\textsuperscript{175} Occasionally, however, the birth mother may attempt to rescind her waiver of parental rights under the contract and keep the baby.\textsuperscript{176}

Although controversy surrounding surrogacy contracts involve more than waiver of a constitutional right,\textsuperscript{177} much of the controversy regarding these agreements has been on the enforceability of the contract with respect to the waiver of parental rights prior to the birth of the child. Historically, all fifty states had adoption statutes prohibiting the birth mother from giving consent to the adoption prior to the birth of the baby.\textsuperscript{178} While the standard for such waivers remains a derivative of the knowing, voluntary, and intelligent standard,\textsuperscript{179} recently, at least five states have adopted legislation allowing enforce-
ment of surrogate contracts regardless of when the surrogate mother consented to waive her parental rights to the child. Other states have statutorily rejected enforcement of surrogacy contracts completely, including Arizona, Michigan, New York, North Dakota, and Utah. Still other states have left enforcement up to the courts based on applicable adoption statutes and constitutional provisions. Many court decisions render the contract unenforceable based on the principle that a surrogate mother may not waive her parental rights prior to the birth of the child.

In one case, Petitioner Whitehead and Respondent Stern entered into a surrogacy agreement in which Mrs. Whitehead was to be artificially inseminated with Mr. Stern’s sperm. The litigants agreed that Whitehead would carry the baby to term and thereafter terminate her parental rights, delivering the baby to Mr. Stern.

Whitehead appealed the decision of a trial level court which terminated her parental rights under enforcement of a surrogacy contract, claiming that enforcement violated “her constitutional right to the companionship of her child.” On appeal, the Supreme Court of New Jersey held that the contract was invalid under both the statutes of the State of New Jersey and according to public policy. Under the statutory scheme, the court noted, inter alia, that “[c]ontractual surrender of parental rights is not provided for in our statutes as now written.”

The New Jersey Supreme Court found that Whitehead could not make a voluntary and informed decision since a decision to waive parental (constitutional) rights prior to the birth of a baby is “uninformed, and . . . compelled by a preexisting contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment.” This is true even when the waiver is “knowing, voluntary and deliberat[e].”

The court goes on to suggest that consent is irrelevant in relation to contractual waiver of fundamental rights. The court then lists several rights, which cannot be purchased via contract. Employers, for example, cannot: contract to buy labor below a certain price; buy women’s labor for less than men’s

180 FLA. STAT. ch. 742.15 (1997); 750 ILL. COMP. STAT. 47/25 (West 2005); NEV. REV. STAT. 126.045 (2004); N.H REV. STAT. ANN. § 168-B:16 (2001); VA. CODE ANN. § 20-160 (Michie 2004).


183 Baby M, 537 A.2d at 1235.

184 Id.

185 Id. at 1238.

186 Id. at 1240.

187 Id. at 1245.

188 Id. at 1248.


190 Baby M, 537 A.2d at 1249.
for the same job; enlist children to work at oppressive labor; purchase the agreement of laborers to work under unsafe, unhealthful conditions. "There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life."

This discussion occurs before the court reaches the constitutionality of the contract. Although the court spends substantial discussion on the direct issue of whether an individual may contractually waive constitutional parental rights, it avoids deciding the case on this basis, preferring the clear statutory construction and public policy instead. In the constitutional analysis, however, the court notes that to grant Mr. Stern the constitutional right of procreation and custody of Baby M "would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation."

2. Comparison of Waiver of Parental vs. Jury Trial Rights

The most obvious analogy between parental rights and jury trial rights is that recognition of these rights is linked directly to the Constitution. The right to a jury trial is guaranteed in Amendment VII, while the courts have afforded parental rights constitutional protection under the Due Process clause of Amendment XIV. Because protection of these rights is guaranteed through the Constitution, the differences in rationale behind protecting them are reduced to mere semantics. The rights should be protected equally since the Constitution does not distinguish between them. The standard for protection of jury trial rights should be the same as that which courts and legislatures use for parental rights, a knowing, informed, and intelligent consent to such a waiver.

Using the facts of Baby M case and applying the knowing, voluntary, and intelligent standard coupled with public policy, the outcome of the case would not have been any different. Although the New Jersey Supreme Court did not use the knowing, voluntary, and intelligent standard to render the contract unenforceable, it did so on public policy grounds.

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

Thus, public policy would continue to protect the rights of the mother prior to the actual birth of the child. However, upon the birth of the child, public policy dictates that allowance is made for the surrogacy contract. At that time, the scales tip, and a knowing, voluntary, and intelligent waiver of parental rights becomes a valid consent. Therefore, using D.H. Overmyer as Supreme Court precedent controlling contractual waivers of parental rights is a functional and practicable method for enforcement.

191 Id.
192 Id.
193 Id. at 1255.
194 Id. at 1254.
195 See supra text accompanying note 171.
196 Baby M, 537 A.2d at 1250.
Surrogacy cases also illustrate that fundamental rights remain superior to the right to contract. The only states that have allowed enforcement of contractual terms in surrogacy contracts signed prior to the birth of the child have done so under a very strict knowing, voluntary, and intelligent standard. Additionally, most courts refused to enforce pre-birth surrogacy contracts regardless of the conditions under which the parties entered the contracts. As one court puts it:

Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby’s birth is, in the most important sense, uninformed, and any decision after that, compelled by a preexisting contractual commitment [and] the threat of a lawsuit... Her interests are of little concern to those who controlled this transaction.

These same principles can be applied to a jury trial waiver. First, individuals who enter adhesion contracts never make a “voluntary, informed decision.” Especially in consumer contracts of adhesion, most individuals do not make an informed decision, so their agreement to the terms can hardly be characterized as “intelligent.”

Additionally, once the right to exercise a jury trial right does arise, the party is “compelled by a preexisting contractual commitment” to avoid the jury trial. Thus, the at least some of the same public policy reasons for avoiding performance of a surrogacy contract apply to jury waiver provisions.

Another principle illustrated by surrogacy contracts is evident in the ability to intelligently waive a right prior to the need to exercise that right because public policy is against it. Although courts generally will not invalidate a contract based on insufficient consideration, when an unsophisticated entity enters into a contract where a right is waived prior to the occurrence of an event that gives rise to the need to exercise the right, the value of that right is indeterminable. For an individual who does not plan to use the right to a jury trial, the right may not seem valuable at all. Then a dispute between the parties arises. Suddenly the right to a jury trial becomes very valuable, yet has been waived prior to the time for exercising the right, often without consideration. The only explanation for entering these contracts is due to lack of meaningful choice, a form of coercion, or lack of knowledge, ether of which should defeat enforcement of the contract.

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197 I am only aware of one situation in which these contracts have been upheld. This situation occurred where the surrogate mother has been artificially inseminated with the zygote of the adoptive parents. See Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

198 Baby M, 537 A.2d at 1248.

199 One scholar in particular argues that courts should look at the efficiency of the contractual term ex ante, that is at the time the parties contracted looking forward. Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. CHI. L. REV. 1203 (2003). Professor Korobkin argues that contract terms should be evaluated ex ante and declared conscionable only if they are efficient, that is “whether the benefits of a low-quality term to the seller in the form of savings in production, distribution, and sales costs exceed the value of an alternative term to potential buyers.” Id. at 1283. Additionally, he finds that “[p]roviding terms that reduce social welfare and make buyers as a class worse off than they otherwise would be is unconscionable behavior...” Id. at 1284.

This principle would not seem apply to more sophisticated parties who have performed extensive legal analyses in order to determine at least the approximate value of either waiving or securing a waiver of a jury trial. The average consumer signing a contract of adhesion has performed no such legal analysis nor indeed possesses the resources to do so. Even on the off chance that the individual had the resources or ability to perform a cost/benefit analysis, she would not likely have the bargaining position to negotiate for removal of the clause or consideration.

Despite these unequal positions at the time of formation, some courts enforce jury trial provisions because "[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court."\(^{201}\) If this is the premise, then the right may not be waived because prior to the need for a jury trial, the right does not exist in the same way that parental rights do not exist until there is a child.\(^ {202}\) Actually performing a knowing, voluntary, and intelligent analysis for jury trial provisions would cure the over-looked ills from enforcing waivers of constitutional rights.

C. Hypothetical Analysis: An Application

In the example provided, any implicit or explicit fundamental, constitutionally recognized right may be inserted, all to the same conclusion: Public policy requires a knowing, voluntary, and intelligent standard for enforcement of contractual waivers of fundamental rights. This is true because the consideration cannot be determined, stare decisis so requires, and fundamental liberties should not be subordinate to contractual principles.

Imagine a woman who contracts or agrees with her parents and family (or any anti-abortion entity, such as a religious organization) that she will never have an abortion. In exchange for the contract, her family gives her the car of her choice (or any imaginable consideration). Fast forward a few years and consider the following scenarios. The woman gets married and decides to have children. She and her husband find out that she is pregnant and she goes to the hospital. Complications occur during the pregnancy putting her life in jeopardy. Although her life is at risk, there is a possibility that she could carry the baby to term. Is she still held to the contract with her family? Her family is not likely to enforce the contract, but what if they did?

Take the same scenario with a different ending. Instead of getting pregnant with her husband, the woman is raped. Now can she have an abortion? Her family wants her to carry the child and give it up for adoption. Is the car, house, or whatever consideration worth waiving the right before the time for exercising it has arisen?

The issue here is whether the woman entered the contractual waiver intelligently. Can an unsophisticated party waive the right to an abortion\(^ {203}\) prior to


\(^{202}\) If this is the case, the jury waiver provisions could also be termed as unconscionable under the UCC. U.C.C. § 2-203 (2004). However, this is not an argument made today.

\(^{203}\) Roe v. Wade first recognized the fundamental right to an abortion. 410 U.S. 113 (1973).
the time to exercise that right? Undoubtedly, the right is much more precious at the moment the woman realizes her life is in jeopardy. Under the knowing, voluntary, and intelligent standard, a court could easily void the contract since no individual would intelligently contract away their life for a new car, or house, or for whatever consideration. The contract would also likely be unenforceable as a matter of public policy since society has a high interest in the lives and health of its citizens.

This hypothetical demonstrates the universality of the knowing, voluntary, and intelligent standard for enforcing contractual waivers of fundamental rights. Rather than scattered standards for enforcing contractual waivers of fundamental rights, a single standard providing greater protection makes logical sense. However, the standard must be applied to all fundamental rights, including the right to a trial by jury.

V. Conclusion

In order for there to be consistency and uniformity in the law, the Supreme Court must enforce contractual waivers of fundamental rights under a single standard. That standard has been enumerated by the Supreme Court in *D.H. Overmyer* and elaborated in subsequent cases such as *Lake James* as a knowing, voluntary, and intelligent standard. This standard is further protected by rendering the waivers unenforceable if they are contrary to public policy. This standard allows flexibility for sophisticated parties to negotiate with one another while preventing them from taking advantage of unwary citizens in contracts of adhesion.

Due to the increasing use of contracts for daily transactions, it is likely that additional waivers will be introduced into contracts, such as waiver of notice of process, etc. Perhaps sufficient protections exist today for some constitutional rights, but enforcement of some waivers of fundamental rights under lower standards sets bad precedent for the future protection of our liberties. Because our society values constitutional rights, greater protection should be afforded them than general contract principles provide.

Finally, our modern jurisprudence dictates that the right to freedom of contract is inferior to our constitutionally enumerated rights and recognized liberties under the Due Process Clause. By enforcing jury waiver provisions under contractual standards, some courts are unknowingly undermining the fabric of the Constitution. A single standard for enforcement will help prevent the unraveling of our rights.

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204 At the time of this writing, I am unaware of any case law either enforcing or rendering such a contract unenforceable.