

University of Missouri School of Law Scholarship Repository

Faculty Publications


2000

Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice

Richard C. Reuben

University of Missouri School of Law, reubenr@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>

 Part of the [Constitutional Law Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949 (2000)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

CONSTITUTIONAL GRAVITY: A UNITARY THEORY OF ALTERNATIVE DISPUTE RESOLUTION AND PUBLIC CIVIL JUSTICE

Richard C. Reuben^{*}

Under the traditional bipolar model, civil dispute resolution is generally divided into two spheres: trial, which is public in nature and therefore subject to constitutional due process, and alternative dispute resolution (ADR), which is private in nature and therefore not subject to such constraints. In this Article, Professor Richard Reuben proposes a unitary understanding of public civil dispute resolution, one that recognizes that ADR is often energized by state action and thus is constitutionally required to comply with minimal but meaningful due process standards. Depending upon the process, such standards might include the right to an impartial forum, the right to present evidence and confront adverse evidence, and a qualified right to counsel. Reuben concludes that the effect of the ADR movement should be the expansion of our concept of public civil justice, rather than its contraction through privatization.

INTRODUCTION.....	952
I. THE CURRENT BIPOLAR UNDERSTANDING: AN OVERVIEW OF MODERN CIVIL DISPUTE RESOLUTION	960
A. The Landscape of Civil Dispute Resolution.....	961
1. The Public System: Traditional Litigation	961
2. The Private System: Alternative Dispute Resolution.....	962
3. Forms of Alternative Dispute Resolution	964
a. Adjudicatory Processes: Arbitration.....	965
b. Consensual Processes: Negotiation and Mediation	967
c. Advisory Processes: An Array of Settlement Aids.....	969

^{*} Senior Research Fellow and Instructor of Law, Harvard Law School. I am very grateful to the following persons for their insights, comments, and encouragement: Janet Alexander, James J. Alfini, Scott Altman, Barbara Allen Babcock, Nora Bensahel, Lisa B. Bingham, James B. Boskey, Tom Brom, Erwin Chemerinsky, Jonathan R. Cohen, William Cohen, Marc F. Galanter, Bryant Garth, Gerald Gunther, Kimberlee K. Kovach, Jerry Mashaw, Carrie Menkel-Meadow, Robert H. Mnookin, Cliff Palefsky, Leonard L. Riskin, Charley Roberts, Nancy Rogers, Frank E.A. Sander, Jean R. Sternlight, and Katherine Van Wezel Stone. Any errors, omissions, or other shortcomings, however, are purely my responsibility. I am also thankful to the Harvard Negotiation Research Project, the Stanford Center on Conflict and Negotiation, and the William and Flora Hewlett Foundation for institutional and financial support.

B.	The Current Legal Structure of Alternative Dispute Resolution	971
1.	Court-Related Programs.....	972
2.	Contractual Alternative Dispute Resolution.....	975
a.	The Federal and State Statutory Arbitration Schemes.....	976
b.	The Revolution in Judicial Attitudes Toward Arbitration and Alternative Dispute Resolution.....	978
C.	Puzzling Inconsistencies: The Gap Between Institutional Support for Alternative Dispute Resolution and Voluntary Usage of Its Processes	981
1.	Continuing Sense of Discomfort.....	981
2.	Possible Explanations.....	983
a.	The Legitimacy Barrier.....	983
b.	The Lawyers' Standard Philosophical Map	985
3.	Contemporary Industry Standards Support This Understanding	987
D.	Conclusion: Alternative Dispute Resolution at a Crossroads	988
II.	THE LEGAL FOUNDATION FOR A UNITARY THEORY OF ALTERNATIVE DISPUTE RESOLUTION AND PUBLIC CIVIL JUSTICE: STATE ACTION.....	989
A.	The Framework for Assessing State Action	990
B.	Assessing State Action in Alternative Dispute Resolution Programs	991
1.	The Source of Alternative Dispute Resolution in State Authority.....	991
a.	Court-Related Alternative Dispute Resolution	991
b.	Contractual Arbitration	992
c.	Contractual Mediation and Other Consensual Processes.....	993
2.	Attribution of Private Conduct to the State	993
a.	Performance of a Traditional Government Function.....	994
(1)	Court-Related Alternative Dispute Resolution	996
(2)	Contractual Alternative Dispute Resolution.....	997
b.	Extent of Government Assistance and Benefits.....	999
(1)	Doctrinal Considerations	1000
(2)	Contractual Alternative Dispute Resolution	1004
(a)	Arbitration	1004
(b)	Mediation and Other Consensual Processes	1006
(3)	Court-Related Alternative Dispute Resolution	1006
c.	A Transitional Comment on <i>Shelley v. Kraemer</i>	1007

d.	Aggravation of the Injury by Incidents of Governmental Authority	1009
(1)	Harm to the Individual	1009
(2)	Harm to Society	1011
C.	Conclusion.....	1016
III.	THE EXPANSION OF PUBLIC JUSTICE: CONTRACTUAL AND CONSTITUTIONAL RIGHTS IN ALTERNATIVE DISPUTE RESOLUTION.....	1017
A.	The Approach of the Federal Arbitration Act.....	1019
B.	The Waiver of Legal Rights Under the Federal Arbitration Act and Related State Laws	1019
1.	Contractual Validity: The “Knowing and Voluntary” Standard	1019
2.	Giving Substance to Knowing and Voluntary Waivers	1020
a.	A General Rule of Construction: Voluntariness Is a Serious Inquiry	1022
b.	The Knowledge Requirement: Assessing the Visibility and Clarity of the Arbitration Agreement	1024
c.	The Voluntariness Requirement: Assessing the General and Specific Waiver Contexts	1028
3.	The Special Problem of Arbitration Clauses in Contracts of Adhesion	1030
4.	The Scope of the Waiver That Is Effected by a Valid Agreement to Arbitrate	1035
a.	The Right to Access a Public Forum	1035
b.	The Waiver of Substantive and Procedural Rights.....	1037
(1)	Substantive Rights	1037
(2)	Procedural Rights	1038
c.	Consistency of Approach	1041
C.	The Effect of Waiver: Expansion of Public Civil Justice.....	1043
IV.	CONSTITUTIONAL GRAVITY: INCORPORATING CONSTITUTIONAL DUE PROCESS INTO SEEMINGLY PRIVATE ALTERNATIVE DISPUTE RESOLUTION	1046
A.	Constitutional Gravity: The Structure of a Unitary Theory of Public Civil Justice	1047
B.	The Essence of Due Process Under a Unitary Theory: Vindication of Constitutional Values	1050
C.	The Application of a Unitary Theory of Public Civil Justice	1054
1.	Trial.....	1054
2.	Arbitration	1054
a.	The Neutrality of the Forum	1055
(1)	The Impartiality of the Arbitrator	1055
(a)	The Background of the Arbitrator	1057
i.	<i>Commonwealth Coatings</i>	1059

ii. Active, Passive, and Structural Bias	1061
iii. The Repeat Player Problem	1064
(b) The Degree of Disclosure	1067
(2) The Neutrality of the Venue.....	1070
b. A Meaningful Opportunity to Present and Confront Evidence	1073
(1) An Opportunity to Present One's Case	1073
(2) An Opportunity to Confront Adverse Evidence	1076
c. A Qualified Right to Counsel.....	1079
d. A Comment on Written and Reasoned Opinions.....	1082
(1) The Benefits of Written and Reasoned Opinions	1085
(2) The Burdens of Written and Reasoned Opinions	1086
3. Mediation.....	1091
a. The Right to a Neutral Forum.....	1091
(1) Impartiality of the Mediator.....	1091
(2) Neutrality of the Venue	1094
b. A Qualified Right to Counsel.....	1095
(1) Absence of Procedural Protections	1098
(2) Power Imbalances.....	1098
(3) The Permeability of Confidentiality	1099
(4) Advisory Processes	1100
CONCLUSION	1101

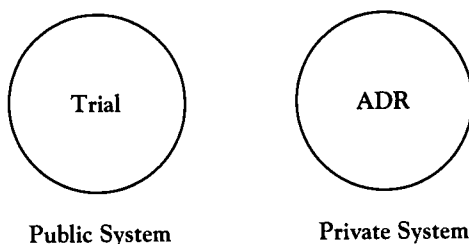
INTRODUCTION

The arrival of alternative dispute resolution (ADR) onto the modern legal landscape brings with it a challenge for the twenty-first century that is worthy of an era of millennial change: defining and ensuring the vitality of public systems of justice that are essential to the continuing consolidation of constitutional democracies. Naturally, the United States provides a most useful vehicle for analyzing the issue, but the lessons learned here certainly may be extrapolated to the developing constitutional democracies in many other countries.¹

1. Inspired in part by the end of the Cold War and the breakup of the former Soviet Union, the late twentieth century saw a dramatic expansion in the use of constitutional democracies across the globe, as nations from the Ukraine to South Africa moved away from totalitarian regimes and toward participatory democracies patterned after the United States and frequently guided by American constitutional scholars. See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE 20TH CENTURY* (1991); JUAN J. LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, AND REEQUILIBRATION* (1978); GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE*

Many have come to view ADR as “privatized justice,” the devolution of public power to private authority that is a byproduct of the downsizing of government at the close of the twentieth century. This bipolar approach is the dominant view of courts, practitioners, and legal scholars.² Under this view, disputants choose between public and private systems of dispute resolution, prompting some legal scholars to suggest that the advent of modern ADR has led to a “process pluralism” of dispute resolution choices for disputants.³ This is, of course, a positive development in light of the continuing popular dissatisfaction with the public justice system that has provided the basis for the ADR movement itself.⁴

Contemporary Understanding: A Bipolar System



But it also raises serious questions, such as whether any constitutional procedural safeguards follow the dispute to the alternative hearing. Under the bipolar approach, the answer is “no”; the hearings are strictly private. But does that mean that the parties have no enforceable due process rights whatsoever in that hearing, such as the right to an impartial adjudicator, the right to present their side of the story, or the right to counsel?

CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES (1986). It should be noted that some democracies are more participatory than others. For an argument that the mode of transition affects the type of democracy that will emerge, see Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 COMP. POL. 1, 1–8 (1990).

2. See, e.g., Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POL. & SOC'Y 367, 374 (1992); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1190 (1993); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 892 (1993); Kim Karelis, Note, *Private Justice: How Civil Litigation Is Becoming a Private Institution—The Rise of Private Dispute Centers*, 23 SW. U. L. REV. 621, 622–23 (1994); see also KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 1–32 (2000).

3. See generally Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. L. POL. & SOC'Y 393 (1992); John Lande, *The Diffusion of a Process Pluralist Ideology of Disputing: Factors Affecting Opinions of Business Lawyers and Executives* (1995) (unpublished Ph.D. dissertation, University of Wisconsin (Madison)) (on file with author).

4. See *infra* Parts I.A.2, I.B.2.b.

The mere asking of such questions suggests a dark side to ADR,⁵ and one with all-too-human faces: a group of waitresses who were told that their sexual harassment claims had to be arbitrated before a panel selected by their employer, in a private rather than a public proceeding, and without compensatory or punitive damages available as remedies;⁶ a businessman who lost his business and his life's savings when a retired judge, brought in to mediate a minor partnership dispute, instead ordered the distribution of all partnership assets;⁷ a Utah housewife who, just moments before being wheeled into serious knee surgery, was told that she must sign a mandatory arbitration agreement in order to proceed with the operation.⁸

In a recent article, I began to suggest a different understanding that may be far more consistent with the nuanced sophistication of modern ADR than the current bipolar model allows—a unitary theory of public justice that is predicated upon the recognition that a significant portion of the modern ADR movement is built upon the foundation of state action.⁹ That is, after analyzing the history of ADR, the state and federal statutory systems under which it primarily operates, and the U.S. Supreme Court's state action doctrine, I suggested that much of modern ADR may not be private at all, but rather may be public in nature and therefore subject to constitutional constraints, particularly due process, at least at some level.¹⁰ ADR programs that are operated by federal and state courts or administrative agencies provide the best example of seemingly private ADR that is more properly characterized as public dispute resolution—a particularly important realization considering Congress's massive 1998 expansion of ADR to every federal district court,¹¹ the Clinton administration's equally extensive expansion of

5. See Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53, 53–58 (citing examples of abuses in alternative dispute resolution (ADR)).

6. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999); see also *infra* notes 595–596 and accompanying text.

7. See Reuben, *supra* note 5, at 53.

8. See Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1. Remarkably, the agreement Doncene Sosa signed with Salt Lake City, Utah, surgeon Dr. Lonnie Paulos, included a provision requiring patients who won less than half the amount they sought against Dr. Paulos in a medical malpractice claim to pay the doctor both his legal fees and \$150 for every hour he spent on the case, even if he was found liable. See *Sosa v. Paulos*, 924 P.2d 357, 360 (Utah 1996).

9. See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 609–41 (1997). While the notion of a unitary theory could include criminal, administrative, and public policy dispute resolution processes, my focus in this Article is simply on civil dispute resolution between private parties.

10. See *id.*

11. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112, Stat. 2993) (codified as amended at 28 U.S.C. §§ 651–658 (1998)).

ADR in federal administrative agencies,¹² and the significant push to expand the use of ADR in state administrative agencies.¹³ A strong, but more controversial, argument can also be made that contractual arbitration is also driven by state action.¹⁴

The reasoning of that article is relatively straightforward and may be easily summarized.¹⁵ The many state and federal statutes, executive orders, and court rules that by necessity have provided the basic architecture for the modern movement have done so by establishing a structure in which public and private actors participate jointly in furthering the goal of binding dispute resolution. Public courts are actively involved in the administration, oversight, and execution of such processes in governmental ADR programs, often compelling or strongly encouraging parties into those programs, often using private neutrals to implement the programs,¹⁶ and often adopting the results of those ADR processes as their own legally binding judgments.¹⁷ The involvement of public courts is similarly woven into the fabric of the many federal and state contractual arbitration statutes that overturned the courts' historic refusal to enforce agreements to arbitrate.¹⁸ In such situations, state action would appear to be present under current doctrine, obliging compliance with constitutional safeguards for personal and property rights, at least at some level. Given the pivotal role that public courts and constitutional values play in the exercise of constitutional democracy, such an understanding may be essential to the facilitation of public confidence in the rule of law as a public institution that political scientists increasingly are recognizing as critical to the deepening and consolidation of constitutional democracies.¹⁹

12. See Executive Order 12988 (Feb. 5, 1996); Martha W. McClellan, *Coming of Age: Arbitration, Other Forms of ADR, See Massive Expansion in U.S. Agencies*, DISP. RESOL. MAG., Spring 1999, at 17. See generally Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. (forthcoming May 2000).

13. See Jennifer Gerarda Brown, *Focus Expands: ADR Spotlight Turns to State Administrative Agencies*, DISP. RESOL. MAG., Spring 1999, at 16.

14. See *infra* Parts II.B.1.b, II.B.2.b.2.a.

15. For a fuller exposition, see *infra* Part II.

16. See, e.g., Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 748–50 (1999). Most federal court programs involve court-selected attorney panels. See CENTER FOR DISPUTE SETTLEMENT, INSTITUTE OF JUDICIAL ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION Rule 6 (1992) (proposing certain rules for mediators on court rosters); ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 8 (1996); Charles Pou, Jr., 'Wheel of Fortune' or 'Singled Out?': How Rosters 'Matchmake' Mediators, DISP. RESOL. MAG., Spring 1997, at 10.

17. See *infra* Part I.B.1.

18. See *infra* Part I.B.2.b.

19. See *infra* Part II.B.2.d.2.

In sharp contrast with the bipolar approach to binding dispute resolution, then, recognizing state action in seemingly private ADR processes lays the foundation for an expanded notion of public civil justice—that is, dispute resolution that is administered and enforced by and through the public courts—rather than for its contraction through privatization.²⁰ This foundation gives rise to a unitary theory of ADR and public civil justice, which recognizes that the rise of the ADR movement at the end of the twentieth century has created, perhaps inadvertently, a unified system of public civil justice in which trial, arbitration, mediation, evaluative techniques, and other forms of ADR all operate toward the single end of binding public civil dispute resolution.²¹ In this view, trial is but one end of a spectrum of public civil dispute resolution, rather than the exclusive method.²² The Constitution, after all, certainly permits other forms of binding dispute resolution; as long as constitutional values are respected, the type of dispute resolution process can be flexible.²³ However, the fact that procedures must comply with due process when energized by state action establishes the unitary character of binding public civil dispute resolution.

In laying out a more comprehensive theory of public civil justice, this Article addresses the challenging question of just how to integrate constitutional norms into seemingly private ADR processes without destroying the very virtues that compel their use. The task seems quite daunting at first blush. ADR processes and constitutional expectations at times seem wholly antithetical. ADR results can and should sometimes be based upon standards far removed from law; constitutional processes require a more traditional and

20. Professor Richard Abel insightfully observed at the outset of the modern era of ADR that the rise of informal dispute resolution processes would actually expand the power of the state much deeper into private affairs by bringing the coercive power of the state into the domain of purely private dispute resolution. See Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 267, 270–79 (Richard L. Abel ed., 1982). For an insightful commentary rejecting the public-private distinction in the administrative law context for purposes of systemic evaluation, see Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* (forthcoming 2000).

21. To the extent that it is used, a better formulation of the acronym is “appropriate dispute resolution.” Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 *UCLA L. REV.* 1613, 1625 (1997).

22. See *infra* Part IV.A–B; see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring) (noting that the judicial model of an evidentiary hearing is neither a required nor even the most effective method of decision making in all circumstances, and that the essence of due process is the requirement that “a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it”).

23. See *id.*; see also *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (“‘Due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (citing *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 162–63 (Frankfurter, J., concurring))); Henry J. Friendly, *Some Kind of Hearing*, 123 *U. PA. L. REV.* 1267, 1277–79, 1316 (1975).

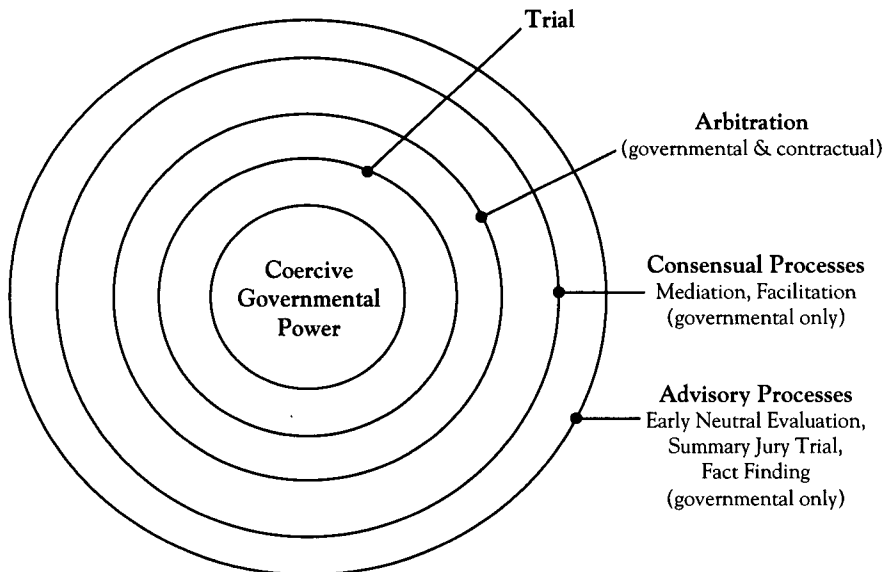
formal grounding. ADR processes are intended to be informal; constitutional processes rely on formality to facilitate fundamental fairness. ADR procedures generally operate outside of public view; constitutional procedures generally assure public witness.

I contend that despite such vastly disparate values, the incorporation of constitutional values into seemingly private ADR is achievable, necessary, and desirable. Thanks in part to the abundance of scholarly and judicial work this century on administrative and labor law, many of these questions have already been considered, yielding a wealth of resources upon which the constitutional integration may draw. The analogy between the legitimate needs of ADR and of those administrative agencies—particularly in their adjudicative capacities—is especially useful in this regard. Both are highlighted by the lower, more flexible level of constitutional compliance than that found in full-blown adjudication; this is to accommodate the tension between the need for specialized bureaucratic discretion and constitutional protection of private property and personal rights.

In the end, I argue that constitutional norms could and should be incorporated into our current ADR structure with relative ease, beginning by simply recognizing the constitutional dimension to ADR when it is present, and as something that augments and enhances our understanding of process pluralism and its still-powerful ancestor, the multidoor courthouse. Public policy strongly favors the use of binding ADR methods for resolving disputes; proper constitutional integration would compel the accommodation of the unique features of individual ADR processes that make them particularly suitable in appropriate cases. While ADR empirical research is still nascent in its scope and conclusions, researchers generally agree that parties who participate in such processes tend to approve of them.²⁴ Therefore, constitutional integration would need to be minimal but meaningful, taking care to avoid the mere recreation of the litigation system by properly respecting the unique characteristics of ADR processes. Similarly, it would need to be sensitive to the federalism issues that inevitably arise when constitutional standards are imposed on the states, and take care to ensure that the constitutional shadow cast on ADR processes reaches no further than is necessary to vindicate constitutional concerns. Finally, integration would also contribute to a more substantial foundation for public funding of governmental ADR programs than the current bipolar understanding permits.

24. See generally Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998); Lynn A. Kerbeshian, ADR: To Be Or ...?, 70 N.D. L. REV. 381, 400 (1994); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 404 (1989).

As a result, the task of constitutional integration must focus on constitutional values, take into account the differing nature and goals of the various ADR processes, and then synthesize these considerations by squaring constitutional values with ADR goals to guide the appropriate constitutional integration for each ADR process. Such an approach leads easily



Unitary System of Public Justice

to a unitary theory of ADR and public justice that recognizes constitutional force as something of a receding gravitational concept: The farther the dispute resolution process is removed from the purview of coercive governmental power, the lower the level of constitutional force, or gravity, exerted on that process. For this reason, constitutional gravity and constitutional requirements are greater in adjudicatory systems (such as litigation and arbitration) than in consensual systems (such as mediation and facilitation), or advisory systems (such as early neutral evaluation (ENE), fact finding, and SJT). So understood, public civil justice under a unitary theory might be viewed as having a solar appearance, with litigation, arbitration, mediation, and other forms of dispute resolution orbiting with receding constitutional gravitational force around the locus of coercive governmental power.

Part I provides an overview of civil dispute resolution, including the history of ADR (especially judicial treatment of agreements to arbitrate) and the rise and legal structure of modern ADR. It also identifies the gap between

high support for ADR and low actual voluntary usage and suggests that one reason may be the lack of constitutional safeguards in ADR under the current bipolar understanding of ADR as simply private justice.

Part II then explores the foundational question of whether ADR is in fact private by applying the state action doctrine, the principle mechanism by which the U.S. Supreme Court has drawn the line between public and private conduct for purposes of constitutional due process. Applying traditional state action analysis to ADR, it concludes that court-related and contractual ADR can give rise to state action when the government compels parties into procedures that either result in binding dispute resolution—traditionally an exclusive function of government—or so entangle private ADR with government action that the private ADR hearing may be fairly attributable to the state under contemporary doctrinal standards. This includes arbitration, mediation, and advisory processes that operate through courts or administrative agencies, as well as contractual arbitrations conducted under the authority of the Federal Arbitration Act of 1925 (FAA) or related state laws.

Part III focuses on contractual arbitration and addresses the relationship between contractual rights and constitutional rights. Departing from the current bipolar approach, which views a contractual agreement to arbitrate as an absolute waiver of all legal rights, it offers alternative theories of the waiver of legal rights that an agreement to arbitrate under the FAA or related state laws represents. Under one theory, the waiver is of one's right to have one's legal claims heard in a governmental decisional forum. Under the alternative theory, the waiver is of one's substantive legal rights and most, but not all, of the full panoply of procedural rights available at trial. Under either theory, the constitutional due process right to a fundamentally fair hearing is preserved in contractual arbitrations energized by state action. The standards for assessing the validity of such a waiver are unclear under current law but at a minimum require that the waiver clearly be knowing and voluntary. To give content to those terms, Part III tracks and synthesizes current doctrine in light of the particular characteristics and concerns of ADR and proposes that the knowledge and voluntariness requirements for waiver may be assessed by reference to the text of the agreement, the environment of the waiver negotiation, and a factual analysis of the actual negotiation of the waiver.

Part IV completes the portrait of the unitary theory by demonstrating how a constitutional dimension may be incorporated into seemingly private ADR in a minimal but meaningful way that both preserves and enhances those processes, while remaining faithful to the core values of the Constitution. It accomplishes this integration by squaring the unique characteristics and

concerns of the various ADR processes with those values paying particular attention to the role being played by the neutral or the government actor in light of the state action doctrine. For arbitration, these minimal but meaningful standards include the right to a neutral forum, the right to present and confront evidence, and a qualified right to counsel. For mediation, they include the right to a neutral forum and a qualified right to counsel. For advisory evaluative and fact-finding processes, they are limited to a qualified right to counsel.

Under such an approach, the incorporation of such constitutional minimums would not disturb the settled law that governs these processes or interfere with their operation. To the contrary, these constitutional minimums are, for the most part, consistent with the best practices of ADR processes and enhance the value of these ADR programs by recognizing fundamental constitutional standards, beyond mere contractual norms, that may be vindicated in the context of specific and exceptional cases. The recognition of such a modest constitutional dimension can mitigate the need for greater governmental regulation of ADR that is currently being felt at the state and national levels²⁵ and instead bring new and creative energy to our concept of public justice for this new millennium.

I. THE CURRENT BIPOLAR UNDERSTANDING: AN OVERVIEW OF MODERN CIVIL DISPUTE RESOLUTION

A unitary theory of public justice must be placed within its proper historical and contemporary contexts. Therefore, Part I lays the foundation for the discussion in Parts II, III, and IV by sketching the current legal understanding of modern ADR, first in terms of its processes (arbitration, mediation, and advisory processes), then in terms of the central routes into those processes (court order, legislative mandate, and contractual agreement), and finally in terms of the law that has arisen around those processes. I then discuss problems with the current understanding and factors that suggest a continuing discomfort with ADR.

25. See, e.g., *Symposium on Drafting a Uniform/Model Mediation Act*, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998); *Model Mediation Law Effort Begins*, DISP. RESOL. MAG., Fall 1997, at 20. For a call for states to enact comprehensive mediation legislation, see Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990).

A. The Landscape of Civil Dispute Resolution

1. The Public System: Traditional Litigation

In the traditional litigation system, the resolution of legal disputes is an adversarial adjudicatory process that generally focuses on the law and the courthouse. That is to say, disputes are legalized by the establishment of rights in constitutions, statutes, court rules, or other sources of law. Persons or entities seeking to vindicate those rights do so in a court of law according to procedures that are generally predictable, well defined, and designed to further the goals of truth seeking, fairness, and accuracy in the pursuit of justice.²⁶

In an adversarial trial process, the parties to the dispute present their versions of the facts and the law to triers of fact and law, who in turn issue a decision resolving the dispute that generally may be appealed to a higher authority.²⁷ The proceedings are conducted according to strict and intricate rules of evidence and procedure that are normally prescribed by courts or legislative bodies.²⁸ As such, litigation is highly formalized, both in its structural institutions and in the agents who engage in the process. Judges decide questions of law.²⁹ Juries (or sometimes judges) decide questions of fact to which the law will be applied.³⁰ Attorneys generally represent parties in litigation because of the technical sophistication of the process and the applicable law.³¹

Considerable dispute resolution activity can and usually does take place informally before and after the dispute is legalized by the filing of a complaint. Attorneys for both parties spend considerable time analyzing and evaluating the legal and factual merits of their cases, interviewing potential witnesses,

26. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 92–93 (3d ed. 1996). Definitions of courts and of adjudication can, of course, vary. See generally THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS (Jethro K. Lieberman ed., 1984).

27. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 7 (1985).

28. See *id.* at 462–69.

29. See *id.* at 457. This of course represents the most fundamental role of judges at trial. The judicial role in the overall process of dispute resolution is far more expansive, in part because of the rise of ADR. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

30. See FRIEDENTHAL ET AL., *supra* note 27, at 475–78, 536–39.

31. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510 (1994) (observing that “the legal system’s central institutional characteristic—litigation [by principals—] is carried out by agents”).

and marshaling arguments that may ultimately be used to persuade a trier of fact or law to rule in their favor. During this period, the two parties generally begin negotiating possible settlements in a process that is heavily influenced by the parties' analysis of their respective cases and general negotiation strategies. This process is often called "bargaining in the shadow of the law."³² While litigation is often thought of in terms of trial, most cases end at this stage in a negotiated settlement; indeed, most researchers estimate that approximately 90 to 95 percent of all disputes are resolved through negotiation and without the need for trial.³³

2. The Private System: Alternative Dispute Resolution

The public litigation process may be effective as a truth- and justice-seeking vehicle, but it certainly carries efficiency costs. While empirical research tends to repudiate popular beliefs in a litigation "crisis,"³⁴ the civil justice system nonetheless remains heavily burdened and can be expected to become even more so as law and society expand. An already sluggish civil trial process is further slowed by the gamesmanship of litigation, increasing direct costs to parties, and indirect costs to the system itself, which are reflected, for example, in higher insurance premiums and lower public confidence.³⁵ Moreover, the complexity of the process, the trauma often associated with trial, and a general dissatisfaction with the traditional legal system have led to a search for new approaches to resolving disputes.³⁶

32. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

33. See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 149, 152 (2d ed. 1992). For the seminal argument that traditional litigation and its formal alternatives are the exception rather than the rule for dispute resolution, see Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

34. For arguments that there is a crisis, see, for example, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-94 (1985) and the sources cited therein, and Robert H. Bork, *Dealing with the Overload in Article III Courts*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 150 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter THE POUND CONFERENCE]. For contrary perspectives, see Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6-7 (1986); Marc Galanter, *The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921; and Robel, *supra* note 2.

35. See Gilson & Mnookin, *supra* note 31, at 510.

36. The modern ADR movement is generally acknowledged to have been born with the Pound Conference in 1976, which was cosponsored by the American Bar Association (ABA), the Conference of Chief Justices, and the Judicial Conference of the United States. The conference invoked a speech presented to the ABA by Harvard Law School Dean Roscoe Pound on August 29, 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." See William T. Gosset et al., *Foreward* to THE POUND CONFERENCE, *supra* note 34, at 7, 7-8; see also Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty:*

The 1980s and 1990s have seen the unprecedented rise of ADR in both governmental and contractual spheres, and at both the state and the federal levels.³⁷ This movement toward more informal methods of dispute resolution may be one of the most significant developments in our system of civil justice since the advent of modern discovery in 1938, and it includes dispute resolution methods that have their source of authority in court rules and legislative, executive, and administrative mandates, as well as private contracts.³⁸

The claimed advantages of ADR are generally cast in terms of efficiency and process. The efficiency argument supporting ADR is that it is a faster and therefore less expensive process than traditional litigation—although this claim has proven difficult to document.³⁹ Process rationales suggest that ADR methods are more satisfying and more private, produce better outcomes, and contribute to a more civil society through less contentious methods of dispute resolution.⁴⁰

Perhaps not surprisingly, the perceived disadvantages of ADR are a mirror image of its strengths, at least as currently understood.⁴¹ To the extent that court formalities in part strive to equalize the power imbalances between the parties, the informal structures of ADR can serve to reinforce those imbalances.⁴² Similarly, the privatization of dispute resolution through ADR,

Fait Accompli, Failed Overture, or Fledgling Adulthood?, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–12 (1996).

37. The growth of ADR in the late twentieth century has not been formally charted. However, it may be reckoned by reference to several measures, including the expansion of court-related programs, delivery systems for contractual ADR, memberships in professional associations, academic course offerings, ADR publications and web sites, and a grudging embrace by the legal profession. For a fuller discussion, see Reuben, *supra* note 9, at 582 n.9. See also JULIANA BIRKHOFF, CONFLICT RESOLUTION SYLLABI (National Inst. for Dispute Resolution 1998); Anthony M. Aarons, *Firm Resolution: Irell & Manella's Stand-Alone ADR Center Aims to Rival AAA and JAMS*, L.A. DAILY J., Apr. 6, 1998, at A5; James B. Boskey, *The Electronic Age Comes to ADR: The Best Web Sites and Listservs*, DISP. RESOL. MAG., Winter 1997, at 25.

38. See Abel, *supra* note 20; Reuben, *supra* note 9, at 594.

39. See, e.g., JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 48–53 (RAND 1996) (arguing that arbitration, mediation, and early neutral evaluation produced no “statistically significant” reductions in time to disposition, the costs of litigation, perceptions of fairness, or client satisfaction).

40. See generally Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Robert D. Raven, *Alternative Dispute Resolution: Expanding Opportunities*, ARB. J., June 1988, at 44; William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384 (1985); Francis E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, DISP. RESOL. MAG., Summer 1997, at 12–13.

41. For an overview of critical scholarship on ADR, see generally Eric K. Yamamoto, *ADR: Where Have All the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996).

42. See, e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 136 (1983); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387–88. See generally Abel, *supra* note 20; Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333–39; Owen M. Fiss, *Against Settlement*,

and the establishment of a new and important class of entrepreneurial ADR providers,⁴³ creates a profit motive for the neutral that does not exist in the public dispute resolution system. As such, repeat players, such as employers, have been found to enjoy a significant advantage in at least some ADR processes.⁴⁴ Under the bipolar model, ADR also results in the sacrifice of constitutional and other public law rights through ADR processes, such as the rights to an attorney and to due process, the appellate process's assurance of the accurate application of public laws, and the educational value of public decision making.⁴⁵ Finally, critics would contend that all of this takes place in an environment of secrecy, in which closed doors can mask a world of mischief. For all of these reasons, whether parties can be compelled into ADR processes has been among the most pervasive and controversial issues of the ADR movement.⁴⁶

3. Forms of Alternative Dispute Resolution

There are many different forms of ADR. However, for purposes of this Article, it is helpful to divide them into three groups: adjudicatory processes (most notably arbitration), consensual processes (most notably mediation), and advisory processes (most notably early neutral evaluation).⁴⁷

93 YALE L.J. 1073 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

43. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 33-62 (1996); Anthony M. Aarons, *Packaging ADR: The Industry Is Still Searching for a Way to Make Money*, CAL. LAW., Feb. 1998, at 26.

44. See, e.g., Lisa B. Bingham, *Employment Arbitration: Differences Between Repeat and Non-Repeat Player Outcomes*, PROC. 49TH ANN. MEETING INDUS. LAB. REL. RES. ASS'N (1997) (arguing that empirical research reveals a substantial bias among employment arbitrators in favor of repeat players); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (discussing advantages of repeat players). For a more detailed discussion of repeat player issues, see *infra* notes 556-572 and accompanying text.

45. See generally Fiss, *supra* note 42, at 1085; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (arguing that settlement most often reduces the public's participation in dispute resolution, reduces the production of rules and precedents, and leads to an erosion of the public realm). *But cf.* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2693 (1995) (arguing that settlement can be participatory, democratic, empowering, educative, and transformative for the parties). For an argument that ADR is a more democratic process than litigation because of its potential to include more parties in the resolution of a dispute, see LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES* (1996).

46. See sources cited *supra* note 42.

47. See generally STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 7-13 (1985).

a. Adjudicatory Processes: Arbitration

Arbitration is the central adjudicatory process in ADR. Like trial, it is an adversarial process in which a third-party neutral simply decides the dispute between the parties. Unlike trial judges, however, arbitrators are generally not bound by the constraints of substantive law in either the procedures by which they conduct their hearings⁴⁸ or in the standards they use to resolve the dispute,⁴⁹ other than any specific instructions that may be delineated in court-related programs or contractual provisions. In fact, arbitrators need not—and often do not—have legal training.⁵⁰ To the contrary, they are typically selected by the parties for their subject matter expertise or personal gravitas rather than their legal acumen.

While arbitrations are far less formal than trials, they still have a very clear adjudicative structure. Each side typically has an opportunity to present witnesses and evidence and to engage in cross-examination—subject to the arbitrator's discretion or, significantly in contractual arbitration, the rules agreed upon by the parties themselves prior to the arbitration. Discovery may be available, but to a much lesser extent than in traditional litigation.⁵¹ As a result, the arbitrator's award generally may be rendered quickly on the basis of the arbitrator's professional judgment under the circumstances rather than on the basis of traditional legal norms.⁵² In contractual arbitration, the arbitrator's decision, or "award," is generally final, binding, and subject to substantive review only for errors of law or fact.⁵³ Courts may modify awards for scrivener's errors and other technical imperfections but may only vacate them upon proof of bias, fraud, misconduct, or abuse of

48. See 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION: THE LAW OF PRACTICE OF COMMERCIAL ARBITRATION § 1.01 (rev. ed. 1999) (noting that traditional rules of evidence and procedure do not apply in arbitration).

49. See FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 366–413 (4th ed. 1985).

50. See *id.* at 138–45; see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 n.18 (1974).

51. Discovery is not expressly provided for under the Federal Arbitration Act (FAA) or the Uniform Arbitration Act (UAA). However, the UAA is currently being revised by the National Conference of Commissioners on Uniform State Laws, and the proposed final draft includes provisions for an expedited discovery process. See also UNIF. ARBITRATION ACT § 17 (Proposed Revisions Mar. 2000). For a discussion of a draft of the proposal, see Timothy J. Heinsz, *Revised Uniform Arbitration Act: Discovery, Punitive Damages, Review, Attorney Fees All Get Tentative OK by NCCUSL Drafting Committee*, DISP. RESOL. MAG., Fall 1998, at 15.

52. It should, however, also be emphasized that the enormous capacity for satellite litigation can seriously diminish the cost- and time-efficiency potential of arbitration. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908 (9th Cir. 1993).

53. See 1 WILNER, *supra* note 48, at §§ 33.00–.11, 34.00–.02.

discretion by the arbitrator.⁵⁴ By contrast, court-related arbitrations are typically nonbinding because of constitutional concerns over jury trial rights.⁵⁵ Regardless of whether the arbitration is court-related or contractual, an arbitration award may be adopted by a public court and enforced as its own judgment.

The history of arbitration may be traced from antiquity⁵⁶ to the traveling crafters' guilds and merchants in medieval England,⁵⁷ the religious communities of colonial America,⁵⁸ and to some degree the maritime and commercial shipping industries. Arbitration became a more important feature of American dispute resolution with the rise of the labor movement in the late nineteenth century. Arbitration emerged as an alternative to strikes in addressing labor grievances⁵⁹ and today is included in more than 95 percent of all collective bargaining agreements⁶⁰ as the "law of the shop."⁶¹ Contractual arbitration is also common in the nonunion workplace,⁶² as well as in an increasingly wide range of consumer settings, such as banking, credit card, financial, health care, insurance, retail purchase, and communication

54. See 9 U.S.C. § 10 (1994); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280 (1997). A recent debate has emerged over whether the parties may agree to terms of judicial review in addition to those found in the FAA and the UAA. See *infra* Part IV.C.2.d.

55. See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 502-05 (1989) (arguing that because constitutional rights can be waived, the issue is not whether binding, consensual arbitration infringes on constitutional rights, but whether there was a voluntary and informed waiver).

56. See EDITH HAMILTON, GREEK MYTHOLOGY 179 (recounting the scene in which Venus, Juno, and Pallas Athene agreed to let Paris decide who was most beautiful); 1 *Corinthians* 6:1-7 (encouraging dispute arbitration).

57. See FRANCES KELLOR, ARBITRATION AND THE LEGAL PROFESSION 3 (1952); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132-34 (1934). See generally JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 71-83, 136 (1918); RODOLPHE J.A. DE SEIFE, DOMKE ON COMMERCIAL ARBITRATION: PRACTICE GUIDE §§ 2:01-:03, at 7-16 (1987).

58. See Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, ARB. J., June 1993, at 14; Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 454-55 (1984).

59. See LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK 1 (1994).

60. See GOLDBERG ET AL., *supra* note 33, at 189.

61. *McDonald v. City of W. Branch*, 466 U.S. 284, 290 (1984); *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 253 (1977); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

62. Virtually all broker-investor and employment disputes in the securities industry, for example, are decided by arbitration rather than by trial. See SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. 6, 13 (1996). For an overview of securities arbitration, see PHILIP J. HOBLIN, JR., SECURITIES ARBITRATION: PROCEDURES, STRATEGIES, CASES (2d ed. 1992); WILNER, *supra* note 48, §§ 19.10-.14.

service agreements.⁶³ Arbitration is particularly well suited for cases involving technical and related matters, cases calling simply for a distribution of resources, and cases involving small disputes that do not justify the transaction costs of more formal litigation for either party.

b. Consensual Processes: Negotiation and Mediation

Unlike adjudicatory judicial and arbitration proceedings, consensual processes call for the parties to decide the dispute themselves. This can be in the form of direct negotiation or through mediation, which is often called “facilitated negotiation.”

Direct negotiation, in which two or more parties try to work out their differences without intervention, is probably the most common method of dispute resolution. While it is easy to overlook negotiation as a means of dispute resolution, recent scholarship has more fully developed its principles and applications and has emphasized its usefulness for fundamental problem solving that can avoid many of the frailties of other dispute resolution techniques, just as it is an ongoing part of ADR processes.⁶⁴ Negotiation is often thought of as part of the litigation process, as indeed it is. However, the recognition of its character, function, goals, and process dynamics as a separate dispute resolution mechanism helps illuminate the details of the broader system of civil dispute resolution of which it is a part.⁶⁵

In mediation, a third-party neutral typically facilitates the resolution of the dispute by guiding the parties through a series of stages that may be

63. See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 1–11 (1997).

64. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981). For commentary and criticism of Fisher and Ury's work, see GOLDBERG ET AL., *supra* note 33, at 20; RICHARD N. LEBOW, *THE ART OF BARGAINING* at x (1996) (commenting that the book really represents “an awkward composite of the accommodative and competitive strategies”); Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 L. & SOC'Y REV. 341 (1987) (arguing that the legal fee structure creates disincentive to gain-sharing solutions); and James J. White, *Essay Review: The Pros and Cons of “Getting To YES,”* 34 J. LEGAL EDUC. 115, 115 (1984) (book review) (describing the book as offering “a forceful and persuasive criticism of much traditional negotiating behavior,” as well as suggesting “a variety of negotiating techniques that are both clever and likely to facilitate collective negotiation”). For more on negotiation, see generally DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* (1989); GERARD I. NIERENBERG, *THE ART OF NEGOTIATING* (1989); and HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

65. In recognizing these differences, Professor Marc Galanter once suggested a “single process of disputing in the vicinity of official tribunals,” which involves “the strategic pursuit of a settlement through mobilizing the court process.” Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984); see also *infra* Part IV.A.

summarized as contracting (agreeing upon ground rules), issue development (identifying facts, positions, etc.), working the conflict (promoting mutual understanding and developing mutually acceptable options), and closure (agreeing upon options).⁶⁶

As a method of dispute resolution, mediation's central strength lies in its communicative and transformative powers—that is, the ability of the parties, with the help of a third-party mediator, to get beyond the initial positions that defined the conflict and down to the underlying interests of the parties—as well as its powerful potential to unleash creative, integrative solutions not possible in adjudicatory decision making.⁶⁷ As such, it can be particularly effective in disputes in which the preservation of relationships is important and that allow for the consideration of options for resolution that exceed those that would be traditionally available in a court of law. While a mediation agreement can generally be enforced like any other contract,⁶⁸ and can sometimes be confirmed by a court for purposes of enforcement,⁶⁹ the process's most fundamental enforcement power comes from the fact that the parties themselves have structured and approved the agreement.

Mediation plainly is not appropriate for all disputes. A critical problem in mediation is its capacity to exacerbate power imbalances. In particular, some criticize mediation as tending to favor the economically or emotionally stronger party, or as working against the one who can least tolerate conflict or most values a harmonious resolution.⁷⁰ This may inspire some parties to settle for far less than they might obtain before a judge in a traditional adversarial setting. As one writer puts it, "compromise only is an equitable solution between equals; between unequals, it 'inevitably reproduces inequality.'"⁷¹ For this reason, for example, while mediation can be extremely effective in addressing the interest-based issues of child custody and property division in

66. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 30–35 (2d ed. 2000); CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 32–33 (1986); NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* §§ 3:01–:05 (2d ed. 1994 & Supp. 1998).

67. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (describing a view that the practice of mediation should be focused on transforming the parties and their relationship).

68. See ROGERS & MCEWEN, *supra* note 66, § 4:13; see also MINN. STAT. ANN. § 572.35 (West 1988 & Supp. 2000); *Haghighi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927 (Minn. 1998), *rev'd*, 173 F.3d 1086 (8th Cir. 1999) (construing the Minnesota statute).

69. See ROGERS & MCEWEN, *supra* note 66, § 8:02.

70. See, e.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3 (1993) (arguing that "harmony ideology" was a response to the law reform discourse of the 1960s).

71. AUERBACH, *supra* note 42, at 136.

divorce proceedings,⁷² some women's rights organizations have taken positions urging women not to mediate such disputes—and certainly not in situations in which domestic violence is or has been present.⁷³

c. Advisory Processes: An Array of Settlement Aids

Beyond arbitration and mediation, ADR also includes a broad range of techniques designed to foster settlement. That is, their primary purpose is to provide the parties and their representatives with more information that will either help narrow the negotiation gap between the parties or provide other incentives to settle the dispute without resort to adjudication. There are several variations, including principally:⁷⁴

(1) Early Neutral Evaluation. In ENE, an expert evaluator meets with the parties to analyze the case, discuss disputed issues, explore settlement possibilities, and evaluate the parties' relative chances of prevailing.⁷⁵ The neutral evaluator frequently provides a "reality check" for one or more of the parties and can be brought in privately by the parties during the negotiation process or, in certain cases, assigned by the court to provide an evaluation in a pending case.⁷⁶

(2) Summary Jury Trials. Pioneered by U.S. District Judge Thomas Lambros, the summary jury trial (SJT) is a form of court-ordered minitrial in which the parties present brief versions of their facts and legal arguments to a jury drawn from the same population as would be used in a real trial.⁷⁷

72. See generally GARY J. FRIEDMAN, *A GUIDE TO DIVORCE MEDIATION: HOW TO REACH A FAIR, LEGAL SETTLEMENT AT A FRACTION OF THE COST* (1993) (presenting firsthand divorce mediation case studies that raise issues the author addresses as a mediator); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992) (demonstrating the importance of interest-based settlements in matters of divorce).

73. See Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 58.

74. For a fuller discussion of these and other advisory processes, such as private judicial and jury trials, see LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 589–647 (2d ed. 1997).

75. See Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1488–91 (1994) (analyzing the early neutral evaluation (ENE) program in the northern district of California); see also PLAPINGER & STIENSTRA, *supra* note 16, at 50–54 (providing a district-by-district description of ADR programs in federal courts).

76. See Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 12–13 (1990); Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1317 (1998).

77. See generally Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV.

An SJT generally lasts one day and consists of the selection of six jurors to hear approximations by counsel of the expected evidence. After receiving an abbreviated charge, the jury retires with directions to render a consensus verdict. After a verdict is reached, the jury is informed that its verdict is advisory in nature and nonbinding. Again, an SJT provides the parties with a reality check by indicating how an actual jury may view their cases and opposing arguments.

(3) Minitrials. Although forms vary, the concept is similar to that of the SJT in that the parties each present their cases in truncated form to a third-party neutral who decides the dispute, though minitrials are private. While the process is adjudicatory in form, it differs from traditional adjudication in that the opinion is generally advisory and nonbinding. As such, it provides a basis for settlement discussions between the parties, which may or may not include the neutral.⁷⁸

(4) Hybrids. The permutations of ADR processes are limited only by one's imagination.⁷⁹ More than one of the foregoing ADR processes may be used to resolve individual disputes, and often several are integrated into the design of overall conflict resolution management schemes.⁸⁰

"Med/arb" is the most common hybrid form of ADR and combines mediation and arbitration into a single process. The dispute is first mediated, and if that proves unsuccessful, it moves into binding arbitration. This form

366 (1986). As to the validity of court-ordered summary jury trials, compare *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 46 (E.D. Ky. 1988) (upholding mandatory summary jury trial as a valid pretrial settlement device), with *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1988) (rejecting a mandatory summary jury trial as inconsistent with the encouragement in Rule 16 of the Federal Rules of Civil Procedure of extrajudicial procedures to facilitate settlement). As to the confidentiality of summary jury trials, see *Cincinnati Gas & Electric Co. v. General Electric Co.*, 854 F.2d 900, 905 (6th Cir. 1988) (noting that because summary jury trial is an aspect of negotiation that is traditionally private, the press has no right to attend).

78. See generally *Mini-Trials: Opportunities for Compromise*, 51 TEX. B.J. 34 (1988).

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

80. See Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOTIATION J. 353, 353 (1991); see also Ellen J. Waxman & Howard Gadlin, *A Breed Apart: An Ombudsman Serves as a Buffer Between and Among Individuals and Large Institutions*, DISP. RESOL. MAG., Summer 1998, at 21, 24. See generally CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

of dispute resolution is found in labor-management agreements and, increasingly, in consumer banking.⁸¹

While med/arb is an example of the blending of two ADR processes into a single process, conflict resolution managers often take the concept one step further, developing tiered structures in which disputes are routed through a series of stages, with a different type of dispute resolution process used at each stage. For example, unions and large construction contractors in California and a handful of other states sometimes enter into collective bargaining agreements that, in effect, partially privatize worker's compensation for specific construction projects, including the delivery of health care services and the system by which disputes arising from workplace injuries are resolved.⁸² The dispute resolution systems typically call for a four-step process, in which the dispute is handled by an ombudsman before going to mediation, arbitration, and finally, if it is still unresolved, back into the public worker's compensation system for possible trial de novo.⁸³

B. The Current Legal Structure of Alternative Dispute Resolution

While the various ADR processes I have described are often considered to be nonlegal in nature, the fact that they operate within a legalized structure begins to point to the inadequacy of the bipolar model. As noted briefly above, there are essentially three routes by which one may enter an ADR process: by court order, by legislative or administrative mandate, or by private contract. For the sake of convenience, I refer to court-ordered and legislatively or administratively mandated ADR processes as "court-related" processes, as all are ultimately implemented through the courts. Together, court-related and contractual ADR are the twin pillars supporting the modern ADR movement—and the prevailing bipolar approach to civil dispute resolution.

81. See generally Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661 (1991); Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982).

82. See DAVID I. LEVINE ET AL., *EVALUATING CARVE-OUTS IN THE CONSTRUCTION INDUSTRY* (forthcoming 2000) (manuscript at 137-49, 207-13, on file with author); Ellyn Moscovitz & Victor J. Van Bourg, *Carve-Outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1, 23-33 (1995).

83. See *id.* at 3-4.

1. Court-Related Programs

Both federal and state judicial and administrative law systems have broadly embraced a variety of ADR methods.⁸⁴ Taken together, they constitute what experts generally believe to be a substantial share of the total ADR “market” of cases and providers. However, this size, the nuanced variations in ADR programs, and the technological balkanization of the courts have combined to largely prohibit a systematic analysis of the many state and federal programs, even as a descriptive matter.

The most important descriptive effort to date was a 1996 study of ADR in the federal district courts by researchers Elizabeth Plapinger and Donna Stienstra.⁸⁵ While their work is limited to the federal sphere, it is commonly believed that the basic structure of their findings substantially mirrors the activities in state court systems—although this is plainly an area in which more empirical work is necessary.⁸⁶

Plapinger and Stienstra found that mediation is the dispute resolution method of choice in the federal district courts, with more than half of the ninety-four district courts offering—and in some instances requiring—the mediation of at least some claims in filed cases.⁸⁷ Arbitration is the next most frequently used ADR procedure in federal district courts, but it is a distant second, with only twenty courts offering the procedure (although several more authorize its use).⁸⁸ The use of ENE is rising but still is found

84. See generally COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998); PLAPINGER & STIENSTRA, *supra* note 16; Patricia M. Killingsworth, “Winning” Redefined: A Positive Approach to the Practice of Law, 12 GA. ST. U. L. REV. 653 (1996) (describing use of ADR by Georgia State Board of Workers’ Compensation); Staci J. Pratt et al., *Alternative Dispute Resolution as a Means of Addressing Agricultural Pollution*, 20 HAMLINE L. REV. 395 (1996); Senger, *supra* note 12.

85. See PLAPINGER & STIENSTRA, *supra* note 16.

86. See Lisa B. Bingham, Structure Affects Function: Context Matters in Research on Third Party Dispute Resolution, Presentation to William and Flora Hewlett Foundation Annual Meeting of Conflict Resolution Centers (Jan. 23, 1999) (unpublished manuscript, on file with author). For a discussion of research needs in the ADR field, see Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15.

87. See PLAPINGER & STIENSTRA, *supra* note 16, at 4.

88. Eighteen of the twenty federal court-related programs are statutorily authorized and congressionally funded. See 28 U.S.C. §§ 651–658 (1994). Two others offer arbitration as part of a hybrid med/arb procedure. See *id.* Moreover, interest in court-annexed arbitration programs appears to be in decline rather than ascent, as at least two courts that have required mandatory arbitration (the western district of Michigan and the western district of Missouri) have changed their programs to include arbitration as but one of a range of ADR options. Similarly, the eastern district of North Carolina has eliminated its mandatory arbitration program altogether. See PLAPINGER & STIENSTRA, *supra* note 16, at 7.

in only fourteen courts. While more than half the federal district courts authorize the use of SJTs, the usage level remains minimal at one or two cases per year.⁸⁹ Many courts offer more than one ADR option, and at least six offer a full array of ADR choices, including arbitration, mediation, ENE, and SJT.⁹⁰

Plapinger and Stienstra further report that some of these ADR programs are voluntary, others are mandatory—that is, parties must attend an ADR hearing if their case meets certain eligibility requirements, usually based on case type or size—and still others have both mandatory and voluntary components.⁹¹ However, both mandatory and voluntary programs are increasingly relying on judges to identify cases that are appropriate for ADR and to educate the parties about ADR options, although local court rules also can impose a duty upon counsel to discuss ADR options with their clients.⁹² In this regard, the settlement conference under Rule 16 of the Federal Rules of Civil Procedure has become a central mechanism by which cases are sorted and routed into ADR.⁹³ The parties are generally required to attend the ADR hearings and, in most cases, to pay for the services of the ADR neutral.⁹⁴

In most programs, the courts establish rosters of private attorney-neutrals to provide the actual ADR service, although some employ court personnel or rely upon bar associations or other private-sector ADR providers of neutrals for these services.⁹⁵ Most courts set eligibility criteria for inclusion on

89. See PLAPINGER & STIENSTRA, *supra* note 16, at 5.

90. See *id.*

91. See *id.* at 7; see also Kent Snapp, *Five Years of Random Testing Shows Early ADR Successful*, DISP. RESOL. MAG., Summer 1997, at 16.

92. See PLAPINGER & STIENSTRA, *supra* note 16, at 7–8. For a discussion and a criticism of the expansion of the judicial function, see Resnik, *supra* note 29.

93. See PLAPINGER & STIENSTRA, *supra* note 16, at 8. For a discussion of the use of Rule 16 as a mechanism for expanding court usage of ADR, and the promotion of a general “settlement culture,” see James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11, 11–12. See also Scott A. Miller, *Expanding the Federal Court’s Power to Encourage Settlement Under Rule 16: G. Heileman Brewing v. Joseph Oat*, 1990 WIS. L. REV. 1399; Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525 (1991).

94. See PLAPINGER & STIENSTRA, *supra* note 16, at 8, 10–11. In calculating rates for neutrals, the majority of courts use the market rate; others, however, set their own fee schedules, require pro bono neutral services, or require the payment of court-set fees after a certain number of pro bono sessions. See *id.* at 10.

95. See *id.* at 9. State examples of this exist. See, e.g., OKLA. STAT. tit. 27A, § 2-3-104(B) (1992) (environmental quality mediations); *id.* tit. 85, § 3.10 (worker’s compensation mediations); WIS. STAT. ANN. § 115.797(4) (West 1999); see also Philip J. Harter, *Negotiating Rules and Other Policies: Pay Close Heed to Structure for Success*, DISP. RESOL. MAG., Fall 1997, at 15.

the rosters, and many include on their rosters any person who has been certified as an ADR neutral by a bar association or state court system. As a result, many ADR neutrals simultaneously serve on the rosters of state court programs, federal court and administrative programs, private ADR brokerages, and bar association programs.⁹⁶ Similarly, many court-related programs are willing to accept neutrals trained by bar associations or private training organizations, while others insist upon conducting the training themselves or hiring and screening trainers for their programs.⁹⁷

The legal contours of these programs have not been heavily litigated, leaving many issues "resolved" only by way of momentum.⁹⁸ Most relevant for my purposes, a small handful of courts have rejected facial challenges to the validity of court-related ADR programs on a variety of constitutional grounds, including Seventh Amendment and due process challenges,⁹⁹ establishing an informal presumption of validity that few litigants even consider challenging. Similarly, a smattering of federal courts have addressed a number of collateral issues, including the immunity of ADR neutrals,¹⁰⁰ the public's right to attend ADR proceedings,¹⁰¹ and the impact on a subsequent trial of the disclosure of privileged information during a court-ordered ADR

96. See Pou, *supra* note 16, at 10 (discussing the establishment and operation of public and private sector rosters).

97. See PLAPINGER & STIENSTRA, *supra* note 16, at 9.

98. For an overview and summary of cases, see generally Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1.

99. See, e.g., *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) (finding Seventh Amendment rights to be waived by the signing of a valid arbitration agreement); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1179-81 (5th Cir. 1979) (holding that mandatory mediation of medical malpractice claims does not violate the Seventh Amendment); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 577 (E.D. Pa. 1979) (upholding a mandatory arbitration program against a Seventh Amendment challenge).

100. See, e.g., *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (holding that a neutral case evaluator in a real estate dispute was entitled to judicial immunity); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990) (holding that securities arbitrators were entitled to full judicial immunity); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982) (extending arbitral immunity to boards and agencies that sponsor arbitration); see also *Olson v. National Ass'n of Sec. Dealers (NASD)*, 85 F.3d 381, 383 (8th Cir. 1996) (holding that the NASD's appointment of an arbitrator was within the scope of the arbitral process and was protected under the immunity); *Wasy, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (holding that a third party named in a private contract to provide a valuation of assets was entitled to absolute immunity).

101. See, e.g., *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 905 (6th Cir. 1988) (stating that a summary jury trial may be ordered closed to the public because it is just part of a negotiation process).

hearing.¹⁰² Remarkably, however, the reported cases have not meaningfully addressed the substantive validity of the *operation* of ADR programs, including matters as fundamental as due process, the right to counsel, and other constitutional rights—a situation that may well change as both state and federal court-related ADR programs continue to expand.¹⁰³

2. Contractual Alternative Dispute Resolution

While court-related ADR has been the most important component of the modern ADR movement, the rise of contractual ADR has also been extremely significant.¹⁰⁴ The overwhelming majority of these arbitrations have been conducted under the authority of the FAA¹⁰⁵ and state versions of the Uniform Arbitration Act (UAA),¹⁰⁶ and these cases have by far generated the greatest body of case law and are the most significant for purposes of state action in developing a unitary theory of ADR and public civil justice. Therefore, while the “sleeping giant” of mediation and tiered dispute resolution systems continue to become more popular,¹⁰⁷ this part focuses on contractual arbitration.

102. See, e.g., *GTE Directories Serv. Corp. v. Pacific Bell Directory*, 135 F.R.D. 187, 192 (N.D. Cal. 1991) (stating that disclosure of privileged documents during an ENE session does not waive the privilege if the affected party states an intent to retain the privilege).

103. But see *Dexter v. Prudential Ins. Co.*, No. CIV.A.96-21 KHV, 1999 WL 156170, at *2–*3 (D. Kan. Mar. 17, 1999) (acknowledging the possibility of a constitutional right of confrontation in arbitration, but rejecting it under the facts of this specific case).

104. This point may be underscored by the fact that while the U.S. Supreme Court has issued many rulings on contractual arbitration under the FAA and on labor arbitration under the Labor Management Relations Act and the Railway Labor Act, the Court has not issued a single significant opinion on mediation or any other ADR process. But see *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 727–29 (1945) (recognizing, in the collective bargaining context, that arbitration and mediation are by necessity voluntary processes); *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 305 (1943) (declining to exercise jurisdiction over agreements mediated by the National Mediation Board). Moreover, the lower federal and state courts that have issued rulings on mediation and other ADR processes have often looked to the arbitration case law for analogy and guidance. See, e.g., *City and County of Denver v. District Court*, 939 P.2d 1353, 1364 (Colo. 1997) (ruling that because an ADR provision serves the same public interests in economy for the parties and judicial efficiency as an arbitration provision, it is enforceable in the same manner as an arbitration agreement).

105. See 9 U.S.C. §§ 1–16 (1994) The FAA was adopted in 1925 and was patterned after similar legislation in New York. The basic structure of these acts was later incorporated into the UAA in 1955 by the National Conference of Commissioners of Uniform State Laws and has been adopted by the overwhelming majority of states.

106. See UNIF. ARBITRATION ACT prefatory note (Proposed Revisions Oct. 1999) (observing that 35 states have adopted the UAA in full and that 14 have adopted it in substantially similar form).

107. See Reuben, *supra* note 73, at 55.

a. The Federal and State Statutory Arbitration Schemes

All fifty states and the District of Columbia have enacted specific arbitration statutes,¹⁰⁸ most patterned after either the New York Arbitration Law of 1920 and the FAA or the UAA.¹⁰⁹

These statutory schemes generally provide that written agreements to arbitrate are “valid, irrevocable, and enforceable,” except upon grounds sufficient to revoke any contract.¹¹⁰ In so doing, they set forth an integrated system of shared roles between public courts and private arbitrators that provides a shadow in which all agreements to arbitrate, and subsequent arbitrations, are entered. In uncontested cases, this shadow of the law, com-

108. See ALA. CODE § 6-6-1 (1993); ALASKA STAT. § 09.43.010 (Michie 1998); ARIZ. REV. STAT. ANN. § 12-1501 (West 1994); ARK. CODE ANN. § 16-108-201 (Michie Supp. 1999); CAL. CIV. PROC. CODE § 1281 (West 1999); COLO. REV. STAT. ANN. § 13-22-203 (West 1999); CONN. GEN. STAT. ANN. § 52-408 (West 1991); DEL. CODE ANN. tit. 10, § 5701 (1975); D.C. CODE ANN. § 16-4301 (1981); FLA. STAT. ANN. §§ 682.02, 684.02 (West 1990); GA. CODE ANN. § 9-9-3 (1999); HAW. REV. STAT. § 658-1 (1999); IDAHO CODE § 7-901 (1998); 710 ILL. COMP. STAT. ANN. 5/1 (West 1999); IND. CODE ANN. § 34-4-2-1 (West 1983); IOWA CODE ANN. § 679A.1 (West 1993); KAN. CIV. PROC. CODE ANN. § 5-401 (West Supp. 1996); KY. REV. STAT. ANN. § 417.050 (Michie Supp. 1998); LA. REV. STAT. ANN. § 9:4201 (West 1997); ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980); MD. CODE ANN., CTS. & JUD. PROC. § 3-206 (1995); MASS. GEN. LAWS ANN. ch. 251, § 1 (West Supp. 1996); MICH. COMP. LAWS ANN. § 600.5001 (West 1987); MINN. STAT. ANN. § 572.08 (West 1988); MISS. CODE ANN. § 11-15-1 (1972); MO. ANN. STAT. § 435.350 (West Supp. 1997); MONT. CODE ANN. § 27-5-114 (1995); NEB. REV. STAT. § 25-2602 (1995); NEV. REV. STAT. ANN. § 38.035 (Michie 1996); N.H. REV. STAT. ANN. § 542:1 (1997); N.J. STAT. ANN. § 2A:24-1 (West 1987); N.M. STAT. ANN. § 44-7-1 (Michie 1995); N.Y. C.P.L.R. 7501 (McKinney 1980); N.C. GEN. STAT. § 1-567.2 (Supp. 1996); N.D. CENT. CODE § 32-29.2-01 (1996); OHIO REV. CODE ANN. § 2711.01 (Banks-Baldwin 1994); OKLA. STAT. ANN. tit. 15, § 802 (West 1993); OR. REV. STAT. § 36.454(5) (1995); 42 PA. CONS. STAT. ANN. § 7303 (West 1982); R.I. GEN. LAWS § 10-3-2 (1997); S.C. CODE ANN. § 15-48-10 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 21-25A-1 (Michie 1987); TENN. CODE ANN. § 29-5-302 (Supp. 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 1997); UTAH CODE ANN. § 78-31a-3 (1996); VT. STAT. ANN. tit. 12, § 5652 (Supp. 1999); VA. CODE ANN. § 8.01-581.016 (Michie 1995); WASH. REV. CODE ANN. § 7.04.010 (West 1992); W. VA. CODE § 55-10-1 (1994); WIS. STAT. ANN. § 788.015 (West Supp. 1999); WYO. STAT. ANN. § 1-36-103 (Michie 1988).

The formalization of mediation is more recent, but such agreements are sometimes treated as arbitration awards under these statutes for enforcement purposes, a process called the “confirmation” of the agreement. See, e.g., CAL. CIV. PROC. CODE § 1297.401 (Deering 1996); CAL. FAM. CODE § 3186 (Deering 1995). See generally ROGERS & MCEWEN, *supra* note 66, at § 3.02 (discussing the format and techniques of a typical mediation session); *id.* at § 8.02 (discussing the enforcement of mediation clauses in contracts).

109. The UAA was enacted in 1955 by the National Conference of Commissioners on Uniform State Laws and is substantially similar to the FAA and the 1920 New York statute. For a detailed comparison of the FAA and the UAA, see Joseph Colagiovanni & Thomas W. Hartmann, *Enforcing Arbitration Awards*, DISP. RESOL. J., Jan. 1995, at 14.

110. See 9 U.S.C. § 2; UNIF. ARBITRATION ACT § 1, 7 U.L.A. 6 (1997).

bined with the will of the parties, provides sufficient regulation for private ordering. In contested cases, courts are to decide whether the initial agreement to arbitrate is valid as a contractual matter, and if so, they are to stay any pending legal action until after the arbitration.¹¹¹ These statutes further authorize the courts to appoint the arbitrator or umpire if a contract so provides or the parties cannot agree on a neutral.¹¹²

Once a dispute is routed into arbitration, the statutes confer upon arbitrators various powers for administering the arbitration, including the power to compel the attendance of witnesses and the production of documents, enforceable by the same contempt power for noncompliance as that given to traditional federal judges.¹¹³ Finally, if the parties' agreement to arbitrate so designates, the statutes permit the prevailing party to have the court enter the award as a formal judgment of the court.¹¹⁴ They also limit the grounds for appealing arbitration awards to situations in which the award was procured by corruption, fraud, undue means, or upon the misconduct of the arbitrator,¹¹⁵ and they limit the bases for vacating¹¹⁶ and modifying¹¹⁷ the awards.

Such an intricate and integrated structure for the enforcement of predispute agreements to arbitrate was a matter of historical necessity.¹¹⁸ While courts were willing to enforce arbitration awards, for centuries they had refused to enforce the initial agreements to arbitrate. Under the "ouster doctrine," English courts, and later American courts, regularly found such agreements to be void because the statutes improperly ousted courts of their jurisdiction to hear matters arising under the laws of the sovereign.¹¹⁹ The FAA and related state statutes were the result of a coordinated effort by the commercial community and the legal profession at the turn of the nineteenth century to reverse the ouster doctrine legislatively and to permit the specific enforcement of agreements to arbitrate commercial cases.¹²⁰ In recent years, the U.S. Supreme Court has expanded the scope of the FAA beyond its commercial origins to include employment and consumer

111. See 9 U.S.C. § 3; UNIF. ARBITRATION ACT § 2(b), 7 U.L.A. 109.

112. See 9 U.S.C. § 5; UNIF. ARBITRATION ACT § 3, 7 U.L.A. 167.

113. See 9 U.S.C. § 7; UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199.

114. See 9 U.S.C. § 9; UNIF. ARBITRATION ACT § 11, 7 U.L.A. 264.

115. See 9 U.S.C. § 10; UNIF. ARBITRATION ACT § 12(a), 7 U.L.A. 280.

116. See 9 U.S.C. § 10; UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280.

117. See 9 U.S.C. § 11; UNIF. ARBITRATION ACT § 13, 7 U.L.A. 409.

118. For a more complete discussion of this issue, see Reuben, *supra* note 9, at 598–601.

119. See, e.g., *Insurance Co. v. Morse*, 87 U.S. 445, 458 (1874); *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746).

120. See Reuben, *supra* note 9, at 601. See generally AUERBACH, *supra* note 42.

arbitration,¹²¹ as well as other statutory rights.¹²² The Court upheld the constitutionality of the FAA as a valid exercise of Congress's admiralty powers,¹²³ and state supreme courts have followed suit under state constitutional law.¹²⁴

b. The Revolution in Judicial Attitudes Toward Arbitration and Alternative Dispute Resolution

Despite the legislative initiatives of the early twentieth century, judicial acceptance of arbitration agreements was generally grudging until the late 1980s.¹²⁵ Initially reflecting Chief Justice Warren Burger's concerns about the case load of the federal courts and the quality of the justice they dispensed,¹²⁶ the U.S. Supreme Court issued a series of opinions over the next decade and one-half that, in sum, took an expansive and forceful view of the FAA as a reflection of the "national policy favoring arbitration."¹²⁷ In particular, the Court ruled that the FAA established a presumption of consent to arbitration agreements,¹²⁸ and it extended the act beyond its commercial roots to apply to all statutory claims in which Congress had not "evinced an intention to preclude a waiver of judicial remedies for the

121. See J. Clark Kelso & Thomas J. Stipanowich, *Protecting Consumers in Arbitration*, DISP. RESOL. MAG., Fall 1998, at 11.

122. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985) (permitting arbitration of civil racketeering, antitrust, and other statutory claims).

123. See *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 278-79 (1932). Remarkably perhaps, admiralty is the only context in which the Supreme Court has upheld the constitutionality of the FAA. While other challenges may lie, such as due process and separation of powers, it is implausible to imagine the Supreme Court striking down the statute at this point, given the body of law that has developed under it and the widespread national and international reliance on its validity.

124. See Katz, *supra* note 98, and cases cited therein.

125. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435 (1953) (holding that mandatory arbitration agreements in securities brokerage agreements are not enforceable under the FAA because "the right to select the judicial forum is the kind of 'provision' that cannot be waived" under the Securities Act of 1933), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1984). For a more complete discussion, see Reuben, *supra* note 9, at 599-602.

126. See, e.g., Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in THE POUND CONFERENCE, *supra* note 34, at 23, 23-25; Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62.

127. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The Court's approach to arbitration under the FAA mirrors its approach to arbitration under federal collective bargaining law. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (Steelworkers Trilogy); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). For a comprehensive criticism of this "national policy" favoring arbitration under the FAA, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

128. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). See generally Sternlight, *supra* note 127, at 660.

statutory rights at issue.¹²⁹ In so doing, the Court used a series of cases from the securities industry to repudiate the ouster doctrine,¹³⁰ summarily reject generalized concerns over power imbalances, and permit the enforcement of mandatory arbitration provisions in contracts of adhesion (at least under certain circumstances).¹³¹

As significant as this expansion was in the federal sphere, the Court's extension of the FAA to the states has been even more remarkable. Within a two-year period, the Court, over the once-vigorous dissent of Justice Sandra Day O'Connor,¹³² held that the act preempts any contrary state law

129. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

130. *Wilko* was formally overruled by *Rodriguez de Quijas*, 490 U.S. at 481, which held that predispute agreements to arbitrate securities fraud claims under the Securities Exchange Act of 1934 are enforceable. See also *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228–29 (1987) (holding that predispute agreements to arbitrate securities fraud claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act of 1970 are enforceable, and distinguishing *Wilko* as applying only to prohibit waivers of substantive rights, not choice of forum provisions).

131. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (upholding mandatory arbitration of an Age Discrimination in Employment Act (ADEA) claim). The case has been quite controversial, spawning a vast literature, largely critical, among scholars. See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Pierre Levy, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455 (1996); 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 (1994). For an argument that the case should be interpreted narrowly, see Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); see also Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 320–23 (1999).

Despite such criticism, several lower federal courts have applied *Gilmer* broadly. See, e.g., *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 597, 601–02 (6th Cir. 1995) (using *Gilmer* to deny an injunction and order arbitration of an employment dispute); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487–88 (10th Cir. 1994) (extending *Gilmer* to bar a pregnancy discrimination claim under Title VII); *Albert v. National Cash Register Co.*, 874 F. Supp. 1328, 1332–33 (S.D. Fla. 1994) (extending *Gilmer* to bar a religious discrimination suit under Title VII); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76, 77–79 (D. Mass. 1993) (extending *Gilmer* to bar a gender discrimination suit under Title VII).

132. Compare Justice O'Connor's dissent in *Southland* (arguing that the majority's extension of the FAA to state courts "is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA," and that "Congress intended to require federal, not state, courts to respect arbitration agreements"), 465 U.S. at 22–23, with her concurrence in *Allied Bruce Terminix Cos. v. Dobson*:

[M]ore than 10 years have passed since *Southland*, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation of the Act in the interim. After reflection, I am persuaded by considerations of stare decisis, which we have said "have special force in the area of statutory

restricting arbitrability,¹³³ that for diversity purposes FAA jurisprudence creates a body of federal substantive law that “governs . . . in either state or federal court,”¹³⁴ and that “as a matter of federal law, any doubts . . . should be resolved in favor of arbitration.”¹³⁵ Similarly, the Court has given the act potentially wide reaching application to state tort and contract law claims by giving the statutory term “commerce” its broadest possible construction.¹³⁶ While there is some significant evidence that judicial enthusiasm for ADR may be becoming more restrained,¹³⁷ and while some judges remain skeptical of ADR,¹³⁸ judicial support for ADR can be expected to continue.

interpretation,” to acquiesce in today’s judgment. Though wrong, *Southland* has not proved unworkable, and, as always, “Congress remains free to alter what we have done.” 513 U.S. 265, 283–84 (1995) (citations omitted).

133. See *Southland*, 465 U.S. at 10–16. For an example of the breadth of the Court’s view of what constitutes a state law that is hostile to arbitration and therefore preempted by the FAA, see *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), which ruled that the FAA preempted Montana from requiring plainer disclosure of arbitration clauses in boilerplate consumer contracts. See also Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16, 16 (noting that two Montana Supreme Court justices “[r]efused to sign a routine remand order” returning the case to the trial courts for further proceedings, and quoting the two justices as saying that they could not “in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental and philosophically misguided as the United States Supreme Court’s decision in this and other cases which interpret and apply the Federal Arbitration Act”).

134. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (Brennan, J., dissenting); see also *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 475 (1989). See generally 2 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 17.3.1.1 (1995). But cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973) (holding that state law is not preempted for statutory claims arising out of an arbitration agreement); *Perry v. Thomas*, 482 U.S. 483 (1987) (revisiting *Ware* in light of *Southland* and finding that an employee’s state labor code claim against his employer/broker must be arbitrated).

135. *Mercury Constr.*, 460 U.S. at 24–25 (Brennan, J., dissenting).

136. See *Allied Bruce*, 513 U.S. at 273–77.

137. See *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79–81 (1998) (holding that a waiver of statutory rights must at least be clear and unmistakable); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (deciding that under FAA, the question of whether arbitrators or courts have primary power to decide if parties agreed to arbitrate merits of dispute is one for the courts, unless the parties agreed to submit the question to arbitration); *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 981 (1997) (holding that a health maintenance organization may be liable in fraud if arbitration provisions held out as faster and less expensive than litigation turn out to be longer and more expensive); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 805–06 (Ct. App. 1998) (holding Bank of America’s unilateral imposition of mandatory arbitration on customer credit accounts unconscionable).

138. See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

C. Puzzling Inconsistencies: The Gap Between Institutional Support for Alternative Dispute Resolution and Voluntary Usage of Its Processes

The remarkable turnabout in judicial attitudes toward ADR, and the visibly strong institutional endorsement of ADR processes, would suggest a massive shift in dispute resolution away from litigation and toward ADR. The empirical research, however, continues to tell quite a different story: one of caution, uncertainty, and discomfort.

1. Continuing Sense of Discomfort

In a 1997 speech at Stanford Law School, Dr. Deborah Hensler, a leading civil justice empiricist, described what she termed “puzzling inconsistencies in the ADR data.”¹³⁹ That is, despite what appears to be high institutional support for ADR (especially for legal disputes), voluntary use appears to be low—and even then, ADR does not appear to achieve its goals of lower cost and greater time efficiency, or party satisfaction.¹⁴⁰ The empirical literature on usage and efficiency is revealing.¹⁴¹

The most comprehensive empirical effort to date is a congressionally mandated evaluation of pilot ADR programs authorized for certain federal district courts under the Civil Justice Reform Act of 1990.¹⁴² The study was jointly performed by the RAND Institute for Civil Justice and the Federal Judicial Center, and it focused on ten demonstration district courts in five states: California, New York, Pennsylvania, Oklahoma, and Texas. In terms of usage, the study found that the percentage of cases referred to ADR was low—less than 10 percent for all but one of the ten demonstration districts, and 5 percent or less in six others.¹⁴³ The findings were equally troubling for

139. Dr. Deborah Hensler, *The Mysteries of ADR*, Address at the Stanford Law School, Stanford Center on Conflict and Negotiation (Feb. 11, 1997).

140. See KAKALIK ET AL., *supra* note 39, at 48–50. But see PLAPINGER & STIENSTRA, *supra* note 16, at 6 (suggesting that usage rates in federal court programs are “fairly substantial” and may not be dependent upon the mandatory referral of cases into these programs); DAVID RAUMA & CAROL KRAJKA, *VOLUNTARY ARBITRATION IN EIGHT FEDERAL DISTRICT COURTS: AN EVALUATION* (1994).

141. See generally NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON RECENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS (Susan Keilitz ed., 1993) [hereinafter NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH].

142. See generally KAKALIK ET AL., *supra* note 39.

143. See *id.*

efficiency claims, as the study concluded that the implementation of arbitration, mediation, and ENE in the federal courts under the act did not lead to efficiency gains. In particular, the study showed no “statistically significant” evidence of a reduction in time to disposition, costs of litigation, perceptions of fairness, or client satisfaction attributable to any of these procedures (although findings were inconclusive for views of the fairness of arbitration).¹⁴⁴ These results were consistent with other research indicating that the real gains in ADR may be more qualitative than quantitative,¹⁴⁵ but they still were controversial when released.¹⁴⁶

While there is little reliable data outside the court-annexed context, that which is available paints a similar and consistent picture. More than half of the lawyers questioned in an *ABA Journal* survey had no involvement in ADR in the five years preceding the survey.¹⁴⁷ This result was similar to one found for corporations, showing that more than half of the corporations reported no use of ADR in the past year, and that those corporations that did report the use of ADR had used it in only five or fewer cases.¹⁴⁸ Similarly again, in a narrow study of private dispute resolution in Los Angeles County—an area of comparatively high ADR sophistication—researchers used actual court filings to estimate projected private ADR usage, determining that ADR was used to dispose of only 5.3 percent of the

144. See *id.* at 48–53.

145. See Susan Keilitz, *Court Annexed Arbitration*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH, *supra* note 141, at 1, 1–50; see also Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 497–98 (1985); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 134–37 (1985) (stating that litigant satisfaction appears to depend upon perceptions of fairness, not whether the process used was settlement or adjudication). But see Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 40–42 (1984) (perceiving mediation as more fair and satisfying than litigation). For an overview of empirical research that compares ADR claims and promises against the empirical literature, see Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1351–87 (1994).

For an example of a federal court program with results that are arguably more positive, see Snapp, *supra* note 91, at 16–17 (describing an internal study of an ADR program in the western district of Missouri that concluded that ADR reduced the time to disposition by 28 percent and produced a median savings per case of \$10,000 (based on attorney estimates) and an average per case savings of \$36,215 (assuming two sides per case)).

146. Several of the nation's leading ADR researchers and practitioners, for example, signed a statement coordinated by the CPR Institute for Dispute Resolution criticizing its methodology and cautioning policymakers against using it to guide policy on ADR. See generally *Views on RAND's CJRA Report: Concerns and Recommendations*, 15 ALTERNATIVES TO HIGH COST LITIG. 67 (1997).

147. See Reuben, *supra* note 73, at 55.

148. See *Nearly One-Half Have Used ADR During the Past Year*, CORP. LEGAL TIMES, July 1994, at 37. But cf. DAVID B. LIPSKY & RONALD L. SEEBER, *THE USE OF ADR IN U.S. CORPORATIONS: EXECUTIVE SUMMARY 1* (1997) (concluding that “the vast majority” of studied corporations used an ADR process within the preceding three years).

county's total dispute case load. This finding led those researchers to conclude that private ADR had not proven to make "a meaningful difference"¹⁴⁹ in the administration of civil justice in the county. Such findings were similar to those in earlier studies.¹⁵⁰

2. Possible Explanations

In her Stanford remarks, Dr. Hensler suggested four possible reasons for the "puzzling inconsistencies" between ADR support and voluntary usage. First, she posited that interest in ADR may in fact be supply driven, rather than demand driven. That is, ADR may simply provide lawyers with new marketing approaches and open up new career opportunities in dispute resolution for nonlawyers. Second, to the extent ADR is demand driven, that demand may be coming from the corporate sector, which may realize modest efficiency benefits of ADR after litigation has commenced, or which may have collateral reasons for preferring ADR that are both noble (such as preserving business relationships) and ignoble (such as limiting remedies for employees, consumers, and vendors). Third, she hypothesized that the phenomenon may be explained by the clash of interests between judges, who seek to clear their dockets, and practicing lawyers, who want to maintain fees and control.¹⁵¹ Finally, she suggested that ADR in practice may not be that different from traditional litigation, with little disputant participation or control, integrative bargaining, or attention to process values.¹⁵²

a. The Legitimacy Barrier

Assuming that there is at least some truth in all of Dr. Hensler's reasons, I would propose at least one more possibility: that ADR has not yet earned its legitimacy as a fair and impartial means of dispute resolution, either within

149. ELIZABETH ROLPH ET AL., *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* 17 (1994).

150. See, e.g., WILLIAM L.F. FELSTINER & LYNN WILLIAMS, *COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS* (1980) (citing low rates of voluntary usage of ADR in criminal cases); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 151-53 (1984) (observing the "low rate of voluntary usage" of ADR); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 426-29, 439 (1982) (arguing that voluntary court-annexed ADR programs do not attract participants).

151. Others have argued that lawyers and judges have teamed up to further ADR. See Bryant G. Garth, *Dealing in Virtue*, Address at the Stanford Law School, Stanford Center on Conflict and Negotiation (Feb. 17, 1998) (summary on file with author); see also Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQUIRY 285, 286-88 (1996) (discussing how the field of professional competition in dispute processing has changed the field of business disputes).

152. See Hensler, *supra* note 139.

the bar or with the public at large. In the language of the field, ADR is not yet a "safe" environment for binding dispute resolution, at least partly because of the absence of even minimal constitutional procedural safeguards.

Among lawyers, ADR is in some important respects counterintuitive.¹⁵³ Lawyers are trained to be advocates, capable of marshaling facts and legal rules to advance the interests of their clients. Similarly, they are trained to be decision makers, applying rules of law to facts to decide cases. While there is considerable room for advocacy in arbitration, there are fewer rules to define the terms of the debate, and there is, therefore, less certainty. Mediation takes lawyers even further from the roots of their training, calling for such skills as active listening, empathy, and value creation, rather than searing cross-examination, erudite argument, and the claiming of value.¹⁵⁴ As a result, lawyers often feel somewhat uncomfortable or unprepared when in an ADR environment—a dynamic underscored in the *ABA Journal* survey, in which, remarkably, only 53 percent of respondents said they thought their training and experience as lawyers prepared them for arbitration, and only 47 percent said the same of their preparation for mediation.¹⁵⁵

Equally tellingly, the survey showed a healthy skepticism about ADR processes. Only 51 percent of the responding lawyers said they preferred mediation over litigation, while 31 percent said they still preferred litigation.¹⁵⁶ When the choice was between litigation and arbitration, 43 percent said they actually preferred litigation, while only 31 percent said they preferred arbitration.¹⁵⁷ One of the reasons appeared to be a deep concern about the personal biases or qualifications of arbitrators or mediators, with 70 percent of the respondents expressing such a concern.¹⁵⁸ As is discussed at length below, such a concern is rooted deeply in constitutional due process.¹⁵⁹

153. See Gary Friedman & Jack Himmelstein, *Deal Killer or Deal Saver: The Consulting Lawyer's Dilemma*, DISP. RESOL. MAG., Winter 1997, at 7, 7; *infra* Part I.C.2.b.

154. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980-81).

155. See Reuben, *supra* note 73, at 60.

156. See *id.* at 56.

157. See *id.*

158. See *id.* at 58. Not surprisingly, perhaps, an equally overwhelming majority, 85 percent, said their concerns were not related to the potential for ADR to reduce the revenues of their practices. See *id.* at 59. The Lipsky & Seeber study also found similar concerns, noting that "almost half [of respondent corporations] say they have a lack of confidence in arbitrators and close to 30 percent say there is a shortage of qualified arbitrators." LIPSKY & SEEBER, *supra* note 148, at 8.

159. See *infra* Part I.C.3.

b. The Lawyers' Standard Philosophical Map

One plausible explanation for lawyers' concerns about the ADR processes is that they may derive from their legal training and the value that is placed on due process as a basic standard of fundamental fairness. This is part of what Professor Leonard L. Riskin has described as the lawyer's "standard philosophical map," which is predicated on two essential assumptions: that disputants are adversaries and that a third party will decide between them according to a rule of law.¹⁶⁰ To the extent that formal structures enhance due process, they create an environment that is safe for binding dispute resolution. The rules, standards, and remedies are widely known, and while skill levels may vary widely, the rules of the game are constant. Lawyers tend to be risk averse,¹⁶¹ and such elements of formality have the effect of increasing predictability and reducing risk. Moreover, appellate rights assure an avenue of relief from undesirable results, or at least a basis for continued negotiation.

While training and professional culture may help explain lawyer skepticism about ADR, the lay public also has reasons to view ADR as less legitimate than trial. To begin with, most people who do not work in conflict-related fields, such as law, social work, or counseling, may simply be unaware of ADR. Similarly, to the extent that lay parties are aware of ADR, they may not understand it, or they may think that ADR provides some aspects associated with the public system (such as adherence to public law and the availability of judicial review) that it does not. Finally, but significantly, one may reasonably surmise that there is a broadly held expectation that legal disputes will be resolved in public courts of law. Professor Lawrence Friedman has referred to this "general expectation of justice" as "a

160. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982); see also DONALD A. SCHON & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* 26-28 (1994) (discussing the relationship between the ways we frame problems and the types of solutions we see).

161. See, e.g., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 379-80 (1997); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Over-deterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 74 n.105 (1995); Steven Shavell, *Liability and the Incentive to Obtain Information About Risk*, 21 J. LEGAL STUD. 259 (1992). A popular expression of antilawyer sentiment, making the undue caution claim, is MARK H. MCCORMICK, *THE TERRIBLE TRUTH ABOUT LAWYERS* 111-12 (1987). For a different perspective on the issue, see Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

genuine feature of American legal culture."¹⁶² Says Friedman: "If somebody senses a wrong, she feels that there must be a remedy, somewhere in the system. These examples, then, are chips off a larger, more significant, block: the welfare state itself, and the principle of social insurance, products themselves of changes in social expectation."¹⁶³

In this regard, the opportunity to have one's "day in court" is an important cultural value with which our current understanding of ADR as purely private is at odds.¹⁶⁴ To be sure, there is an appreciable literature suggesting that one of the things that participants like about ADR is that it gives them a more meaningful "day in court."¹⁶⁵ Upon closer scrutiny, however, this dynamic may be better understood as referring to a more meaningful opportunity for parties to tell their story or, more likely, to gain vindication.¹⁶⁶ After all, as currently understood, ADR does not provide a day in court, but rather an alternative to a day in court.

162. LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 76 (1985).

163. *Id.*

164. The importance of one's day in court as an American cultural value dates back to the initial drafting of the Constitution. Indeed, it is widely acknowledged that the lack of a civil jury trial right was among the most important factors driving the debate between the federalists and the antifederalists prior to the adoption of the Constitution. See generally IRVING BRANT, *THE BILL OF RIGHTS* 39 (1965); ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 122-24, 140 (1955); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 509-10 (1937); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

165. See, e.g., JANE W. ADLER ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 65 (1983) (noting that litigants want "an opportunity to have their case heard" and that they "tak[e] it for granted that they ha[ve] a right to appear in person, to be heard fully, and to be treated even-handedly"); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 57 & n.87 (1996) (citing "[s]everal scholars [who] have discussed the importance of one particular non-economic motive: the desire to have a day in court to obtain formal justice" (citations omitted)); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 99 ("[T]he most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story' . . ."); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 63 (1985) ("A plaintiff . . . may want to complete the process of litigation in order to feel that she has had her day in court. Settlement may not satisfy this litigant even if the settlement would be more favorable than the outcome at trial . . .").

166. See, e.g., Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 799 (1986) (noting that libel plaintiffs sue not for economic gain but because "litigation is the only effective means of achieving a remedy for their reputational, as distinguished from economic, harm"); Gross & Syverud, *supra* note 165, at 58 ("[D]octors are insisting on trial in some medical malpractice cases in which they expect to obtain public vindication. This is most likely to happen when the doctor is convinced that she acted in a professionally responsible manner, but has nonetheless been wounded in her self-esteem . . ."); Merry & Silbey, *supra* note 150, at 153 (arguing that "the grievant wants vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong"); Simon, *supra* note 165, at 63 ("[A] defendant may desire to complete the process of litigation even if victory is unlikely, because

3. Contemporary Industry Standards Support This Understanding

The approach of the three most significant industry self-regulation efforts of the modern ADR movement supports the suggestion that the lack of constitutional safeguards and the legitimacy barrier may be at least part of the explanation for the gap between ADR support and actual usage.

Two of these efforts—the so-called *Dunlop Report*¹⁶⁷ and *The Due Process Protocol*¹⁶⁸—were inspired by broadly acknowledged due process concerns about ADR in the employment setting, in which there has been nothing less than a holy war between management and plaintiffs' lawyers over the issue of the mandatory arbitration of employment claims.¹⁶⁹ The third—the American Arbitration Association's (AAA's) *Consumer Due Process Protocol*¹⁷⁰—was inspired by concerns over the courts' apparent willingness to enforce mandatory arbitration provisions in contracts of adhesion.¹⁷¹ Although none of the three includes an enforcement mechanism—a crucial failure in the eyes of critics¹⁷²—all three nonetheless

victory in court may be the only way to obtain public vindication.”); David A. Rammelt, Note, “*Inherent Power*” and Rule 16: *How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965, 1001 (1990) (“[T]here are some disputes in which the litigants’ primary motivation for filing suit does not involve monetary compensation or redress, but rather involves an overwhelming element of personal vindication.”). *But see* RICHARD LEMPert & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DISTRIBUTION 175 (1986) (concluding from a series of studies that only plaintiffs in discrimination suits were likely to pursue litigation for the sake of justice rather than economic well-being); Gross & Syverud, *supra* note 165, at 58 (finding that relatively few disputes, other than some medical malpractice disputes, went to trial because of either party’s desire for vindication).

167. U.S. DEP’T OF LABOR & U.S. DEP’T OF COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (1994). This report of the President’s Commission on the Future of Worker-Management Relations was chaired by Harvard economist and former Labor Secretary John T. Dunlop, and it called for quality standards in contractual nonunion ADR that may be seen as the functional equivalent of due process standards. *See id.* at 116–19.

168. *Prototype Agreement on Job Bias Dispute Resolution: A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, [May–June 1995] Daily Lab. Rep. (BNA) No. 91, at E-11 (May 11, 1995). For a general discussion of the process and the protocols, see Christopher A. Barreca et al., *Document: A Due Process Protocol for Resolving Employment Disputes Involving Statutory Rights*, DISP. RESOL. J., Oct.–Dec. 1995, at 37–39; see also Arnold M. Zack, *Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model*, 7 WORLD ARB. & MEDIATION REP. 10 (1996).

169. *See, e.g.*, Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58–60.

170. NATIONAL CONSUMER DISPUTES ADVISORY COMM., AMERICAN ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (1998).

171. *See infra* note 388 and accompanying text.

172. *See, e.g.*, Reuben, *supra* note 9, at 592 n.49; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1044–46 (1996).

resonate in constitutional due process. In particular, they call for such basic elements as the right to a competent and impartial neutral, representation, prehearing access to reasonably relevant information, full availability of remedies, and reasoned, written opinions. Together, these standards represent the clearest articulation of broad-based efforts by the industry to deal with acknowledged problems, and they were developed with an eye to constitutional and administrative law notions of due process. Moreover, there is some empirical evidence to suggest that these rudimentary elements of due process have made a substantial inroad into mitigating one of the more challenging aspects of the modern entrepreneurial ADR movement: the repeat player problem. A study of employment discrimination cases administered by the AAA compared the employee "win rate" in cases brought pursuant to a personnel handbook arbitration clause both before and after the AAA adopted so-called due process protocols.¹⁷³ Before the protocols became effective, the win rate of employees in handbook cases was 25 percent, as compared to a 72 percent win rate in nonhandbook claims.¹⁷⁴ After the due process protocols became effective, the employees' win rate jumped to 40 percent, as compared to a nonprotocol rate of 46 percent. Researchers interpret these data to suggest that the AAA screening (pursuant to its commitment not to administer cases that did not comply with the protocols)¹⁷⁵ was effectively screening out the arbitration provisions that were structurally unfair.¹⁷⁶ In other words, the imposition of due process standards appeared to have been effective in mitigating unfairness in arbitration.

D. Conclusion: Alternative Dispute Resolution at a Crossroads

There is an old story about the well-intended but slightly confused man who was said to have a mind like a steel trap whose jaws don't quite close.¹⁷⁷ And so it is with modern ADR. Institutional support is visibly high, but voluntary usage remains low and is marked both by a pervasive sense of silent skepticism by ADR outsiders and by mounting disappointment and disillusionment from ADR insiders. In short, the ADR movement finds itself at an important crossroads. Two decades of enthusiastic institutional promotion have brought ADR to a meaningful and important

173. See Bingham, *supra* note 86. Employee "win rate" was defined in terms of the granting of relief of any kind on a filed claim. See *id.*

174. See *id.* tbl. 12.

175. See American Arbitration Ass'n, Press Release (Oct. 30, 1995).

176. See Telephone Interview with Professor Lisa Bingham (Apr. 3, 1999).

177. With great appreciation to Oliver Wendell Holmes, through Professor Gerald Gunther, for the anecdote.

level of acceptance, particularly if one factors in court-related programs. From the perspective of the movement's pioneers, this is cause for cheer.¹⁷⁸ The glass is half full rather than half empty. However, the low level of voluntary usage raises serious questions about the degree to which the glass will continue to fill.

In this regard, the legitimacy barrier to the use of ADR is cause for particular concern. Public policy strongly supports the use of binding dispute resolution techniques other than trial—even if the assumptions that ADR will save time and money and relieve the courts of chronic congestion prove to be overstated. Pluralism and choice in dispute resolution processes are highly desirable, because the type of dispute resolution technique that is best for any given conflict will depend upon a variety of considerations, which include the nature of the conflict and the goals of the parties in resolving it.¹⁷⁹ It is this aspect of ADR that helps to explain research findings of party satisfaction with ADR processes and outcomes,¹⁸⁰ which in turn furthers a broader public policy favoring private rather than public ordering of nongovernmental affairs.

Such aspirations cannot be wholly realized if the legitimacy barrier is not scaled. Because the loss of constitutional safeguards derives from the contemporary bipolar understanding that the private nature of ADR simply makes them unavailable, this predicate assumption is worth a closer look. Part II examines this assumption more closely, by reference to the manner in which the U.S. Supreme Court has historically drawn that line: the state action doctrine.

II. THE LEGAL FOUNDATION FOR A UNITARY THEORY OF ALTERNATIVE DISPUTE RESOLUTION AND PUBLIC CIVIL JUSTICE: STATE ACTION

In Part I, I suggested that the absence of even rudimentary constitutional due process protections in ADR may help explain the gap between high institutional support for ADR and low voluntary usage of such processes. Here in Part II, I demonstrate how the U.S. Supreme Court's state action doctrine seems to compel an understanding of certain aspects of ADR as public rather than private for purposes of constitutional due process, particularly court-related ADR processes and contractual arbitrations conducted

178. I thank Professor Randy Lowry for underscoring this point.

179. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOTIATION J.* 49, 49–50 (1994).

180. See *supra* notes 165–166 and accompanying text.

under the FAA.¹⁸¹ I begin with a general discussion of the state action doctrine and then apply it to the ADR context described in Part I.

A. The Framework for Assessing State Action

The state action doctrine is a central, and often controversial, tenet through which the public-private distinction is played out in the application of constitutional law. It serves as a recognition that the Fourteenth Amendment is a limitation on government power, rather than on private conduct and choices.¹⁸²

Historically, the Supreme Court has used either of two tests in assessing state action, finding private conduct to be state action if the private actor performs a public function or performs a private function that has a close “nexus” to, or “entanglement” with, the government. In recent years, however, the Court appears to have settled on a two-part framework for analyzing state action questions that takes a balancing approach incorporating both standards. This analytical framework was articulated in *Lugar v. Edmondson Oil Co.*¹⁸³ and amplified in *Edmonson v. Leesville Concrete Co.*¹⁸⁴ As later articulated in *Georgia v. McCollum*,¹⁸⁵ the *Lugar-Edmonson* test is as follows:

The first inquiry is “whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority.” . . .

The second inquiry is whether the private party charged with the deprivation can be described as a state actor. In resolving that issue, the Court [has] found it useful to apply three principles: (1) “the extent to which the actor relies on governmental assistance and benefits”; (2) “whether the actor is performing a traditional governmental function”; and (3) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”¹⁸⁶

These inquiries generally consider the degree to which the action of the state either coerces personal choice or, more commonly, facilitates and makes possible private choices toward ends that would be unconstitutional if per-

181. A more comprehensive explication of this argument may be found in Reuben, *supra* note 9, at 609–33.

182. For a general discussion of the state action doctrine, see WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1107–46 (10th ed. 1997); GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 921–62 (13th ed. 1997).

183. 457 U.S. 922 (1982).

184. 500 U.S. 614 (1991).

185. 505 U.S. 42 (1992).

186. *Id.* at 51 (alteration in original) (citations omitted).

formed by the state directly. As Chief Justice William Rehnquist noted in the October 1998 term: “Whether such a ‘close nexus’ exists, our cases state, depends on whether the state ‘has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.’”¹⁸⁷

B. Assessing State Action in Alternative Dispute Resolution Programs

1. The Source of Alternative Dispute Resolution in State Authority

The first question in a *Lugar-Edmonson* analysis is “whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority.”¹⁸⁸ In analyzing this element, I consider court-related and contractual ADR in turn.

a. Court-Related Alternative Dispute Resolution

Court-related arbitration, mediation, and other ADR programs would seem to satisfy the threshold requirement of state authority handily because they are effected through the state’s direct statutory or administrative compulsion of the party into the ADR process in involuntary programs, and the state’s complete, actual, and direct administration and oversight of voluntary court-related ADR programs.¹⁸⁹

An arbitration conducted, for example, pursuant to California’s statute requiring that all civil cases worth less than \$50,000 be arbitrated as a condition of trial would plainly be an arbitration conducted pursuant to statutory authority.¹⁹⁰ But for the statute, the case would still be in a public court. Similarly, a child custody dispute ordered to mediation pursuant to a court rule requiring all family law matters to be mediated by a private mediator before resorting to trial, if either party so requests, would also be a

187. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58 (1999) (finding the private insurers’ decisions to withhold payment of disputed worker’s compensation medical treatment payments pending utilization review was not state action requiring adherence to due process requirements of notice and opportunity to be heard).

188. *Lugar*, 457 U.S. at 939.

189. See PLAPINGER & STIENSTRA, *supra* note 16, at 3–13; Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865 (1998); Shapp, *supra* note 91, at 16. Moreover, even court or agency programs that merely “encourage” the use of ADR processes have a powerful coercive element, as it may be quite difficult for parties, and their counsel, to distinguish such encouragement from a de facto directive, or at least a strong and fearsome preference.

190. See CAL. CIV. PROC. CODE § 1141.11(a) (West 1999).

mediation conducted pursuant to state authority.¹⁹¹ Again, but for the court rule, the matter would still be in a public court for decision. Certainly both hearings are conducted pursuant to state authority.

b. Contractual Arbitration

Contractual arbitrations conducted under the FAA and related state laws also meet this preliminary threshold requirement.¹⁹² As noted above, in contested cases these statutes essentially route cases to public courts first for a determination of the validity of the agreement to arbitrate, then to arbitrators for decision (subject to the court's continuing jurisdiction), and then back to the public courts for possible limited review, adoption, and enforcement.¹⁹³

This is sufficient under the current doctrine to meet the threshold requirement of state authority. Indeed, the Court pointed to just such a structure as satisfying this element in *Edmonson*, noting that most jurisdictions have statutes authorizing and regulating the use of preemptory challenges, and that without statutory authorization the defendant "would not have been able to engage in the alleged discriminatory acts."¹⁹⁴ The Court also noted the significant involvement of the judge, arguably the ultimate state actor, in furthering the private actor's discriminatory preemptory challenge.¹⁹⁵ Similarly, in the creditors' rights cases discussed more thoroughly below,¹⁹⁶ the Court also looked at statutory schemes that could be availed by private parties in finding that statutes providing for private creditor remedies constituted sufficient state authority to justify proceeding to the attribution question. Similarly, in ADR, the FAA and related state laws provide sufficient state authority to trigger the possible ultimate finding of state action.

191. See, e.g., SUPER. CT. CAL. COUNTY OF SAN MATEO CT. R. 5.3 (1999) (superseded by *id.* R. 5.3 (2000)).

192. Section 3 of the FAA, which compels a court to stay active court proceedings pending arbitration when a contractual arbitration agreement is found to be valid, presents the most coercive of statutory arbitration environments. See 9 U.S.C. § 3 (1994). Section 4 is, arguably, slightly less coercive because it does not necessarily direct a party out of trial proceedings and into arbitration. Rather, it permits the party to a contract to petition a court for what is, in effect, a positive injunction directing such party into arbitration—again, however, after a judicial finding of the validity of the agreement to arbitrate. See *id.* § 4. Both provisions, however, are substantially coercive in that they direct a party that does not want to arbitrate a matter into such a proceeding against the party's will and preference.

193. See *supra* notes 110–117 and accompanying text.

194. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991).

195. See *id.* at 623–24.

196. See *infra* notes 248–256 and accompanying text.

c. Contractual Mediation and Other Consensual Processes

Significantly, however, contractual mediations and most other contractual consensual ADR processes often would not meet this threshold “source in state authority” requirement of the *Lugar-Edmonson* state action analysis, even in situations in which the results were confirmed by a court. While judicial hostility to arbitration in the form of the ouster doctrine led to the passage of comprehensive national arbitration legislation, as discussed above,¹⁹⁷ there was no such hostility to mediation by the time it meaningfully arrived as a viable dispute resolution technique at the onset of the modern ADR movement. As a result, state authorization for mediation tends to be scattered within substantive law statutes.¹⁹⁸ These statutes do not intertwine the roles of the government and the private mediators in the same manner that the FAA and related state laws blend the roles of courts and arbitrators. Apart from court-related mediation, and mere statutory authorizations to use mediation, the only meaningful involvement mediation has with the government is in the availability of judicial enforcement of the mediation awards, by way of either contract or, in some instances, confirmation.¹⁹⁹ For reasons discussed more fully below,²⁰⁰ the mere enforcement of a mediation agreement is insufficient, by itself, to give rise to state action, both because the mediation is not conducted pursuant to state authority and because the mere enforcement of a mediation agreement or other such ADR process is insufficient to make the conduct of the mediator or other ADR neutral fairly attributable to the state.²⁰¹

2. Attribution of Private Conduct to the State

The second prong of the *Lugar-Edmonson* analysis tests “whether the private party charged with the deprivation can be described as a state actor.”²⁰²

Edmonson amplified *Lugar* by stressing three factors that must be considered in answering the attribution question: (1) “the extent to which

197. See *supra* notes 118–120 and accompanying text.

198. See, e.g., Florida Water Resources, Conservation, Reclamation, and Use Act, FLA. STAT. ANN. § 373.71 (West 1997) (authorizing mediation for interstate water disputes); MONT. CODE ANN. § 40-4-300 (1987) (regulating mediation authorized for family disputes). See generally UNIF. MEDIATION ACT prefatory note at 4 (Draft Mar. 2000).

199. See ROGERS & MCEWEN, *supra* note 66, § 8:02.

200. See *infra* Part II.B.2.c.

201. The one possible exception to this general understanding could be the hybrid process of med/arb, and then only to the extent of the arbitration component, assuming, as is likely the case, that the arbitration is conducted pursuant to the FAA or a related state law. In such cases, it may be the conduct of the arbitrators may be fairly attributable to the state.

202. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1991).

the actor relies on governmental assistance and benefits,” (2) “whether the actor is performing a traditional governmental function,” and (3) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”²⁰³ As I show below, the first two considerations effectively recast the Court’s historical public nexus (or entanglement) and public function approaches, while the third wisely forces the state action proponent to confront the broader policy considerations at stake. To further analytical congruity, I address them in an order slightly different from the Court’s, beginning with the public function aspect before moving on to the reliance (entanglement) and aggravation (policy) factors.

a. Performance of a Traditional Government Function

The earliest cases in the modern era of state action recognize that state action will be found when private actors perform a traditional public function. The classic, and easiest, case is *Marsh v. Alabama*,²⁰⁴ in which the court held that Chickasaw, Alabama, a company town wholly owned by a corporation, could not prohibit a Jehovah’s Witness from passing out religious literature near the local post office.²⁰⁵ From that baseline, the analysis becomes more complex, in part because the Court has never been able to delineate just what a public function is. Indeed, the task may be beyond the possibility of broad-based consensus.²⁰⁶ In *Marsh*, the question was arguably easy because the township, a local government, in effect had been wholly re-created by the private company. However, in the modern era that is a rare instance and certainly is not central to the U.S. Supreme Court’s later public function jurisprudence.

Rather, the Court’s public function cases after *Marsh* have more commonly drawn upon the concept of delegation. That is to say, when a state traditionally and exclusively performs a function and then delegates all or part of that function to a private actor, the constitutional character of the delegated function follows the delegation. A critical limitation here has been the concept of traditional exclusivity. If anything has been clear in this otherwise murky jurisprudential backwash, it is that a function must be traditionally performed exclusively by the government in order for its per-

203. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621–22 (1991) (citations omitted).

204. 326 U.S. 501 (1946).

205. *See id.* at 506–09.

206. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1128–49 (1980) (arguing that the private-public distinction cannot justify the longstanding refusal to grant real power to cities); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350–57 (1982) (using the public-private distinction to illustrate the sequence of stages by which a distinction loses its clarity).

formance by private parties to be deemed attributable to the state under a public function rationale.

A pair of contrasting public function cases helps illustrate the point. In the first, *Jackson v. Metropolitan Edison Co.*,²⁰⁷ the Court refused to find a utility's provision of electricity services to be a public function, even though the utility allegedly had been granted a government monopoly, because the provision of such services is not a function "traditionally the exclusive prerogative of the State."²⁰⁸ Because the provision of utility services was not a traditionally exclusive public function, held the Court, the challengers had no constitutional ground upon which to complain that the summary termination of services without notice or a hearing violated their rights to procedural due process. The state's comprehensive regulation of the utility was of no consequence to the state action determination.

In the white primary cases, however, the Court was willing to find the administration of Texas election primaries by private clubs to be a public function.²⁰⁹ This series of cases stemmed from the claims of African Americans that they were being improperly excluded from meaningful participation in this important aspect of democracy and sovereignty.²¹⁰ One of the more salient of these cases is *Terry v. Adams*,²¹¹ which involved the delegation of the election function to a private voting club, the all-white Jaybird Democratic Association, to conduct an all-white private primary before the public primary and general election. Eight Justices agreed that the Jaybirds were state actors and that this "three-step" elective system violated the Fifteenth Amendment's specific protection of black voting rights.²¹² The Court's plurality opinion provided three separate rationales for finding state action in the private Jaybird voting club. In the lead opinion, Justice Hugo Black found the club to be a state actor because it performed a

207. 419 U.S. 345 (1974).

208. *Id.* at 353.

209. The white primary cases were decided before the Court's decision in *Jackson* formally introduced the concept of an exclusivity limitation. However, the Court has never disavowed these cases on that ground, and it continues to cite them approvingly in state action and other cases, including *Jackson*. See, e.g., *Bush v. Vera*, 517 U.S. 952, 981-82 (1996); *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 63-64 (1980); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978); *Jackson*, 419 U.S. at 352.

210. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944). In *Allwright*, the Court held that white primaries established by state convention are unconstitutional under the Fifteenth Amendment. Stressing the importance of elections in a constitutional democracy, the Court said, "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." *Id.* at 663.

211. 345 U.S. 461 (1953).

212. See *id.* at 484 (Minton, J., dissenting). Only Justice Sherman Minton dissented, finding no state action whatsoever arising from the Jaybird primary. See *id.* at 484-94 (Minton, J., dissenting).

traditional public function, the conduct of political elections.²¹³ Three concurring Justices—Tom C. Clark, Stanley F. Reed, and Robert H. Jackson—advanced a separate delegation theory in finding the voting club to be a state actor as an “auxiliary” of the local Democratic Party.²¹⁴ Finally, Justice Felix Frankfurter’s solo concurring opinion found the private discrimination to be “clothed with the authority of the State” in part because of the role of county election officials as “participants in the scheme.”²¹⁵ While Frankfurter’s concurring opinion stands alone in the white primary cases, it may also be seen as presaging what would become the court’s modern entanglement rationale, the notion of joint participation. This concept is examined more fully below,²¹⁶ but for now it is enough to understand the white primary cases as standing in part for the principle that delegation is the essence of a public function rationale.

(1) Court-Related Alternative Dispute Resolution

A public function analysis seems to paint a fairly clear portrait of court-related ADR as state action. As noted above, these programs are generally developed and administered by the state through court rules and administrative or legislative mandates that require or encourage parties to participate in arbitrations, mediations, or other ADR processes, often as a condition for proceeding to trial.²¹⁷ The compulsion into these ADR hearings is direct, and participation is often nonvolitional.²¹⁸ When a court delegates its authority to administer a dispute to private attorney-neutrals who serve on rosters at the court’s pleasure, the court’s essential constitutional obligations flow to the private neutral along with the delegation of authority to act on the court’s behalf in the resolution of a dispute. The presence of state action seems beyond reasonable question. Indeed, there has long been tacit recognition of this point, as evidenced by the fact that court-related ADR

213. See *id.* at 469.

214. See *id.* at 483–84 (extending *Allwright*, 321 U.S. at 664).

215. *Id.* at 475–76. In this way, Justice Frankfurter concluded, citing Justice Holmes, the public and private actors “are bound together as the parts of a single plan. The plan may make the parts unlawful.” *Id.* at 476 (quoting *Swift & Co. v. U.S.*, 196 U.S. 375, 396 (1905)). The Court later expressly rejected this comprehensive-regulation rationale as a basis for finding state action. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); see also *Public Utils. Comm’n v. Pollak*, 343 U.S. 451, 462 (1952).

216. See *infra* notes 232–258 and accompanying text.

217. See *supra* Part I.B.1.

218. See ROGERS & MCEWEN, *supra* note 66, §§ 7:01–:02. Situations in which the neutral is a court staffer do not require sophisticated analysis; such staffer-neutrals are by definition state actors.

programs, including in particular arbitration programs, are nonbinding, in deference to state and federal jury trial rights.²¹⁹

(2) Contractual Alternative Dispute Resolution

The public function argument is a bit more attenuated in the contractual ADR context. Given the contemporary bipolar view that ADR hearings are private matters, the argument can be made that the resolution of disputes outside of the courthouse is hardly a public function. After all, disputes are resolved every day without resort to the public courts, through personal negotiations and wholly private interventions by friends, family members, professional colleagues, and others. Thus, the argument goes, because these negotiations and interventions are the functional equivalents of arbitrations, mediations, or other informal ADR processes, ADR is most certainly not a traditional government function. The U.S. Court of Appeals for the Ninth Circuit, in a recent opinion by Judge Stephen R. Reinhardt, *Duffield v. Robertson Stephens & Co.*,²²⁰ expressly and exclusively relied on this argument in refusing to find state action in securities industry employment discrimination arbitrations,²²¹ noting that “since dispute resolution is not an ‘exclusive’ governmental function, neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action.”²²²

While appealing in its simplicity, the Ninth Circuit’s analysis just as simply ignores a distinction that has long been recognized by other courts, scholars, and practitioners: the distinction between binding and nonbinding dispute resolution processes.²²³ The binding resolution of disputes is, of course, a traditionally exclusive public function. Indeed, it is difficult to contemplate a function traditionally more exclusive than what the second Justice John Marshall Harlan described in *Boddie v. Connecticut*²²⁴ as “the State’s monopoly

219. See, e.g., Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 502–21 (1989); see also *Kimrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979) (holding that the application of a local experimental rule providing for compulsory nonbinding arbitration as a prerequisite to a jury trial in certain civil suits for recovery of money damages of \$50,000 or less does not violate the right to a jury trial or to equal protection). See generally STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 372–73 (3d ed. 1999).

220. 144 F.3d 1182 (9th Cir. 1998).

221. See *id.* at 1201–02. It should be disclosed that I served as counsel of record for an amicus brief filed on behalf of “several concerned scholars” urging the court to rule in favor of the plaintiff-appellant, and I offered the state action theory presented herein as an alternative state action theory to that presented by the plaintiff-appellant.

222. *Id.*

223. See Abel, *supra* note 20, at 488–502; see also, GOLDBERG ET AL., *supra* note 33, at 4–6.

224. 401 U.S. 371 (1971).

over techniques for binding conflict resolution.”²²⁵ This dynamic may be seen most vividly in arbitration cases, such as *Duffield*, in which the third-party neutral, like a trial judge, actually decides the dispute by contractual agreement of the parties, in a ruling that is made enforceable by the state per force of the FAA or related state laws. Put another way, under a public function rationale, the statutory delegation of the judicial function to private arbitrators in arbitrations conducted under the FAA and related state laws transforms the conduct of those private adjudicators into state action, just as the delegation of trial functions to magistrates or discovery masters extends constitutional duties to those unquestionable state actors.²²⁶

Again, the white primary cases are instructive in furthering the public function analysis of contractual arbitration, shedding light on the nature of the function being delegated in at least two respects. First, one sees a strong analogy between the elective function seen in the white primary cases and the judicial function reflected in arbitrations conducted under the FAA or related state laws. Both functions are expressly provided for in the Constitution,²²⁷ and both are central to the maintenance of a democracy. While elections ensure representation, the judicial function ensures a continuing commitment to the rule of law in a constitutional democracy that ultimately depends upon that commitment for its very survival. In both instances, that function is delegated to private parties pursuant to statutory schemes expressly authorizing such delegations. Following the logic of the white primary cases, constitutional obligations follow the delegation to the private party.

225. *Id.* at 375. It can be argued that *Boddie* was context-specific because its divorce context is state-exclusive, and that it is inapposite because it was not a state action case. However, the Court has never so limited its application of *Boddie*, and the tenor of Justice Harlan's stirring words resonate much deeper than merely state matters, and farther than questions of state action. See *infra* note 295 and accompanying text. In any event, because my constitutional arguments do not rest only on a judicial access theory, my reliance on *Boddie* is limited to Harlan's more transcendent and perhaps unparalleled discussion of the essence of due process and its relationship to the rule of law and the ordering of society.

226. Further analysis of contractual arbitration under a public function theory would suggest that there are two delegations. Legislatures have delegated to arbitrators decisional power over disputing parties that will be enforced by the state, and parties have further contractually agreed both to delegate the power to decide their dispute to an arbitrator and to be bound by that decision. Because of these delegations, a central question for reviewing courts is whether the arbitrator exceeded the scope of his or her authority and therefore acted *ultra vires*. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 65 (3d ed. 1988); see also 9 U.S.C. § 10(a)(4) (1994) (stating that an arbitration award may be vacated if arbitrators exceeded their powers); UNIF. ARBITRATION ACT § 12(a)(3), 7 U.L.A. 281 (1997).

227. See U.S. CONST. art. I (providing for the election and power of legislators); *id.* art. III (providing for an independent judiciary); *id.* amend. XV (barring abridgment of the right to vote on account of race, color, or previous condition of servitude); *id.* amend. XIX (barring abridgment of the right to vote on account of gender).

Moreover, an important teaching of the white primary cases is that a central concern of the Court's, as a matter of constitutional law in the state action inquiry, is with the use of government power and its imprimatur to further the deprivation of a fundamental constitutional right. For this reason, the Court has continued to cite these cases for this proposition in a broad range of non-voting-rights state action cases, including cases concerned with creditor remedies²²⁸ and with peremptory challenges.²²⁹ Indeed, in *Edmonson*, Justice Kennedy suggested that a state-created scheme that operates to deprive important constitutional rights may be more constitutionally problematic in the judicial context than in the electoral context.²³⁰ We need not go that far here, however, for if we are to adhere to the belief that the courts are a coequal department of our constitutional order, such deprivations merit no less constitutional concern in the judicial context than in the electoral.²³¹ This concern provides a useful bridge from the public function rationale to the entanglement rationale for finding state action.

b. Extent of Government Assistance and Benefits

The second element of the attribution prong of the *Lugar-Edmonson* analysis tests "the extent to which the actor relies on governmental assistance and benefits," and it provides an even stronger and more direct basis for finding state action in contractual arbitration than the previously discussed delegation of a traditionally exclusive public judicial function. It effectively updates the Court's historical public nexus (or entanglement) approach, in which a court "sift[s] facts and weigh[s] circumstances" to determine whether the relationship between the government's action and the complained-of private conduct is sufficiently close to attribute that conduct to the state.²³²

228. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928-29 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). In this regard, note too Justice White's remarkable concession in *Lugar* that the various state action tests may be "simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court" in such cases. *Lugar*, 457 U.S. at 939.

229. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22, 625-26 (1991). For other references to *Terry* in the nonrace, nonvoting context, see *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 549, 556 (1987) (Brennan, J., dissenting); *Rendell-Baker v. Kohn*, 457 U.S. 830, 849 n.3, 850 (1982) (Marshall, J., dissenting); and *Buckley v. Valeo*, 424 U.S. 1, 250 n.18 (1976) (Burger, C.J., concurring in part and dissenting in part).

230. See *Edmonson*, 500 U.S. at 628.

231. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) ("[I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.").

232. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

(1) Doctrinal Considerations

The traditional starting point in the nexus analysis is *Shelley v. Kraemer*,²³³ the landmark decision holding that judicial enforcement of racially restrictive covenants is enough, by itself, to constitute state action sufficient to invalidate the covenants on equal protection grounds.²³⁴ The Court has not extended this rationale materially beyond *Shelley*, and for good reason; its unimpeded logical extension would improperly constitutionalize the law of contract.²³⁵

While *Shelley* is discussed more specifically below,²³⁶ one of the central concepts the Court has used to restrain the case is the principle that mere approval, encouragement, or authorization of private conduct is insufficient to establish state action.²³⁷ In *Jackson*, for example, the Court used this principle as a basis for refusing to find the comprehensive regulation of a utility to be sufficient to create state action under a public function theory as noted above.²³⁸ More recently, the Court used this as a basis for rejecting the possibility that the decisions of private insurers working in a state worker's compensation context could constitute state action.²³⁹

A liquor-licensing case, *Moose Lodge No. 107 v. Irvis*,²⁴⁰ is even more illustrative. There, the Court rejected a claim that, because a private club served alcoholic beverages under one of a limited number of liquor licenses issued by the Pennsylvania Liquor Control Board, its racial discrimination was unconstitutional. In rejecting the state action claim, then-Justice William Rehnquist²⁴¹

233. 334 U.S. 1 (1948).

234. See *id.* at 14–18.

235. At least one court has expressly cited this consideration as a basis for rejecting a constitutional claim arising out of a contractual ADR agreement. See *Sportastiks, Inc. v. Beltz*, No. 88-C-9293, 1989 WL 26825, at *4 (N.D. Ill. Mar. 22, 1989). Some scholars have argued this is entirely appropriate. See, e.g., Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 221 (1957).

236. See *infra* Part II.B.2.c.

237. But see *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (accepting the holding of the California Supreme Court that a popular initiative amending the state's constitution to permit "absolute discretion" of a property owner in the sale, lease, or rental of real property would impermissibly encourage and significantly involve the state in private racial discrimination).

238. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358–59 (1974); *supra* note 208 and accompanying text.

239. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52–53 (1999).

240. 407 U.S. 163, 165 (1972).

241. Throughout his tenure on the Court, Rehnquist has had a particularly influential role in shaping the state action doctrine. See Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 791–92, 795 (1989).

stressed the remoteness of the relationship between the club's discrimination and the state's licensing scheme:

[T]he Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor . . . [Therefore, h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination.²⁴²

In the arbitration context, the argument against the existence of state action under this element would be that any actions of the arbitrator that raise constitutional problems may no more be attributed to the state than could *Moose Lodge's* decision to discriminate on the basis of race.

The argument, however, does not withstand serious analysis. As a factual matter, it is plainly inconsistent with the Court's more recent findings of state action in cases like *Lugar* and *Edmonson*.²⁴³ In *Lugar*, it must be recalled, the Court found state action in what a *Moose Lodge* analysis would have concluded was a creditor's purely private choice of electing to secure its rights through the prejudgment attachment procedure—a choice in which the government played “absolutely no part.”²⁴⁴ *Edmonson* provides an even more compelling example. There, the Court found state action in a private attorney's exercise of a peremptory challenge²⁴⁵—a choice so private that the attorney need not even disclose a reason for it unless challenged on constitutional grounds.²⁴⁶

This is not to suggest that these cases have overruled *Moose Lodge* sub silentio. To the contrary, they have simply sharpened its meaning. Properly understood, *Moose Lodge* addresses the degree of proximity between the governmental conduct and the private conduct necessary to fairly attribute the private conduct to the state, not whether the act of government by itself compels private conduct or merely authorizes it. Critical to this inquiry, the Court has repeatedly stated, is the degree to which government servants actively participate in, facilitate, and give effect to

242. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–77 (1972).

243. Chief Justice Rehnquist's more extreme views on state action have been rejected by the Court. He was left to join Justice Lewis F. Powell's dissent in *Lugar*, in which Powell argued that the participation of government actors with private actors must rise to the level of a conspiracy to violate constitutional rights in order to constitute state action on a nexus rationale. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 953–56 (1991). Similarly, he joined Justice O'Connor's dissent in *Edmonson*, which took a similarly narrow view of the degree of government involvement necessary to convert private conduct into state action. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

244. *Moose Lodge*, 407 U.S. at 175.

245. See *Edmonson*, 500 U.S. at 618–28.

246. See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

private choices, particularly for conduct that would be unconstitutional if committed directly by the state.²⁴⁷

A series of cases involving statutory remedies for private creditors, culminating in *Lugar*, confirms this analysis. These creditors' rights cases also underscore the central importance of the role of the government as a joint participant in the private actor's conduct in making such conduct fairly attributable to the state.

As a matter of background, the Court historically had been receptive to procedural due process challenges arising from summary procedures providing for the attachment or sale of debtors' property.²⁴⁸ In *Flagg Brothers, Inc. v. Brooks*,²⁴⁹ however, the Court seemed to be embarking on a different path, as it upheld a New York warehouseman's lien procedure on the ground that constitutional challenges to the procedure could not lie, for lack of state action, because the legislation upon which the procedure was based merely authorized, but did not compel, the private decision to sell the affected personal property. Neither courts nor any other government personnel were involved in the execution of the lien, as the statute was self-executing and required only notice to the affected parties and a ten-day waiting period before a creditor warehouseman could lawfully sell chattels in his possession to satisfy a debtor's obligations.²⁵⁰ Therefore, in the language of the current *Lugar-Edmonson* analysis, any deprivation of property rights resulting from the warehouseman's lien procedure could not be fairly attributed to the state because the nexus between the statutory scheme for the self-executing warehouseman's lien procedure did not involve government assistance and benefits to an appreciable extent. In other words, the nexus between the government and the sale of the chattels was too remote to fairly attribute the warehouseman's private conduct to the state.

The opinion generated much controversy, as *Flagg Brothers* could easily be read to have superseded the general principle of due process availability that was at the heart of the earlier creditors' rights cases.²⁵¹ The Court ulti-

247. For an outlier case, however, see *Evans v. Abney*, 396 U.S. 435, 444 (1970) (holding that the application by a state court of its normal principles of will construction, which resulted in the reversion to a testator's heirs of property that had been dedicated to a city as a whites-only park, did not constitute state action).

248. See, e.g., *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). These are often referred to generically as the "creditors' rights cases."

249. 436 U.S. 149 (1978).

250. See *id.* at 153 n.1.

251. See, e.g., Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1317-22 (1982); Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 413-14 (1983); Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State*

mately used *Lugar* to ease the serious tension between *Flagg Brothers* and earlier cases.

Lugar involved a Virginia statutory prejudgment attachment procedure that allowed creditors to attach a debtor's property if the creditor alleged, in an ex parte petition, a belief that the debtor might dispose of property in order to defeat creditors. The *Lugar* Court concluded that this "procedural scheme created by the statute obviously [was] the product of state action"²⁵² and therefore was fairly attributable to the state. It distinguished *Flagg Brothers* by reference to the critical role of court personnel in participating in the execution of the levy, stating: "[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment"²⁵³

In other words, a private creditor's use of the Virginia statutory prejudgment attachment procedure was fairly attributable to the state because state servants were literally involved in the execution of the procedure, while a private creditor's use of the New York warehouseman's lien statute was not fairly attributable to the state because it was self-executing and state servants were not involved in the actual execution of the lien.

This understanding of the case is fully consistent with the Court's treatment of the "extent of government assistance and benefits" factor in *Edmonson*. In that case, the Court explained its meaning by reference to a relatively obscure case, *Tulsa Professional Collection Services, Inc. v. Pope*.²⁵⁴ *Tulsa* addressed the constitutionality of a nonclaim provision of the Oklahoma Probate Code that required creditors to file claims against an estate within two months of the published notice that probate proceedings had begun. The threshold question was whether there was sufficient state action to trigger the Constitution's Due Process Clause on behalf of creditors who failed to meet the filing deadlines. The Court rejected an argument that the provision was simply a self-executing statute of limitations and instead found "significant state action" because the probate court was "intimately involved throughout [the procedure], and without that involvement the time bar is

Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks, 69 GEO. L.J. 745, 750–51 (1981).

252. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1991).

253. *Id.*

254. 485 U.S. 478 (1988). The case continues to be cited to illustrate the Court's approach to joint participation. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52–55 (1999) (holding that the mere receipt of a form indicating insurer's intent to appeal disputed medical treatment in a worker's compensation case, without further analysis, review, or processing of any kind, is insufficient to establish joint participation for purposes of state action).

never activated.”²⁵⁵ This intimate involvement included commencing the probate proceeding, appointing the executor to publish the notice, and filing copies of the notice and the affidavit of publication with the court.²⁵⁶

Applying this consideration to peremptory challenges in *Edmonson*, the Supreme Court found “significant participation”²⁵⁷ by the government through the intimate involvement of the trial court in the exercise of a peremptory challenge, including the statutory processes governing the summoning and qualification of jurors, the trial court’s “substantial control” over voir dire, and, of course, the approval or rejection of peremptory challenges.²⁵⁸

Having thus described the meaning of the “extent of government assistance benefits” element of the attribution prong of the *Lugar-Edmonson* state action analysis, I now apply it to contractual ADR and then to court-related ADR.

(2) Contractual Alternative Dispute Resolution

(a) Arbitration

In a recent opinion, Chief Justice Rehnquist expressly endorsed the possibility of a private nonjudicial adjudicator’s being deemed a state actor,²⁵⁹ and, as we have seen, contractual arbitration seems to provide a fairly explicit example. Indeed, contractual arbitration rests on state involvement, through the FAA and related state laws, that is at least as intimate in the arbitration proceeding as it was in Oklahoma’s nonclaim probate provision, the creditor remedy procedures in the creditors’ rights cases, and the federal peremptory challenge scheme. In fact, the overt joint participation of government and private actors required under the FAA is much greater,²⁶⁰ extending far beyond the “mere use of the State’s dispute resolution machinery.”²⁶¹

The trial court has an intimate involvement in contractual arbitration, well beyond its statutory authorization to enforce arbitration agreements. In the typical case challenging the validity of an arbitration agreement, the court will receive either a litigant’s formal complaint followed by a responsive motion to compel arbitration,²⁶² or a motion to compel arbitration in cases

255. *Tulsa*, 485 U.S. at 487.

256. *See id.*

257. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

258. *See id.* at 623–24.

259. *See Sullivan*, 526 U.S. at 52. “While the decision of a [Utilization Review Organization], like that of any judicial official, may properly be considered state action, a private party’s mere use of the State’s dispute resolution machinery, without the ‘overt, significant assistance of state officials,’ cannot.” *Id.* at 54 (quoting *Tulsa*, 485 U.S. at 486).

260. *See supra* notes 110–117 and accompanying text.

261. *Sullivan*, 526 U.S. at 54.

262. *See* 9 U.S.C. § 3 (1994).

in which one disputing party simply refuses to comply with the terms of the contract without court intervention.²⁶³ In either situation, the trial court must decide whether to compel arbitration and must determine the legitimacy of any contract-based defense to the validity of the agreement to arbitrate.²⁶⁴ Further, the statutory scheme permits the court to stay the litigation pending the arbitration and to retain an active supervisory role even after the case has been ordered to arbitration;²⁶⁵ it authorizes the trial court to correct, modify,²⁶⁶ or vacate an arbitration award.²⁶⁷ Lastly, the statute authorizes the trial court to adopt the award and to confirm it as its own judgment,²⁶⁸ thus making it available for enforcement like any other judgment, with the full panoply of vehicles available for enforcement, including garnishment and attachment.²⁶⁹

Finally, it is worth noting that the additional benefits conferred upon arbitrators are substantial. Arbitrators are often statutorily vested with broad judicial powers to administer depositions²⁷⁰ and discovery,²⁷¹ including subpoena²⁷² and sanction²⁷³ powers. In addition, arbitrators often receive the

263. See *id.* § 4.

264. See, e.g., *id.* § 2; UNIF. ARBITRATION ACT § 1, 7 U.L.A. 6 (1997); CAL. CIV. PROC. CODE § 1281.2 (West 1999); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (finding that under the FAA, the question of whether arbitrators or courts have the primary power to decide if the parties agreed to arbitrate the merits of the dispute is one for the courts, unless the parties agreed to submit the question to arbitration).

265. See, e.g., 9 U.S.C. § 3; UNIF. ARBITRATION ACT § 2, 7 U.L.A. 109; CAL. CIV. PROC. CODE §§ 1284–1286.8.

266. See, e.g., 9 U.S.C. § 11; UNIF. ARBITRATION ACT § 9, 7 U.L.A. 244; CAL. CIV. PROC. CODE § 1286.

267. See, e.g., 9 U.S.C. § 10; UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280; CAL. CIV. PROC. CODE §§ 481.010–493.060.

268. See, e.g., 9 U.S.C. § 9; UNIF. ARBITRATION ACT § 11, 7 U.L.A. 264; CAL. CIV. PROC. CODE §§ 1283, 1283.5.

269. See, e.g., CAL. CIV. PROC. CODE §§ 481.010–493.060.

270. See UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE §§ 1283, 1283.05.

271. See UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE §§ 1283.05, 1283.1. It should be emphasized that discovery rights are far more limited in arbitration than they are in trial. The arbitrator's central statutory power with regard to discovery is the subpoena power to order the attendance of witnesses. However, parties may include provisions describing permissible discovery in the arbitration process, and they frequently do as a matter of practice. Moreover, the proposed Revised Uniform Arbitration Act includes new provisions specifically allowing for discovery unless the parties agree not to permit discovery, in a process that would be presided over by the arbitrator. See UNIF. ARBITRATION ACT § 17 (Proposed Revisions Mar. 2000). For a general discussion of this provision, see Heinsz, *supra* note 51.

272. See 9 U.S.C. § 7; UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE § 1282.6.

273. See 9 U.S.C. § 7; UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE § 1283.05. For a discussion of the broad array of sanctions to which mandatory ADR participants may be subject, see Katz, *supra* note 98, at 37–41.

same “judicial” immunity from civil liability that is reserved exclusively for the states’ own constitutionally authorized judiciary.²⁷⁴

In short, the statutory schemes that establish an intimate involvement between arbitrators and the public courts toward the single end of state-enforced dispute resolution may be seen as establishing an inseverable and indispensable nexus between seemingly private actors and their governmental partners. This relationship appears to represent an extremely high level of government assistance and benefits for seemingly private conduct. As such, it would seem that the “private use of [arbitration] with the help of state officials constitutes state action.”²⁷⁵

(b) Mediation and Other Consensual Processes

As discussed above, contractual mediation does not operate under the authority of a state statute and therefore need not be analyzed further under the state action doctrine.²⁷⁶

(3) Court-Related Alternative Dispute Resolution

As with the public function rationale, court-related ADR programs again seem to provide an easier case for finding state action under an entanglement rationale than contractual ADR.

Take, for example, an arbitration conducted pursuant to California’s court-related arbitration statute, which provides that “all at-issue civil actions . . . shall be submitted to arbitration, by the presiding judge or the judge designated, . . . if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars (\$50,000) for each plaintiff.”²⁷⁷ In such a case, the trial court receives the initial claim, makes the determination of the likely value of the case (an unappealable determination),²⁷⁸ and then orders the case to be transferred to arbitration²⁷⁹ under a

274. The arbitral immunity doctrine has been accepted by courts for years and sometimes is statutory. See, e.g., FLA. STAT. ANN. § 44.107 (West 1999). The proposed Revised Uniform Arbitration Act would not only codify this immunity for arbitrators but would also extend it for provider organizations, such as the American Arbitration Association (AAA) and JAMS/Endispute, according to an article by the Reporter for the Revised Uniform Arbitration Act Drafting Committee of the National Conference of Commissioners on Uniform State Laws, Dean Timothy J. Heinsz of the University of Missouri-Columbia School of Law. See Heinsz, *supra* note 51. For a general discussion of statutory and common law immunity, see Reuben, *supra* note 9, at 594 n.54 and cases cited therein.

275. Lugar v. Edmondson Oil Co., 457 U.S. 922, 933 (1982).

276. See *supra* notes 198–201 and accompanying text.

277. CAL. CIV. PROC. CODE § 1141.11(a).

278. See *id.*

279. See *id.* § 1141.16(a).

program wholly organized, administered, and supervised by the state. California's supervision also includes the use of seemingly private arbitrators on an official roster of potential arbitrators. The California statute is typical in providing for continuing jurisdiction through de novo review of the arbitration award²⁸⁰ as well as for the power to correct, modify, or vacate the award altogether.²⁸¹ If the parties choose not to seek de novo review, the statute authorizes the trial court to adopt the award and to confirm it as a judgment of the court.²⁸² Finally, the statute even provides for the administrative costs of the arbitration to be paid for by the county in which it takes place, including the proportional share of the arbitrator's fees, if a party cannot afford it.²⁸³

The case management procedure would be substantially for court-related mediations. Consider, for example, the court rule previously described for family law mediations.²⁸⁴ In such a case, the divorce petition would be filed in a state court. If one of the parties requested the case to be mediated, the case would, if it is a well-run program, likely be evaluated by the court for suitability for mediation; the matter would not be ordered to mediation if, for example, there is a history of domestic violence or child abuse. Assuming the court found the case to be amenable to mediation, the court would issue the order and send the parties to a mediator. Depending upon the program, the mediator would either be provided by the court (perhaps even a member of the court or the court's staff), be selected by the parties from a roster provided by the court, or be selected by the parties themselves and retained with the approval of the court. The parties would then go to mediation, which if successful would produce an agreement that could be returned to the court for confirmation and enforcement as an appropriate decree of that court.

In both of the above situations, the participation of government servants is intimate, necessary, ongoing, and substantial. Therefore, the conduct of the private neutrals in court-related ADR programs is fairly attributable to the state under a nexus or entanglement theory.

c. A Transitional Comment on *Shelley v. Kraemer*

It may be argued that I am merely calling for an extension of *Shelley v. Kraemer* to the contractual arbitration context. I am not, for I do not

280. See *id.* § 1141.20.

281. See *id.* § 1141.22.

282. See *id.* § 1141.23.

283. See *id.* § 1141.28.

284. See *supra* note 191 and accompanying text.

believe that mere enforcement of a contractual ADR agreement is sufficient for a finding of state action. Rather, I believe more must be shown, such as the statutory delegation of a traditionally exclusive public function or the partnership of public and private actors in facilitating unconstitutional conduct.²⁸⁵ In the contractual arbitration context, this is seen in the statutory delegation of binding decisional authority to seemingly private arbitrators, as well as in the interwoven actions of public courts and seemingly private arbitrators that together advance the single goal of the binding resolution of a dispute.²⁸⁶ By contrast, this is not seen in contractual mediations, which typically operate under the authority of mediation authorization provisions embedded within substantive law statutes.²⁸⁷

This is not to disavow *Shelley* as being wholly fact-specific or inapplicable. Rather, I submit that the case law before and after *Shelley* suggests that the opinion is more about judicial participation in conduct that would be unconstitutional if performed directly by the state than it is about the mere enforcement of contractual terms, such as the racially restrictive covenant at issue in *Shelley*. Indeed, the Supreme Court continues to cite *Shelley* for the proposition that judicial actions, including the enforcement of private choices, bear special but not dispositive consideration in weighing state action because of the place of the courts in our constitutional democracy. As Justice Kennedy said for the Court in the *Edmonson* peremptory challenge case,

By enforcing a discriminatory peremptory challenge, the court “has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.” In so doing, the government has “create[d] the legal framework governing the [challenged] conduct,” and in a significant way has involved itself with invidious discrimination.²⁸⁸

This understanding of *Shelley* is consistent with the Supreme Court’s reasoning in the white primary cases. In both *Shelley* and the white primary cases, the Court recognizes that it is not mere judicial enforcement that converts private conduct into state action. Rather, the Court holds that direct and intimate judicial participation in private conduct that would offend the Constitution if committed directly by the government aggravates

285. See *supra* notes 204–258 and accompanying text.

286. See *supra* notes 110–117 and accompanying text.

287. See *ROGERS & MCEWEN*, *supra* note 66, § 1:03.

288. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (alterations in original) (quoting, respectively, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) and *National Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192 (1988)).

the injury in a unique way because of the unique place of the courts in a democratic government built upon the rule of law.²⁸⁹

I believe that such an understanding of *Shelley*, being less about mere enforcement and more about the role and place of the courts in a constitutional democracy, puts *Shelley* in a much more narrow and accurate light. The decision's emphasis on broad systemic concerns serves both to cabin *Shelley* from unwarranted expansion and to recognize the special place that courts and the rule of law hold in our constitutional order. It is small wonder, then, that the final element of the *Lugar-Edmonson* analysis, arguably the only "new" element of the state action analysis reiterated by the Supreme Court, addresses precisely this concern. It is to this element that I now turn.

d. Aggravation of the Injury by Incidents
of Governmental Authority

While the government benefits and public function elements of the *Lugar-Edmonson* analysis may be seen as modern idioms for analytical approaches with long and rich heritages, the aggravation element adds a new dimension to the analysis by explicitly forcing the consideration of higher policy questions. This analysis should be understood as a limiting principle, similar to traditional exclusivity, that ensures that the application of constitutional force to private actors is occasioned judiciously and is reserved for the most fundamental of concerns. In this regard, there is no need to distinguish between court-related and contractual ADR procedures in analyzing harms to individuals and to society that flow from constitutional violations in ADR hearings driven by state action.²⁹⁰

(1) Harm to the Individual

Due process violations that result from state action can result in significant and troubling harms to individuals, in terms of both their property rights and the dignitary rights that some scholars have proposed lie at the core of procedural due process as a constitutional value.²⁹¹ While those who

289. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

290. It may be contended that there can be no harms arising from due process violations in court-related ADR because such processes are nonbinding, even arbitration. However, such a "no harm, no foul" argument overlooks the fact the potentially important information may be disclosed and strategies revealed during the ADR hearing that a party may not have disclosed or revealed had the ADR hearing not been compelled.

291. See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886-87 (1981).

do not prevail in court are almost always injured in some way, the injuries in an arbitration are aggravated by a public court's participation in and ultimate adoption of the arbitration award (regardless of its legal correctness), and by the individual's knowledge that there is no other viable avenue of relief.²⁹² As Justice Kennedy observed in *Edmonson*:

Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.²⁹³

By compelling, overseeing, and ultimately enforcing such decisions, the trial court is both a direct and an indirect participant in the seemingly private process of arbitration. The trial court places its power, prestige, and imprimatur behind the result, foreclosing any inquiry into the fairness of the process. While it may be true that the hearing is conducted and the decision reached outside the four walls of the public courtroom, that hearing is conducted in the shadow of the courthouse, and its result is given effect, meaning, and enforcement in the same public courtroom to which society turns for final and binding resolution of other conflicts.²⁹⁴

Beneath Justice Kennedy's words lies a much deeper concern for the procedural and democratic values that are at the very heart of the American democratic experience. As the second Justice Harlan so eloquently observed nearly a quarter of a century ago when describing the meaning and spirit of due process,

At its core, the right to due process reflects a fundamental value in our American constitutional system. . . .

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements

292. Special legislation is always a theoretically available remedy. But any suggestion that it is the appropriate remedy to correct individual injustices serves only to underscore the unique aggravation caused by public law enforcement of harms that can be caused in seemingly private ADR processes.

293. *Edmonson*, 500 U.S. at 628.

294. See Abel, *supra* note 20, at 270-79; Mnookin & Kornhauser, *supra* note 32.

without the anxieties that would beset them in a disorganized society. . . .

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.²⁹⁵

(2) Harm to Society

Justice Harlan's powerful words suggest how the current bipolar understanding of ADR as purely private dispute resolution devoid of enforceable due process rights might play a role in diminishing the strength of American democracy. Although scholars may differ as to the exact definition of democracy,²⁹⁶ nearly all agree on at least two central and interrelated themes: citizen

295. *Boddie v. Connecticut*, 401 U.S. 371, 374-75 (1971). "[D]ue process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id.* at 374. *But see Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973) (holding that a \$25 filing fee for appellate review of an agency's decision to reduce welfare benefits was not a denial of access to the courts); *United States v. Kras*, 409 U.S. 434, 449-50 (1973) (holding that the federal bankruptcy filing fee of \$50 did not amount to a denial of due process).

296. The conceptual confusion over the meaning of democracy is so serious that scholars have identified nearly 550 "subtypes" of democracy. See DAVID COLLIER & STEVEN LEVITSKY, *DEMOCRACY "WITH ADJECTIVES": CONCEPTUAL INNOVATION IN COMPARATIVE RESEARCH* (Helen Kellogg Inst. for Int'l Studies, University of Notre Dame Working Paper No. 230, 1996).

The seminal elaboration of democracy has been Robert H. Dahl's conception of "polyarchy," which overtly has two dimensions: opposition, which involves organized contestation through regular, free, and fair elections, and participation, the right of virtually all adults to vote and to contest for office. However, a third dimension is embedded within these two: civil liberty, which includes the freedom to speak and publish dissenting views, the freedom to form and join organizations, and the existence of alternative sources of information. So understood, civil liberty reflects a

participation in governance and the accountability of government to those citizens.²⁹⁷ These principles rest at the core of the decision of this nation's founders to establish a democratic republic.²⁹⁸ Indeed, the Federalists were ultimately able to reach a consensus on the appropriateness of a national constitution only by arguing that it was "the People" who were delegating the authority to draft such a document in the first instance.²⁹⁹ The Constitution itself was drafted under the theory of a social contract and the consent of the governed.³⁰⁰ Later, it was the assurance of civil liberties in the Bill of Rights—especially the rights to freedom of speech and the press,³⁰¹ and to participate in the administration of the law as jurors in civil and criminal trials—that persuaded the colonists to ratify the charter.³⁰² As Chief Justice John Marshall recognized nearly two hundred years ago in *Marbury v. Madison*,³⁰³

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

. . . .

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.³⁰⁴

broad social pluralism that makes political opposition and participation truly meaningful. See Larry Diamond, *Is the Third Wave Over?*, J. DEMOCRACY, July 1996, at 20.

297. Civic participation and accountability are but two of nearly a dozen core values described by Schmitter and Karl. See Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, in THE GLOBAL RESURGENCE OF DEMOCRACY 47–49 (Larry Diamond & Marc F. Plattner eds., 1993).

298. While the notion of "taxation without representation" provides only a starting point for a discussion of the factors leading to the American revolution, it is, in this regard, a telling starting point nonetheless.

299. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 532–36 (1969).

300. See generally JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole trans., Dutton 1950) (1762). For an overview of consensual theories of rights and state action, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 531–35 (1985) (arguing for the abandonment of the state action requirement).

301. See U.S. CONST. amend. I; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); see also *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (upholding flag burning as protected speech).

302. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–73 (1973).

303. 5 U.S. (1 Cranch) 137 (1803).

304. *Id.* at 163.

The catalogue of procedural values identified by Professor Jerry Mashaw provide a helpful standard against which to measure the degree to which ADR processes comport with these elements of democracy.³⁰⁵ Central to procedural fairness, he contends, is the independence of the neutral and the equality of treatment in the proceedings.³⁰⁶ The public law system safeguards these values through a public selection process,³⁰⁷ procedures for disciplining or removing judges in certain circumstances,³⁰⁸ and a constitutional basis, in the form of due process, for invalidating judgments made by biased tribunals.³⁰⁹

This is generally not always the case, however, with ADR. For example, the overwhelming majority of states have no disciplinary requirements for arbitrators or mediators, other than the possibility of removal from the rosters of court-related programs. In most states, barbers and taxidermists are subject to far greater regulation than ADR neutrals.³¹⁰ While it is true that arbitrator bias provides what may well be a central basis for overturning an arbitrator's award, the standard for proving such bias is extraordinarily high, requiring proof of actual bias against a party in the case, rather than a mere appearance of impropriety.³¹¹ As a result, the vacatur

305. See Mashaw, *supra* note 291, at 899–906 (discussing the application of “process values,” which include equality, predictability, and privacy).

306. See *id.* at 899–901.

307. The vast majority of state court trial and appellate judgeships are filled by popular election. See DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1993, at 32–43 (1995). While federal judicial seats are filled by presidential appointment, such appointments are subject to the advice and consent of the Senate and, therefore, to representative controls. See U.S. CONST. art. II, § 2, cl. 2. The failed nomination of Robert Bork demonstrates just how strong these controls can be, at least when the appointment is to the Supreme Court. See generally ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

308. The federal scheme for the discipline and removal of judges is codified at 28 U.S.C. § 372 (1994). Impeachment is also a possibility. See U.S. CONST. art. II, § 4. For a case confirming the constitutionality of the federal statute and an example of its operation, see *Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987). For more on federal judicial discipline, see Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993), and Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333 (1993). State laws also provide several avenues for the discipline and removal of judicial officers. See, e.g., CAL. CONST. art. II, § 13 (recall); *id.* art. IV, § 18 (impeachment); *id.* art. VI, § 16 (elections); *id.* art. VI, § 18 (discipline, including removal).

309. See *infra* Part IV.C.2.a.1.a.

310. Formal requirements for the qualifications of arbitrators are rare, although some states require arbitrators to take an oath of fairness and impartiality as a condition of their appointment. See 3 MACNEIL ET AL., *supra* note 134, §§ 27.2.1, 27.4. Qualifications for mediators are similarly rare. See Reuben, *supra* note 73, at 60 (“Only a small handful—Florida, New Jersey and Hawaii—have adopted qualifications requirements for mediators.”).

311. Under the FAA, an arbitration award may be vacated “[w]here there was evident partiality or corruption in the arbitrators, or either of them.” 9 U.S.C. § 10(a)(2) (1994). State laws

of an arbitration award on this ground is rare. It is here that constitutional due process is perhaps most deeply offended, an issue discussed at length below.³¹²

This troubling aspect of ADR is only exacerbated by the absence of even the most basic procedural safeguards, particularly the right to counsel³¹³ and the right to present and confront evidence.³¹⁴ Public hearings are typically held at a neutral public site, which is one nuance of formality that some have contended goes a long way toward ensuring procedural fairness.³¹⁵ By contrast, private arbitrations, mediations, and other ADR procedures are often held wherever space can be found, and they can easily take place in the conference room of a law firm known for advocating one side of an issue.³¹⁶

Procedural values, Mashaw says, also further a sense of rationality and predictability in the law, ensuring that the rules governing a conflict will be applied accurately and in a way capable of guiding future individual and societal behavior. Not so in ADR. The processes are removed from public witness, negating any possibility that the dispute's resolution will have any public educational or deterrent value. Perhaps more importantly, there is no mechanism for ensuring that society's laws are accurately administered, an issue that seems less troubling when the ADR agreement is the product of a knowing and voluntary agreement to waive those substantive rights,³¹⁷ but one that can be very disturbing when there is no such waiver and participation in the ADR process is compelled. Indeed, one of the ironies of contemporary compulsory ADR is that it can result in the removal by the state of the availability of public law to redress a party's harms, either sub-

are similar. See, e.g., CAL. CIV. PROC. CODE § 1286.2 (West 1999); *Luster v. Collins*, 15 Cal. App. 4th 1338, 1345 (Ct. App. 1993) ("To support a claim of bias, a party must demonstrate the arbitrator had an interest in the subject matter of the arbitration or a preexisting business or social relationship with one of the parties which would color the arbitrator's judgment."); 3 MACNEIL ET AL., *supra* note 134, § 28.2; 4 *id.* § 40.1; see also UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280 (1997).

312. See *infra* Part IV.C.2.a.1.a.

313. See *infra* Part IV.C.2.c.

314. It is easy to shrug off issues regarding the presentation of evidence as limited to arbitration, which is essentially an adjudicatory procedure. But these issues can also arise in mediation, in which one of the parties can be essentially silenced by a biased or hurried mediator. Cf. Grillo, *supra* note 42, at 1585.

315. See Delgado et al., *supra* note 42, at 1387-89 (arguing that formality and adversarial procedures counteract bias among legal decision makers).

316. See Telephone Interview with Jeffrey Liddle, Attorney (Feb. 9, 1996) (observing that Securities and Exchange Commission arbitrations are frequently held in law offices of firms that represent securities brokerages).

317. See *infra* Part III.C.

stantively or procedurally, even though the provision of a remedy for a given harm may be precisely the law's intent.

The net effect is that the very law that citizens have agreed will govern their lives ultimately has little bearing on how their disputes are resolved in ADR. This in turn could lead to a diminution of democracy itself, as ADR continues to expand and becomes more institutionalized, and as the mass of potential individualized injustices continues to get more critical. In his landmark work on democracy in the largely autonomous Italian regional governments since 1970, Harvard political scientist Robert Putnam concludes that civic culture and social capital are far more effective than positive law, political institutions, and economic factors in generating effective democracy.³¹⁸ Successful regional governments, he finds, are marked by a civic culture that broadly encourages cooperation and reciprocation among its citizenry at all levels of national life, from social to political to economic and beyond.³¹⁹ Drawing on modern game theory, Putnam suggests that such cooperation leads to a constantly deepening sense of trust and order, both horizontally among the citizenry and vertically between the citizenry and its governmental and national institutions.³²⁰ He concludes that social capital is more powerful and effective than positive law or economics in ordering human affairs, and that it is the very engine that drives effective democracy. Stoke this social capital and democracy will flourish; starve it and democracy will wither.

The rule of law is inarguably one of the central elements of government in a democratic regime. It provides the stability and order that permits electoral and other institutions to operate without chaos or arbitrariness. Yet it depends on the very kind of voluntary compliance and cooperation that Putnam finds so important to the success of effective regional democracies in Italy—the belief and trust among the public that we should obey the law because others will do so as well.³²¹ In many ways, the procedural

318. See ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 165–85 (1993) (comparing effective and ineffective regional democratic governments in Italy since the devolution of most powers to regional governments in 1970); see also GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 473 (1963) (arguing that cultural factors shape political institutions).

319. See PUTNAM, *supra* note 318, at 165–85.

320. See *id.* at 173–76.

321. This research is consistent with the findings of social psychologist Tom R. Tyler in his study of procedural justice. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); THOMAS R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (contending that compliance with the law may be traced to such normative considerations as legitimacy, legitimacy to such normative issues as procedural fairness, and procedural fairness to such normative matters as the citizenry's having a voice in the decisions that affect them). Tyler generally concludes that if the authorities are "good guys," the citizens will be

values described above are intended to facilitate the trust and cooperation that provide the basis for this nation's social capital and commitment to the rule of law. To the extent that they are not accounted for in ADR that takes place under the aegis of state action, America's social capital may decline and the effectiveness of our democracy may be diminished. One need look no further than the 1991 Los Angeles riots, which followed the acquittal of four officers charged with using unlawful force against motorist Rodney King, to see how quickly order can turn into chaos and destruction when society's desire to accept the rule of law breaks down.³²²

Justice Kennedy's concerns for these procedural and democratic values led the Supreme Court to find state action in the administration of peremptory challenges in a private civil action, because the private injury was aggravated by the incidents of governmental authority.³²³ The aggravation of injury in the ADR context certainly seems no less than in the peremptory challenge context. In fact, it can be much greater.

C. Conclusion

In law, the state action doctrine is the measure used to draw the line between that which is public in nature, and therefore subject to constitutional limitations, and that which is private, and therefore bound by no such constraints. An application of the doctrine to ADR shows that court-related arbitration, mediation, and advisory procedures are the product of state action by virtue of the direct compulsion of litigants into these seemingly private ADR processes through mandatory programs, and by the state's complete responsibility for the administration, supervision, and execution of voluntary court-related programs. This analysis also presents a strong case for finding state action in contractual arbitration because of the unprecedented level of entanglement of public courts and private arbitrators toward the single end of binding dispute resolution, and because the delegation of binding decisional authority to arbitrators is the delegation of a traditionally exclusive governmental function that is comparable to the delegations of

"good citizens," not because they have to be but because they feel they should. See *id.* at 178; see also JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 35 (William Rehg trans., MIT Press 1996) (1992); Robert J. Lukens, Comment, *Discoursing on Democracy and the Law—A Deconstructive Analysis*, 70 TEMP. L. REV. 587, 596 (1997) (applying to deliberative democracy theory the philosophy of Habermas that law is the central vehicle for the "coordination of coordinated activity" that gives community norms meaning and legitimizes obedience to law).

322. See, e.g., Marc Lacey & Shawn Hubler, *Rioters Set Fires, Loot Stores; 4 Reported Dead*, L.A. TIMES, Apr. 30, 1992, at A1; Melvin L. Oliver, *It's the Fire Every Time, and We Do Nothing*, L.A. TIMES, May 1, 1992, at B7.

323. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

electoral functions found to be state action in the white primary cases. In both contexts, the private neutrals engage in dispute resolution under color of state law, and their actions are fairly attributable to the state. In court-related ADR, this attribution is fair because of the state's actual operation of the ADR program, even when the hearing itself may be conducted by a seemingly private neutral. In contractual arbitrations conducted under the FAA and related state laws, this attribution is fair because the arbitrators are performing the traditionally exclusive public function of binding dispute resolution, facilitated and made possible by the extraordinary benefit of the state's active participation. Both individual and societal harms are aggravated by the state's unique role in these court-related and contractual ADR processes because the state has lent its power, prestige, and imprimatur to the results of those processes. The effect of such aggravated harms may be the diminution of democracy itself if participation in those processes is not voluntary.

In Part III, I propose a methodology for assessing the voluntariness of participation in contractual arbitrations conducted under the FAA and related state laws while discussing the larger relationship between contractual and constitutional rights in the ADR context. I again focus on contractual arbitrations conducted under the FAA and related state laws.

III. THE EXPANSION OF PUBLIC JUSTICE: CONTRACTUAL AND CONSTITUTIONAL RIGHTS IN ALTERNATIVE DISPUTE RESOLUTION

The recognition that there can be state action in contractual arbitration under the FAA and related state laws raises important questions regarding the fundamental relationship between the individual and the state. In particular, it forces consideration of the central struggle between personal autonomy as expressed in the freedom of contract and the needs of a constitutional democracy built upon "the concept of ordered liberty."³²⁴

This is a familiar source of tension in American constitutional jurisprudence, and one that led the Supreme Court to one of its darker periods as it embraced private contractual rights over the ability of government to enact laws that protect the safety, health, morals, and general

324. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). Carrington and Haagen suggest that the Court's recently renewed embrace of contract rights is one explanation for its strong support of contractual arbitration. See Carrington & Haagen, *supra* note 42, at 333-34.

welfare of citizens through its police powers.³²⁵ More specifically, the Court during the *Lochner* era interpreted the Due Process Clause of the Fourteenth Amendment to include the freedom of contract and strictly scrutinized state and federal laws that interfered with contractual rights. Thus, the Court struck down laws setting maximum hours that bakers could work,³²⁶ minimum wages for women,³²⁷ and various forms of consumer legislation setting maximum prices,³²⁸ while also striking down legislation making it a crime for employers to force employees not to join unions³²⁹ and limiting the use of injunctions in labor disputes.³³⁰ Economic and political pressure led to the demise and ultimate discrediting of the *Lochner* era³³¹ in favor of a new course for the Court's Fourteenth Amendment due process jurisprudence that focused instead on the political process and the protection of "discrete and insular minorities."³³²

Addressing this pressure between individual and group rights need not be so traumatic in the contractual arbitration context, for the FAA and related state laws appear to assign a fairly specific role to contract: that of waiving one's legal rights to have one's claims heard in a public court. Although simple enough to state, the requirements and scope of the waiver present complex questions. As I demonstrate in this part, when state action is present in contractual arbitration, the waiver, if valid, operates to waive all substantive law rights and most procedural rights. However, it does not waive *all* procedural rights. Rather, arbitration procedures energized by the constitutional gravity of state action must conform to at least rudimentary notions of fundamental fairness in order to be constitutionally adequate. This constitutional dimension supplements, rather than supplants, the traditional contractual foundation of contractual arbitration and, in so doing, expands our concept of public civil justice to include all those processes beyond trial that are affected by the constitutional gravity of state action.

325. See *Lochner v. New York*, 198 U.S. 45 (1905). For a general discussion of the *Lochner* era, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 471-86 (1997); COHEN & VARAT, *supra* note 182, at 504-25; GUNTHER & SULLIVAN, *supra* note 182, at 460-74.

326. See *Lochner*, 198 U.S. at 53-61.

327. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

328. See *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (involving prices for gasoline); *Ribnik v. McBride*, 277 U.S. 350 (1928) (involving fees charged by employment agencies); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (involving prices for theater tickets).

329. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

330. See *Truax v. Corrigan*, 257 U.S. 312 (1921).

331. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1935) (overruling *Adkins*, and representing a case in which Justice Owen Roberts is alleged to have responded to political pressures and switched his vote to uphold a state law requiring a minimum wage for women employees). For a concise general discussion of these pressures, see CHEMERINSKY, *supra* note 325, at 487-91.

332. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

A. The Approach of the Federal Arbitration Act

As discussed above, the FAA was enacted to overturn legislatively the historical refusal of courts to enforce agreements to arbitrate.³³³ Furthermore, members of the Supreme Court have interpreted the act to reflect a “federal [or national] policy favoring arbitration”³³⁴ and have effectively used this policy to bring down the ouster doctrine. Precisely what that ambiguous phrase means is highly debatable. Some courts and scholars have interpreted it to mean a national policy favoring arbitration over litigation as the primary means of resolving claims under the Constitution, statutes, and laws of the United States.³³⁵ But the history of the ouster doctrine, the plain language of the FAA, and its unambiguous legislative intent suggest that “the federal policy favoring arbitration” should be viewed as meaning that federal courts should strongly support knowing and voluntary agreements to arbitrate commercial disputes, not the displacement of litigation with arbitration.³³⁶ As the Court stated in *Volt Information Sciences, Inc. v. Board of Trustees*,³³⁷ “the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”³³⁸ In other words, it may be more accurate to think of the policy as procontract than as proarbitration.

B. The Waiver of Legal Rights Under the Federal Arbitration Act and Related State Laws

1. Contractual Validity: The “Knowing and Voluntary” Standard

As the FAA suggests, the waiver of legal rights represented by a contractual agreement to arbitrate must be assessed according to familiar principles of contract. Under contract law, a waiver occurs when a party to a contract

333. See *supra* notes 118–120 and accompanying text (discussing the ouster doctrine).

334. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983) (construing the FAA for the first time to represent a “federal policy favoring arbitration”); see also *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (finding that the FAA’s national policy favoring arbitration preempts state laws that are hostile to arbitration); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding that the FAA’s national policy favoring arbitration means that arbitrability issues must be decided with a healthy regard for arbitration).

335. For discussion and criticism, see Sternlight, *supra* note 127, at 641.

336. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942–43 (1995) (holding that under the FAA, the question whether arbitrators or courts have primary power to decide if parties agreed to arbitrate the merits of a dispute is one for the courts, unless the parties agreed to submit the question to arbitration).

337. 489 U.S. 468 (1989).

338. *Id.* at 476; see also *First Options*, 514 U.S. at 942–43.

promises to render performance under the contract, even though a certain contractual condition of the obligation to perform has not occurred.³³⁹ It is often spoken of in terms of the “voluntary relinquishment of a known right,”³⁴⁰ thus calling for consideration of (1) the voluntariness of the relinquishment and (2) the party’s knowledge of the right being relinquished. Courts have frequently applied this standard to agreements to arbitrate in particular, including situations in which the claim is that enforcement of the relevant arbitration provision violates the constitutional right to a jury trial.³⁴¹

2. Giving Substance to Knowing and Voluntary Waivers

The talismanic “knowing and voluntary” phrase provides little by way of substantive analytic guidance, as the courts remarkably have not clearly articulated just how such essential characteristics are to be determined. Only recently, the Supreme Court confirmed that such a waiver must be at the very least clear and unmistakable.³⁴² Two cases, however, do provide a starting point on the substance of knowledge and voluntariness: *D.H.*

339. See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 424–31, 510–20 (2d ed. 1998).

340. RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1979) (warning that the common definition is somewhat inexact because it may lead one to the faulty belief that “the promisor must know his legal rights and must intend the legal effect of the promise”).

341. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832–33 (4th Cir. 1986) (holding that a waiver of the Seventh Amendment right to a jury must be knowing and voluntary); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755–57 (6th Cir. 1985) (upholding a magistrate’s refusal to enforce a contractual waiver of a jury trial right, and concluding that application of the “knowing and voluntary” standard was appropriate); *National Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 257–58 (2d Cir. 1977) (upholding a court’s grant of a jury trial, despite a jury trial waiver “buried in the eleventh paragraph of a fine print, sixteen-clause agreement,” and stating that the right to a jury trial can only be waived knowingly and intentionally); *Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428, 438 (D. Mass. 1991) (similar); *Reggie Packing Co. v. Lazere Fin. Corp.*, 671 F. Supp. 571, 573 (N.D. Ill. 1987) (similar); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (similar); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (similar); *McKinstry v. Valley Obstetrics-Gynecology Clinic*, 405 N.W.2d 88, 96 (Mich. 1987) (similar); *Sanchez v. Sirmons*, 467 N.Y.S.2d 757, 760 (Sup. Ct. 1983) (similar). See generally Debra T. Landis, Annotation, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 (1989).

Interestingly, the Supreme Court has not clearly stated whether the constitutional standard for waivers so familiar in the criminal context applies to waivers of constitutional rights in the civil context, such as claims that arbitration provisions violate the Seventh Amendment right to a jury trial in certain cases. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 94–96 (1972) (indicating that it would have used the constitutional formulation, but holding that it was not necessary because the waiver was facially invalid); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972) (assuming the constitutional formulation applied in the civil context, and applying it). Both decisions are discussed more thoroughly at *infra* notes 343–353 and accompanying text.

342. See *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79–80 (1998).

*Overmyer Co. v. Frick*³⁴³ and *Fuentes v. Shevin*.³⁴⁴ In *Overmyer*, the Court upheld a contractor's confession of judgment, or cognovit note, waiving due process and other legal rights, finding that it was very specific, that it had been carefully negotiated by an attorney on behalf of a sophisticated client rather than imposed in a contract of adhesion, and that it was granted in return for substantial consideration.³⁴⁵ By contrast, the Court in *Fuentes* held that an unsophisticated woman did not waive her due process rights to notice and a hearing when she purchased a stove and a stereo using a standard form contract that included a replevin provision permitting the seller to seize the property in the event that she defaulted on her monthly installment obligations.³⁴⁶

Professor Jean Sternlight forcefully argues that the Supreme Court used a virtually identical analysis to assess the knowingness and voluntariness of consent in both cases, which she contends focuses on four fact-specific considerations: (1) the visibility and clarity of the agreement, (2) the relative knowledge and economic power possessed by the parties, (3) the degree of voluntariness of the purported agreement, and (4) the substantive fairness of the purported agreement.³⁴⁷ Writing in favor of incorporating broader constitutional due process standards into arbitrations than are ultimately suggested in Part IV,³⁴⁸ Sternlight further suggests that these factors should be used to assess the validity of the contractual waiver under the FAA and related state laws.

Despite its appeal to formalism and precedent, this proposed analysis is difficult to fully embrace because of inherent analytical problems with two of the four factors. In particular, the "degree of voluntariness" factor is logically fallacious, merely begging the ultimate question as an element that would assess *inter alia* the voluntariness of consent.³⁴⁹ Moreover, the "substantive fairness" element bespeaks a subjectivity that is reminiscent of the continuing debate over substantive due process.³⁵⁰

343. 405 U.S. 174 (1972).

344. 407 U.S. 67 (1972).

345. See *Overmyer*, 405 U.S. at 186–88.

346. See *Fuentes*, 407 U.S. at 95–96.

347. While the Court's holding in *Fuentes* was based on the lack of a clear waiver, the Court made a point of addressing the other listed factors at length and drawing an explicit contrast to *Overmyer*. For a comprehensive discussion, see 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, 53–82 (1997).

348. Compare the minimal process-value integrative approach suggested *infra* Part IV, with the categorical approach suggested by Sternlight, *supra* note 347, at 80–97.

349. See generally RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A CLEAR GUIDE TO LEGAL THINKING* (1989).

350. See generally GUNTHER & SULLIVAN, *supra* note 182, at 454–60.

Still, Sternlight rightly identifies and elaborates the value of the *Overmyer* and *Fuentes* decisions in informing the meaning of a “knowing and voluntary” waiver in the arbitration context. I, however, propose a slightly different formulation, yet one that is still faithful to the contractual principles upon which the FAA and its related jurisprudence rests. In my view, the knowing and voluntary waiver analysis should be structured according to the following three factors: (1) the visibility and clarity of the waiver agreement on its face, (2) the general contractual environment in which the waiver was secured, and (3) the specific facts and circumstances of the actual bargaining over the waiver.³⁵¹ The first factor (visibility and clarity), which addresses the knowingness of the waiver, is drawn from Sternlight’s proposed analysis and needs no further explanation. The second factor (general contract environment) addresses the voluntariness of the waiver and assesses the coerciveness of the environment by considering such elements as the sophistication of the parties, the relative economic bargaining strength of the parties, whether the parties were represented by counsel, the availability of alternative means of procuring the product, service, or opportunity that is the broader subject of the contract, and other relevant factors relating to the overall coerciveness of the situation. Finally, the third factor (specific facts and circumstances) also addresses voluntariness and weighs the degree to which the waiver was in fact the result of an actual bargained-for exchange. The inquiry into this factor should be taken with “particular care”³⁵² in situations suggestive of substantial coercion, such as the inclusion of an arbitration provision in the boilerplate of a form contract. All three factors should be balanced against both the presumptive validity of such agreements under the FAA and the federal policy favoring arbitration.³⁵³

a. A General Rule of Construction: Voluntariness Is a Serious Inquiry

While it is well established that substantive and procedural legal rights can be contractually waived, the common law of exculpatory agreements teaches that such waivers should be scrutinized seriously because of the important nature of the rights involved.

351. Arguably, the second and third factors I propose could be collapsed into a single consideration of the facts and circumstances of the case. But I prefer separating the elements to bring greater clarity to the distinct considerations involved in analyzing the actual waiver negotiations and the coerciveness of the environment in which those negotiations take place.

352. See *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 176 (Cal. 1981). For more on the case, see *infra* notes 403–413 and accompanying text.

353. See *supra* note 127 and accompanying text.

As a general rule, courts are sometimes willing to uphold exculpatory agreements, which typically call for a waiver of legal rights, such as the right to bring a tort action, in exchange for the opportunity to undertake a particular activity, such as participating in recreational sports.³⁵⁴ However, exculpatory agreements are strongly disfavored as a categorical matter and are subject to constraints so substantial that these exceptions can often be seen as swallowing the rule that exculpatory agreements are severally enforceable.³⁵⁵ As the proposed *Restatement (Third) of Torts* stresses, the strong public policy considerations that flow from the elimination of substantive law rights “has led the courts to strictly scrutinize such agreements, construing them against the party invoking them, and to require as a condition to validity that the ‘intention of the parties [be] expressed in clear and unambiguous language.’”³⁵⁶ That is, the exculpatory agreement must clearly “alert the party agreeing to such a provision that it is giving up a very substantial right.”³⁵⁷ Judicial inquiry into the question of the validity of an exculpatory agreement (waiving legal rights) is a wide-ranging factual analysis that should be understood as a “hard look” to assure their voluntariness and consistency with public policy.

This hard look originates in the common law but is consistent with standards that have been imposed legislatively. For example, in 1990, Congress passed the Older Workers Benefits Protection Act (OWBPA), which amended the Age Discrimination in Employment Act (ADEA) to provide

354. See, e.g., *Clanton v. United Skates of Am.*, 686 N.E.2d 896, 901 (Ind. Ct. App. 1997) (upholding an ice skating rink’s exculpatory clause in a personal injury suit for damages arising from a skating accident); *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166], 758 P.2d. 968 (Wash. 1988) (holding that releases that public school students were required to sign as a condition of engaging in school-related activities such as interscholastic athletics and that released the school districts from consequences of all future school district negligence were invalid as violating public policy); *Arnold v. Shawano Agric. Soc’y*, 330 N.W.2d 773, 778 (Wis. 1983) (finding that an exculpatory clause in an auto racer’s contract with track owners and race promoters did not bar a claim for “negligent rescue”). However, exculpatory agreements can also be found in other contexts involving hazardous activities, including commercial activities. See, e.g., *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525–29 (9th Cir. 1987) (upholding the exculpatory clause in a contract between an aircraft manufacturer and a commercial airline); *Morgan v. South Cent. Bell Tel. Co.*, 466 So. 2d 107, 118 (Ala. 1985) (holding an exculpatory clause in a telephone “yellow pages” company’s contract with a periodontist invalid as violative of public policy).

355. See, e.g., Alexander T. Pendleton, *Enforcing Exculpatory Agreements*, WIS. LAW., Nov. 1997, at 10 (noting that all five of the exculpatory agreement cases that the Wisconsin Supreme Court has considered in the past 15 years have resulted in a voiding of the agreement for one reason or another).

356. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 8 cmt. k (1998) (reporter’s note) (quoting *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (en banc)).

357. *Sirek v. Fairfield Snowbowl, Inc.*, 800 P.2d 1291, 1295 (Ariz. Ct. App. 1990) (construing a ski rental agreement’s exculpatory agreement narrowly to exclude negligence).

special protections for older workers in recognition of their unique vulnerability.³⁵⁸ Among other things, the OWBPA says that the waiver of rights under the ADEA must be “knowing and voluntary” and enumerates six specific considerations in making this assessment, including a plaintiff’s sophistication and the availability of counsel.³⁵⁹ Together, the exculpatory agreement cases and the OWBPA legislation evince a broad legislative and judicial policy requiring that the waiver of legal rights through a contractual arbitration clause is not to be lightly inferred and must satisfy the requirements of actual knowledge and voluntariness.

b. The Knowledge Requirement: Assessing the Visibility and Clarity of the Arbitration Agreement

The assessment of whether a contractual waiver of legal rights is knowing should focus first on a textual analysis of the clarity and content of the arbitration clause itself.³⁶⁰ As the Supreme Court stated in *Fuentes*, if the clause is unclear on its face, then no further analysis is required—there can be no waiver.³⁶¹ Other courts have used similar language in the arbitration context.³⁶²

358. See 29 U.S.C. § 626 (1994); Bruce P. McMoran, *Age Discrimination: Coping with Ambiguity, Decisions on the Merits and Supreme Court Pronouncements*, in 26TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 589, 612 (PLI Litig. & Admin. Practice Course Handbook Series No. 571, 1997).

359. See 29 U.S.C. § 626(f)(1). These include (1) the plaintiff’s education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of the plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law. See *id.*; see also *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998) (holding that a release that does not comply with requirements of the Older Workers Benefits Protection Act (OWBPA) may not bar an employee’s ADEA claims, even if the employee has neither returned nor offered to return money she received in consideration of signing the release).

360. Significantly, there is no requirement under a contractual waiver analysis that the waiver be “intelligent” in that the waiving party understands fully the consequences of the waiver. This appears to be the principal difference between the standards for waiver of civil law rights and those for waiver of constitutional criminal procedural rights. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“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.”); see also *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (“Presuming waiver [of Sixth Amendment right to counsel] from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”).

361. See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (“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.”).

362. See, e.g., *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761 (9th Cir. 1997), cert. denied, 523 U.S. 1072 (1998); *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997); *Sewell v. Jefferson*

This element of the analysis would seem to call into question the validity of waivers in a typical broadly worded predispute ADR agreement providing, for example, that "all disputes arising under this contract shall be decided by binding arbitration."³⁶³ It would seem that a waiver of future rights could not be knowing if the substantive nature of a possible dispute were not known or prospectively described with particularity at the time of contracting.³⁶⁴ This view has been adopted in several recent Ninth Circuit cases that arose in the context of securities employment arbitration.³⁶⁵ In all of those cases, the route to arbitration was contractual, based upon the employees' signing of the U-4 form.³⁶⁶

In what is arguably the lead case, *Prudential Insurance Co. of America v. Lai*,³⁶⁷ a sexual harassment case, the court noted that:

[E]ven assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not purport to describe the types of disputes that were to be subject to arbitration. Moreover, even if appellants had signed a contract containing the NASD arbitration clause, it would not put them on notice that they were bound to arbitrate Title VII claims. That provision did not even refer to employment disputes.³⁶⁸

County Fiscal Court, 863 F.2d 461, 468-69 (6th Cir. 1988) (Kennedy, J., concurring in part and dissenting in part); *Bueno v. City of Donna*, 714 F.2d 484, 492-93 (5th Cir. 1983); *Bowens v. North Carolina Dep't of Human Resources*, 710 F.2d 1015, 1018 (4th Cir. 1983).

363. See, for example, *Standard Applications for Securities Industry Registration, Form U-4*, which is required by the NASD. Paragraph 5 of the form, the arbitration clause, reads as follows:

I agree 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 by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Id.

364. For a contrary view, see Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1346-50 (1997).

365. See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189-90 (9th Cir. 1998) (holding that mandatory and binding predispute arbitration clauses do not apply to Title VII claims), *cert. denied*, 525 U.S. 996 (1998); *Nelson*, 119 F.3d at 761 (holding that because a waiver of the right to a judicial forum must be "knowing," an employee did not knowingly agree to arbitrate claims by signing a form acknowledging receipt of a revised employee handbook); *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1108 (9th Cir. 1997) (holding that the arbitration clause contained in the Uniform Application for Securities Industry Registration did not constitute a "knowing" waiver of Title VII and related state claims because the clause did not refer specifically to employment disputes); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994).

366. See cases cited *supra* note 365.

367. 42 F.3d 1299 (9th Cir. 1994).

368. *Id.* at 1305.

The Ninth Circuit's judicial wisdom is buttressed by common sense and has been relied upon by several other courts.³⁶⁹ If the concept of a knowing decision means anything, it means that one had some specific and known information upon which to base that decision. Because generalized, broadly worded clauses, such as that found in the U-4 form, speak only in terms of the full range of possible disputes, they cannot be said to constitute a knowing waiver of any specific rights.³⁷⁰

It can, of course, be argued that the choice to accept a broadly worded arbitration provision in a standard form contract is still a choice, and that agreements such as the U-4 form represent a voluntary waiver of one's substantive legal rights. But such *Lochner*-era logic grossly distorts the reality of the bargaining environment. The selection of an alternative method of dispute resolution is supposed to represent a choice between trial and another means of resolving conflicts, not a choice between working in a given industry and finding another livelihood³⁷¹—or between purchasing a stove, hiring a doctor, or procuring the services of a stock broker and walking away from the opportunity to obtain those goods and services.

A much closer call is presented if a predispute arbitration clause specifically delineates the types of disputes to which the clause applies, that is, claims of gender, age, race, or other types of discrimination in the employment context. In such cases, it could be argued that the claimant at least knew some information about the class of disputes for which legal rights would be waived. Even then, however, the choice of a dispute resolution forum can ultimately be expected to depend upon the unique facts and circumstances giving rise to the dispute,³⁷² including how the dispute is handled by the parties prior to legal intervention.³⁷³ This is particularly true in the context of alleged violations of statutory rights that reflect substantial public policy decisions made at the legislative level, such as rights against employment discrimination. Alleged violations of statutory and other rights do vary in kind and degree, and the public scrutiny or vindication

369. For Ninth Circuit cases, see cases cited *supra* note 365. *Prudential* has been followed in other circuits as well. See, e.g., *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218, 226 (S.D.N.Y. 1997); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 190, 197 (D. Mass. 1997), *aff'd*, 163 F.3d 53 (1st Cir. 1998); *Oldroyd v. Elmira Sav. Bank*, 956 F. Supp. 393, 398 (W.D.N.Y. 1997). But see, e.g., *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183–84 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995); *Hall v. MetLife Resources, No. 94 CIV.0358 (JFK)*, 1995 WL 258061, at *4 (S.D.N.Y. May 3, 1995); *Lockhart v. A.G. Edwards & Sons, Inc.*, No. CIV.A.93-2418-GTV, 1994 WL 34870, at *3–*4 (D. Kan. Jan. 25, 1994).

370. See *Duffield*, 144 F.3d at 1186.

371. See Richard C. Reuben, *Reforming ADR*, CAL. LAW., Feb. 1998, at 31.

372. See Sander & Goldberg, *supra* note 179, at 66.

373. See LEVINE ET AL., *supra* note 82.

that can accompany a public trial might not seem significant until the harm has been personally felt.

Moreover, as noted above,³⁷⁴ courts in other contexts have instructed that waivers of substantive legal rights are not to be inferred lightly³⁷⁵ and should at minimum be “clear and unmistakable.”³⁷⁶ This admonition suggests a presumption against the validity of predispute waivers of legal rights that would operate in clear tension with those cases holding that the FAA establishes a presumption of validity for arbitration provisions.³⁷⁷ However, a more nuanced understanding of the history and structure of the FAA and related state laws helps ease the tension within this line of cases by putting this presumption favoring the validity of arbitration agreements in a more precise context. As a historical matter, it must be remembered that the FAA took agreements to arbitrate that were otherwise valid under standard principles of state contract law and made them “valid, irrevocable, and enforceable thus overturning legislatively the common law ouster doctrine.”³⁷⁸ That is, to the extent that the FAA and related state laws legitimized agreements to arbitrate, they did so by reversing the common law’s refusal to enforce such agreements even when they were contractually valid. They did not, however, do away with the requirement that they be contractually valid as an initial matter.³⁷⁹ In other words, there is a rebuttable presumption against the validity of contractual agreements to arbitrate just as there is for other contracts that waive substantive legal rights. This presumption may be overcome by a showing that a waiver of rights in an arbitration agreement was the product of knowing and voluntary affirmative assent. This assent may be deduced by an analysis of the environment of the negotiation (that is, the sophistication or relationship of the parties, evidence of knowledge and acquiescence to industry customs, etc.), and the actual negotiation over the arbitration agreement itself. Once that showing has been made, the arbitration provision’s presumption of validity becomes essentially irrebuttable, and the waiver of legal rights that flows from that arbitration agreement becomes perfected.

Applying this understanding to predispute waivers of legal rights made through contractual arbitration provisions suggests that the better view would be that even the narrowing of generalized clauses to describe specific classes of covered disputes should be inadequate to save their validity as a facial

374. See *supra* Part III.B.2.a.

375. See *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972).

376. *Wright v. Universal Maritime Servs. Corp.*, 525 U.S. 70, 80 (1998).

377. See *supra* Part I.B.2.b.

378. 9 U.S.C. § 2 (1994).

379. See *id.*

matter without additional indicia of voluntariness. Rather, just as predispute waivers of substantive legal rights are not to be lightly inferred in other contexts, they should be presumptively invalid as described here because, simply put, they cannot be said to be knowing in a substantive sense,³⁸⁰ absent rebutting evidence that the waiver was knowing and voluntary as described below.

c. The Voluntariness Requirement: Assessing the General and Specific Waiver Contexts

If a court concludes that an arbitration agreement is clear enough to permit a knowing waiver, it should go on to consider the voluntariness of that agreement by analyzing (1) the general contractual environment and (2) the specific negotiations (if any) attendant to the agreement. Again, the *Overmyer* and *Fuentes* decisions are instructive starting points for demonstrating how the analysis is to be applied.

In *Overmyer*, the general contractual environment appears to have been relatively balanced. Both *Overmyer* and *Frick* were corporations of some apparent size in a populous state (Ohio), were represented by counsel, were sophisticated in business, and had alternative means of procuring the goods and services each sought from the other. That is, *Overmyer* could have sought manufacturers other than *Frick* to manufacture and install an automatic refrigeration system in an *Overmyer* warehouse, and *Frick* could have found other warehouses to buy its refrigeration services.³⁸¹ Against this general contractual background, the parties engaged in lengthy negotiations over how to handle *Overmyer's* financial plight, which ended in a contract that included *Overmyer's* agreement to sign the cognovit note (confession of judgment) in exchange for the release of mechanic's liens and the securing of preferred payment terms as to the amount, time, and interest rate of future payments.³⁸² As such, the cognovit provision was freely bargained for between sophisticated parties of relatively equal bargaining power. While the environment was somewhat coercive in the sense that *Overmyer* was experiencing financial difficulty, the nature and complexity of the negotiations suggested that *Overmyer* had options other than signing the cognovit note. Based on these facts, the Court held that *Overmyer* voluntarily agreed to the confession of judgment and that it was not imposed involuntarily

380. See Sternlight, *supra* note 347, at 49–50.

381. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 177–78 (1972).

382. See *id.* at 178–81.

upon the company. Therefore, the Supreme Court properly found that it was enforceable.³⁸³

The circumstances in *Fuentes*, on the other hand, were “a far cry” from those in *Overmyer*.³⁸⁴ The general contractual environment was highly coercive, involving a contract of adhesion rather than the negotiated agreement seen in *Overmyer*. Moreover, one of the parties, Firestone Tire & Rubber Co., was a sophisticated national corporation that was represented by counsel, while the other was an unsophisticated, unrepresented (at the time of contracting) woman of lesser economic means who spoke little or no English.³⁸⁵ Clearly, the general environment in which *Fuentes* came to be bound by the replevin provision was highly suggestive of a lack of assent, calling for an assessment of the actual circumstances of the negotiation with particular care to determine whether she actually consented to that provision. In this regard, the opinions of the federal district court and the U.S. Supreme Court note that there were no actual negotiations over the replevin provision or any other terms of the retail agreement, and that Firestone had made no effort to make her aware of the “fine print now relied upon as a waiver of constitutional rights.”³⁸⁶ Given her lack of sophistication and English skills, it is reasonable to assume that *Fuentes* simply purchased the gas stove in question without negotiating price or being aware of any other terms or conditions of sale. In this regard, while it is true that she could have gone to another seller, she may reasonably have believed that it would have been futile to try to find one willing to proceed on an installment basis without the repossession clause. The Supreme Court rightly found that she had not voluntarily waived her basic due process rights to a preseizure hearing, and in the end the replevin provision was “no more than a statement of the seller’s right to repossession upon occurrence of certain events.”³⁸⁷

Overmyer and *Fuentes* provide a useful vehicle for illustrating the applicability of the three-part test I have proposed for the assessment of whether waivers of legal rights under the FAA and related state laws are knowing and voluntary and therefore valid under state law. Traditional

383. It is important to note that the Supreme Court explicitly observed that its conclusion might have been different had the cognovit note been imposed as a contract of adhesion. See *id.* at 188.

384. See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

385. See *Fuentes v. Faircloth*, 317 F. Supp. 954, 956 (S.D. Fla. 1970), *vacated*, *Fuentes v. Shevin*, 407 U.S. 67 (1972).

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

387. *Id.* at 96.

contracts that include terms that are substantially the result of bargaining, such as in *Overmyer*, readily lend themselves to this analysis and require no further discussion. As in *Overmyer*, they can most certainly be valid. On the other hand, adhesion contracts, such as the one in *Fuentes*, call for a slightly extended analysis because of their unique character.

3. The Special Problem of Arbitration Clauses in Contracts of Adhesion

Rather than being the products of negotiation, contracts of adhesion are generally characterized by a lack of real bargaining in that they are generally tendered on a "take it or leave it" basis and often include terms that are favorable to the drafting party.³⁸⁸ As such, there seems to be little place for voluntariness, other than simply walking away from the larger opportunity because of the offensive provision—assuming, of course, that one is aware of its existence.³⁸⁹ Therefore, the waiver analysis must be extended slightly to include an assessment of the validity of the adhesive arbitration provision before proceeding to discern the adhering party's voluntary assent to it.

While some scholars have argued that contracts of adhesion should be presumptively invalid,³⁹⁰ the courts have rejected that call as a categorical matter. Rather, the courts have generally upheld adhesion contracts on prudential grounds, albeit with some reluctance, as a necessary compromise between the demands of doctrinal regimen and the pragmatic needs of a large and complex society.³⁹¹ In an immediately relevant example, the U.S.

388. See 1 FARNSWORTH, *supra* note 339, at 533–45.

389. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997) (holding that an arbitration provision included in a computer package from a direct-order manufacturer was effective, even though it was not received until after completion of the transaction). Elsewhere I have argued that one way of approaching the voluntariness problem in the context of consumer contracts of adhesion is by having consumers check off whether they agree to use mandatory arbitration if a dispute arises under the contract, similar to the way that consumers check off whether they have accepted insurance and refueling options when renting an automobile. See Richard C. Reuben, *The Pendulum Swings Again: Badie, Wright Decisions Underscore the Importance of Actual Assent to Arbitration*, DISP. RESOL. MAG., Fall 1999, at 21.

390. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1242 (1983) (arguing that the form terms contained in contracts of adhesion should be presumptively unenforceable).

391. See generally 1 FARNSWORTH, *supra* note 339, at 533–45 and authorities cited therein. This acceptance has not been unqualified, however, as some courts have been willing, on occasion, to void standardized contracts, or at least mitigate their harshness, through a variety of techniques. These techniques include finding the contract not to have been supported by an offer, finding that the term is not one that reasonably would have been expected to be a part of the offer, and construing the term against the drafter and in favor of the other party. See *id.*; see also *Ellis v. Mullen*, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977) (holding that illiterate persons ignorant of the

Supreme Court has brushed aside concerns over hardship and inconvenience in favor of efficiency and economic rationales in upholding “forum selection” clauses in contracts of adhesion that require all claims arising from passenger cruises to be decided in the cruise line’s home state.³⁹² Similarly, the franchise agreement upheld in *Doctor’s Associates, Inc. v. Casarotto*³⁹³ was also a contract of adhesion, as were the termite extermination contract in *Allied-Bruce Terminix Cos. v. Dobson*³⁹⁴ and the investor agreements in the *Shearson* cases.³⁹⁵

As these cases suggest, mandatory arbitration requirements in contracts of adhesion are increasingly pervasive and may be found in the banking, securities, health care, real estate, employment, and consumer sales contexts, to name just a few.³⁹⁶ Indeed, their proliferation is arguably the fastest growing aspect of arbitration today—and the most troubling, given the gravity of rights being waived and the potential for abuse.³⁹⁷ These concerns have given rise to two significant practice protocols during the last

contents of a writing signed by them may be relieved from obligations under it “on proof of anything in the nature of overreaching or unfair advantage taken of their illiteracy”). *But see* *St. Landry Loan Co. v. Avie*, 147 So. 2d 725, 728 (La. Ct. App. 1962) (finding an illiterate French-speaking man to be bound to a promissory note by his “X” regardless of a showing that he had not read it, had not had it read or explained to him, and did not understand its provisions); *Gingell v. Backus*, 227 A.2d 349 (Md. 1967) (holding a 61-year-old laborer with a fourth-grade education to be bound by a release form he signed but did not read).

392. *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991). *Carnival Cruise Lines* built upon the Court’s decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which had held that “reasonable” forum-selection clauses, while not historically favored, are “prima facie valid” when freely negotiated by commercial parties in an international context. *See id.* at 9–10. *Carnival Cruise Lines* extended *The Bremen* to consumer cases in upholding a forum selection clause in a standard form cruise line ticket requiring all claims to be decided in Florida. *Carnival Cruise Lines*, 499 U.S. at 592–93. It has been severely criticized, perhaps most strikingly by Justice Stevens, who affixed a copy of the contested standard form contract containing the fine print forum-selection clause to his dissenting opinion. *See id.* at 597–605 (Stevens, J., dissenting); *see also* *Northwestern Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (Posner, C.J.) (“If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was [*Carnival Cruise Lines*]; and perhaps no stretch was necessary.”); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716–20 (1992) (contending that economic analysis does not justify the *Carnival Cruise Lines* decision); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L.J. 323, 325–26 (1992) (arguing that *Carnival Cruise Lines* failed to properly apply well-established contract law).

393. 517 U.S. 681, 683 (1996).

394. 513 U.S. 265 (1995).

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

396. *See supra* note 63 and accompanying text.

397. *See supra* note 63 and accompanying text; *see also* 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, 309–29 (1995); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 40–53.

five years: one for disputes arising out of adhesive arbitration in the employment context³⁹⁸ and the other for conflicts arising out of adhesion contracts used in consumer transactions.³⁹⁹ Both of these protocols at least tacitly endorse the validity of arbitration provisions in adhesion contracts. On the other hand, arbitration provisions in contracts of adhesion have also attracted the attention of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in its proposed Revised Uniform Arbitration Act (RUAA). After considerable discussion, the Commissioners' Drafting Committee decided to note the trend and the substantial potential for unfairness to the weaker or adhering parties but to leave further regulation to the states, primarily through their contract doctrines of unconscionability.⁴⁰⁰ However, the official comments to the RUAA are still expected to "accentuate the importance of considering whether the weaker party was actually free to make an informed decision about arbitration and whether arbitration can provide adequate remedies."⁴⁰¹ The Drafting Committee's reporter, Dean Timothy J. Heinsz, has further noted that "[w]ithout these safeguards, arbitration loses some credibility as an appropriate option to litigation."⁴⁰²

Both due process protocols are to be applauded as thoughtful ADR industry efforts to regulate difficult problems of fairness in arbitration that arise from valid predispute arbitration clauses in contracts of adhesion. However, the aspirations of an industry do not override the obligations of state contract law and the strong policies favoring at least fundamental fairness in the execution even of adhesion contracts. As the cautious NCCUSL approach encourages, state courts should begin taking a more serious look at arbitration provisions in standard form agreements and should be willing to recognize when they are unconscionable, and therefore unenforceable, under general state contract law.

A strong and well-accepted model for state courts is the California Supreme Court's decision in *Graham v. Scissor-Tail, Inc.*,⁴⁰³ a ruling that is

398. See *supra* notes 167–169 and accompanying text.

399. See *supra* note 170 and accompanying text. Professor Stipanowich has referred to it as the "consumerization of arbitration." See Stipanowich, *supra* note 63, at 1–11.

400. See UNIF. ARBITRATION ACT § 3 (reporter's note 6) (Proposed Revisions Oct. 1999).

401. Heinsz, *supra* note 51, at 17.

402. See UNIF. ARBITRATION ACT (Proposed Revisions Oct. 1999).

403. 623 P.2d 165 (Cal. 1981). An earlier California Supreme Court opinion, *Madden v. Kaiser Foundation Hospitals*, 552 P.2d 1178 (Cal. 1976), is frequently thought of as endorsing the enforceability of arbitration clauses in standard form contracts. However, the court in that case found that the health services agreement containing the arbitration provision was freely negotiated by the Kaiser Foundation Health Plan and the Board of Administration of the California Employees Retirement System as a benefit for state employees, and therefore was not a contract of adhesion. As a result, the court never reached the unconscionability question finally decided in *Graham*. See *id.* at 1185–86.

frequently cited in state and federal opinions as the touchstone of unconscionability analysis.⁴⁰⁴ The facts are worth noting in some detail as a demonstration of how efficiency and fairness are balanced in assessing the validity of arbitration provisions in this unique context of adhesion contracts. The plaintiff, Bill Graham, was a major producer of rock concerts. The defendant was the corporation of a popular rock star known publicly as Leon Russell, who was a member of the American Federation of Musicians (AFM). The two had agreed to separate contracts for four concerts, using the standard AFM Form B contract for each event.⁴⁰⁵ The form contract included an arbitration clause providing, in relevant part, that all disputes arising out of the contract “shall be submitted to, heard, arbitrated and determined by the International Executive Board of the American Federation of Musicians pursuant to and in accordance with the laws, rules and regulations of the said Federation.”⁴⁰⁶

In a *per curiam* opinion, the California Supreme Court used a two-part analysis in refusing to enforce the clause. The court first analyzed whether the contract was one of adhesion and found it to be so, despite Graham’s substantial bargaining power as a major concert promoter; Graham had no choice but to use the form contract if he wanted to promote the Russell concerts.⁴⁰⁷ It proceeded to determine whether the contract fell within one of two common law exceptions to the enforceability of adhesion contracts: that the contract (or term) does not fall within the “reasonable expectations of the weaker or ‘adhering’ party,” or that it is “unduly oppressive or ‘unconscionable.’”⁴⁰⁸ The court found that the arbitration provision was within Graham’s reasonable expectations because he frequently did business with AFM artists and therefore should reasonably have been aware of the arbitration provision in the standard form contract. However, the court found that the provision was substantively unconscionable because it failed to meet “minimum levels of integrity” by requiring arbitration before a presumptively biased panel, the AFM board.⁴⁰⁹ Addressing the tension between contractual freedom and state law policies calling for fundamental

404. See, e.g., *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 289 (Ct. App. 1998); *Stirlen v. Supercuts*, 60 Cal. Rptr. 2d 138, 144 (Ct. App. 1997); see also *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 480 (D.C. Cir. 1996); *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1412 (9th Cir. 1996); *Taylor v. Nelson*, 615 F. Supp. 533, 537 (W.D. Va. 1985); *Gilchrist Mach. Co. v. Komatsu Am. Corp.*, 601 F. Supp. 1192, 1201 (S.D. Miss. 1984).

405. See *Graham*, 623 P.2d at 168.

406. *Id.* at 168 n.2.

407. See *id.* at 172.

408. *Id.* at 172–73.

409. See *id.* at 175–76.

fairness in the enforcement of adhesion contracts, the court acknowledged that parties are not necessarily prohibited from engaging an arbitrator who may in some respects be biased, adding, however, that

[a]t the same time, we must note that when as here the contract designating such an arbitrator is the product of circumstances suggestive of adhesion, the possibility of overreaching by the dominant party looms large; *contracts concluded in such circumstances, then, must be scrutinized with particular care to insure that the party of lesser bargaining power, in agreeing thereto, is not left in a position depriving him of any realistic and fair opportunity to prevail in a dispute under its terms.*⁴¹⁰

The two-part inquiry in *Graham* provides a useful and well-accepted model for analyzing the validity of an arbitration provision in a contract of adhesion. Under *Graham*, a contract or provision thereof is adhesive if the adhering or weaker party has no real choice but to accept the terms. Even then, the adhesion contract may be enforced unless it (1) frustrates the reasonable expectations of the parties, or (2) is unconscionable or unduly oppressive. Such an assessment should be taken with “particular care” because of the adhesive nature of the contracting environment.⁴¹¹ For purposes of arbitration clauses in adhesion contracts, unconscionability may be defined as failing to meet minimal levels of integrity, which in *Graham* meant the requirement of arbitrating claims before a presumptively biased tribunal. Significantly *Graham* did not limit or otherwise define what those minimal levels are, expressly leaving it for courts to determine on a case-by-case basis.⁴¹² Factors and considerations that courts have used in the course of an unconscionability analysis include unequal bargaining power, whether the weaker party could opt out of arbitration, the arbitration clause’s clarity and conspicuousness, whether an unfair advantage was obtained, whether the arbitration clause was negotiable, whether the arbitration waiver was contained in a boilerplate provision, whether the aggrieved party had a meaningful choice or was compelled to accept the arbitration provision, whether the arbitration agreement was within the reasonable expectations of the weaker party, and whether the stronger party used deceptive tactics.⁴¹³ All of these factors would, of course, be considered within the discussion of the general contractual environment and the analysis of the specific negotiations over the arbitration provision, which I have suggested are part of a three-part analysis of the validity of an agreement to arbitrate.

410. *Id.* at 176 (emphasis added).

411. *See id.*

412. *See id.*

413. *See Heinsz, supra* note 51, at 17.

4. The Scope of the Waiver That Is Effected by a Valid Agreement to Arbitrate

As with any waiver, the question of scope is critical. In other words, assuming that there is a valid waiver of legal rights effectuated by a valid agreement to arbitrate, just what rights does that agreement waive? Two possibilities present themselves immediately: (1) the right to access a public forum, and (2) the right to avail oneself of relevant substantive and procedural law.

a. The Right to Access a Public Forum

The first possible right waived is the right to access a public forum to redress public harms, which may be defined in terms of positive rights conferred by the Constitution, a statute, or another law. Both intuition and some case law seem to support the view that an agreement to arbitrate waives one's right to access a public forum,⁴¹⁴ even though such a right does not appear expressly in the Constitution.

As noted above, the right to trial, to the extent that it is available, is the essential entitlement under our constitutional system of dispute resolution. Civil jury trials are, of course, expressly provided for in the Bill of Rights, although that right has been held to be more limited than its plain text might suggest.⁴¹⁵ Whether there is a fundamental right of access to judicial forums is a broader question, and one upon which reasonable

414. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

415. The Supreme Court's Seventh Amendment jurisprudence has been dominated by the search for the types of cases and issues to which the Seventh Amendment civil jury trial right applies. Over a century and a half, this quest has led to the construction and interpretation of the so-called historical test for making such determinations.

Tull v. United States, 481 U.S. 412 (1987), provides: "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-18 (citations omitted).

This test generally looks to the practices of the English courts in 1791, when the amendment was ratified, to determine whether a jury trial would be required in a given action or for a particular issue. Thus, under the test, if a jury would have been empaneled in 1791 England to decide a matter, then the jury right would be seen as attaching here under the amendment. Here, as in England, that question has been answered primarily by reference to the remedy sought by the plaintiff; legal remedies avail themselves to jury trials in civil cases (as they did in 1791 English courts of law), while equitable matters do not (as juries were not empaneled in courts of equity in 1791 England). See *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 507 (1959).

The primary utility of the historical test in this country has been to determine the types of civil issues subject to the jury trial. But it has also been used to answer questions regarding the mode of the trial, such as the allocation of duties between judges and juries, jury size, and unanimity requirements.

minds may disagree. In a famous article, Professors Henry M. Hart, Jr., and Herbert Wechsler fleshed out the debate over this question of access in the context of Congress's power to limit the jurisdiction of the federal courts.⁴¹⁶ Citing *Ex Parte McCardle*,⁴¹⁷ they developed the view that the Constitution provides no absolute right to access the courts in civil cases, and that the gate into the federal courts is controlled instead entirely by Congress.⁴¹⁸ Another view is that at least some access is required because Congress would otherwise have the power to "destroy the Constitution" without judicial remedy.⁴¹⁹ Others have suggested that the right to access the courts is an incident of due process,⁴²⁰ a point noted in the Hart-Wechsler debate as well.⁴²¹

Plainly, the ADR movement has given this old debate very modern currency, for the FAA and related state laws ultimately authorize private parties to bar access to the public courts and the public law that would apply therein. I do not presume the capacity to resolve this difficult question—which ultimately, in my view, is one of philosophy rather than of a discernable rule of law—and this Article is not in any event the appropriate place for its thorough vetting. However, I can say that at least some access seems to be required, a view consistent with the Seventh Amendment jurisprudence recognizing the validity of pretrial procedures that do not result in "total prostration" of the constitutional right to a jury.⁴²² Viewing

416. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). While it is not always clear which of the professors was articulating which viewpoint, the contours of the debate are plainly visible.

417. 74 U.S. (7 Wall.) 506, 515 (1869) (recognizing the power of Congress to frustrate a determination of the constitutionality of the post-Civil War reconstruction amendments by withdrawing, during the pendency of the appeal, its jurisdiction to review decisions of the federal circuit courts in habeas corpus).

418. See Hart, *supra* note 416, at 1364–65.

419. *Id.*

420. For an argument that there is a right to access the courts as a matter of due process, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 1437 (2d ed. 1988). See also Jeffrey R. Pankratz, Comment, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091 (1992).

421. See Hart, *supra* note 416, at 1366 n.19 (citing *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U.S. 196, 204–05 (1924), and *Porter v. Investors Syndicate*, 286 U.S. 461 (1932), for the proposition that due process requires an opportunity to apply to a court for an interlocutory stay of a state administrative order challenged on constitutional grounds).

422. See, e.g., *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819). In this arbitration case, the Court said:

It is true, cases may be supposed, in which the policy of a country may set bounds to the relinquishment of private rights. And this Court would ponder long before it . . . produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection.

Id. at 243.

the development and application of law as an exercise in democratic dialogue,⁴²³ I agree with Chief Justice Marshall that there can be little reason for law if there is not a concomitant public forum in which to vindicate the rights that it confers.⁴²⁴ To the extent that our constitutional and, particularly, statutory law represents the consent of the governed, the primary forum for the vindication of these rights must be the judicial forum that is a critical component of our constitutional democracy. Naturally, Congress can expressly require that specific statutory rights be vindicated in nonjudicial forums, just as it can expand or contract the jurisdiction of the courts.⁴²⁵ But in matters of constitutional rights, statutory rights, and even common law rights, it seems to me that the presumption must be that when the law creates a right that may be vindicated, it also creates a corollary right to vindicate that right in a judicial forum, unless Congress or another appropriate legislative body has properly circumscribed that right.⁴²⁶

b. The Waiver of Substantive and Procedural Rights

Despite the foregoing discussion, any judicial reluctance to recognize a right of access to a public forum for the vindication of positive law rights need not be fatal to our inquiry. A second, less controversial approach to the question of what rights are waived by virtue of a valid arbitration agreement may be found in the distinction between substantive and procedural rights.⁴²⁷

(1) Substantive Rights

As an initial matter, our discussion of the exculpatory agreement cases and the OWBPA legislation makes clear that substantive legal rights may be waived as a matter of contract through a valid knowing and voluntary

The notion of “total prostration” as a limit on the condition required of litigants to exercise their civil jury trial rights has resonated through the Court’s cases on the subject since *Okely*. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 159–60 (1973) (stating that the use of six jurors does not violate the Seventh Amendment); *Capital Traction v. Hof*, 174 U.S. 1, 18 (1899) (stating that trial by magistrate is not a jury trial for purposes of the Seventh Amendment); *Walker v. New Mexico & S. Pac. R.R. Co.*, 165 U.S. 593, 596–98 (1897) (holding that the Seventh Amendment is not violated by the use of special questions and directed verdicts); *Walker v. Sauvinet*, 92 U.S. 90, 91–93 (1875) (holding that because a state statute permitting a trial judge to take a case from the jury if it could not agree did not result in a complete prostration of civil jury trial rights, there was no need to determine the applicability of the Seventh Amendment to the states).

423. See Reuben, *supra* note 9, at 582 n.5 and accompanying text.

424. See *supra* notes 303–304 and accompanying text.

425. See U.S. CONST. art. III.

426. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–29 (1991).

427. Great appreciation is due Professor William Cohen for this insight.

agreement. Implicit within this teaching is that substantive rights may also be waived without constitutional concern. Though such agreements are clearly disfavored, courts are nonetheless willing to uphold them as waivers of substantive legal rights, such as the right to bring a personal injury claim against a ski lift operator on a simple negligence theory, or even a gross negligence theory, if certain criteria are met.⁴²⁸ The question of the waiver of substantive law rights is a serious matter, but if the waiver is valid—that is, knowing and voluntary—then it operates to extinguish the substantive law rights.

(2) Procedural Rights

The waiver of procedural rights is a different matter. Arbitrations, mediations, and other ADR processes frequently affect the life, liberty, or property of one or more of the parties. The Supreme Court has repeatedly held that an essential principle of due process is that a deprivation of life, liberty, or property by the government must be “preceded by notice and opportunity for hearing appropriate to the nature of the case.”⁴²⁹ Much of the law in this area has developed in the administrative law context, in which the Supreme Court has struggled to balance the efficiency needs of a large bureaucracy with the constitutional demands of individuals requiring due process when their life, liberty, or property is affected by government action.

In *Goldberg v. Kelly*,⁴³⁰ for example, the Supreme Court spelled out the requirements for due process in judicial trial-type administrative adjudications that result in the termination of welfare benefits. These include the rights to notice and an opportunity to be heard,⁴³¹ the right to present evidence,⁴³² the right to retain counsel,⁴³³ the right to a written statement explaining the reasons for the decision and the evidence relied upon,⁴³⁴ and, of course, the right to an impartial decision maker.⁴³⁵ The Court’s decision in *Goldberg* was limited to trial-type adjudicatory agency hearings and expressly allowed that other types of government actions might warrant fewer procedural safeguards that are more appropriately adapted to the “nature of the

428. See *supra* note 354 and cases cited.

429. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

430. 397 U.S. 254, 260–67 (1970) (holding that welfare benefits may not be terminated without a pretermination hearing that meets rudimentary standards of due process).

431. See *id.* at 267–68.

432. See *id.* at 268.

433. See *id.* at 270.

434. See *id.* at 271.

435. See *id.*

controversies to be resolved.”⁴³⁶ The Court’s cases in the administrative law area since *Goldberg* may be “explained as part of an effort to construct defensible limits on the scope of its holding in *Goldberg*.”⁴³⁷

Still, the principle of notice and opportunity to be heard when government action affects life, liberty, or property stands firm, and the Court has further made clear that a hearing, any hearing, conducted by a government actor must accord with at least rudimentary constitutional due process standards, regardless of the substantive nature of the claim. For example, in *Goldberg*, the Court found that Goldberg was entitled to a constitutionally fair process, even though the nature of the right at stake—welfare entitlements—was determined according to state law standards.⁴³⁸ A constitutionally adequate process was necessary, the court said, less as a matter of vindicating Goldberg’s substantive rights, and more to ensure the integrity of governmental decision-making processes against the possibility of arbitrary, capricious, or erroneous government action.⁴³⁹

This principle had perhaps its most significant challenge in the public employment cases, in which now-Chief Justice Rehnquist attempted to advance the so-called “bitter with the sweet” argument as a limitation on constitutional due process rights for government employees whose positions are created by statute. Rehnquist’s approach was essentially this: If a statute that confers substantive legal rights, such as the right to government employment, also sets out procedural mechanisms for enforcing that right, such as a removal procedure, then the substantive and the procedural rights are limited to those found in the statute. Therefore, if a government employee’s employment right is defined in a statute that provides fewer procedural safeguards for termination than might otherwise be available as a matter of constitutional due process, the employee does not get the sweet benefit of those additional constitutional protections. Rather, he must take the bitter with the sweet that the public employment statute gives him, accepting the bitter limitations of the termination procedures prescribed in the statute.

Rehnquist first articulated this theory in a plurality opinion for the Court in *Arnett v. Kennedy*,⁴⁴⁰ stating:

[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in

436. See *id.* at 267.

437. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE § 8.5 (3d ed. 1994). For a discussion of a key case in this respect, *Mathews v. Eldridge*, see *infra* notes 483–494 and accompanying text.

438. See *Goldberg*, 397 U.S. at 256–60.

439. See *id.* at 260–64.

440. 416 U.S. 134 (1974).

determining that right, a litigant [must] take the bitter with the sweet. . . . Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.⁴⁴¹

The theory carried the day for the three justices who signed the plurality opinion in *Arnett*,⁴⁴² which resulted in a decision rejecting a nonprobationary federal civil service employee's claim to a full hearing prior to dismissal. However, Rehnquist never was able to garner the necessary additional votes to get it adopted as a majority opinion of the Court.⁴⁴³ Finally, in *Cleveland Board of Education v. Loudermill*,⁴⁴⁴ the Court put the argument to rest for good expressly, with Justice Byron R. White stating emphatically:

[It] is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: *the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.*⁴⁴⁵

Such reasoning also operates to limit the nature of the waiver of legal rights that flow from a valid arbitration agreement, at least in hearings that are administered by state actors under the FAA and related state laws (as well as in court-related hearings that may not be subject to a waiver analysis). While the FAA waiver applies clearly to substantive legal rights, as well as to the full panoply of procedural rights that would be available in a full-blown trial, constitutional due process still requires some appropriate procedural protections of fundamental fairness to ensure that dispute resolution processes administered by state actors are constitutionally adequate. The rule of law that supports our democratic system plainly has an institutional interest in preserving its own integrity. The contours of such procedural protections are described more fully below in Part IV.

441. *Id.* at 153–55.

442. Rehnquist's opinion was joined by Chief Justice Warren Burger and Justice Potter Stewart. Six justices, however, affirmatively rejected his "bitter with the sweet" argument. *See id.* at 166–67 (Powell, J., joined by Blackmun, J., concurring); *id.* at 177–78 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., joined by Douglas and Brennan, JJ., dissenting).

443. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek v. Jones*, 445 U.S. 480, 490 (1980); *Bishop v. Wood*, 426 U.S. 341, 355–61 (1976) (White, J., dissenting); *Goss v. Lopez*, 419 U.S. 565, 586–87 (1975) (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting).

444. 470 U.S. 532 (1985).

445. *Id.* at 541 (emphasis added).

c. Consistency of Approach

The understanding that minimal procedural safeguards are retained in contractual arbitration despite a waiver of substantive legal rights under the FAA or related state law is consistent with the doctrinal teachings of both the law of collective bargaining arbitration and the common law doctrine of fair procedures.

Until the modern ADR movement's expansion of FAA arbitration, union arbitration of workplace grievances was the primary context for American arbitration.⁴⁴⁶ Those private arbitrations are conducted primarily under the Labor Management Relations Act (LMRA), and the Court has insisted that they be conducted in accordance with "minimal levels of integrity," language that echoes the minimal notions of due process expected in government hearings. As Justice White wrote in the leading case on this point, *Hines v. Anchor Motor Freight, Inc.*,⁴⁴⁷ "Congress has put its blessing on private dispute settlement arrangements provided in collective [bargaining] agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity."⁴⁴⁸

While *Hines* was written in the context of LMRA arbitrations, surely, as courts have recognized, no less integrity would be expected of the contractual machinery of the FAA,⁴⁴⁹ especially when the arbitration is conducted by a government actor. Indeed, the Court hinted as much in *Gilmer v.*

446. See *supra* notes 59–61 and accompanying text.

447. 424 U.S. 554 (1976).

448. *Id.* at 571.

449. See, e.g., *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854) ("If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."); *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994) ("The courts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decision makers are not infected with bias." (citation omitted)); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990) ("In reviewing the district court's vacatur, we posit the . . . question . . . whether the arbitration proceedings were fundamentally unfair."); see also *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992) ("[T]he Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues."); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir. 1987) ("A hearing is fundamentally fair if it meets 'the minimal requirements of fairness'—adequate notice, a hearing on the evidence, and an impartial decision . . ." (quoting *Ficek v. Southern Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964))); *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985) (holding that an arbitrator must give each party an adequate opportunity to present evidence and arguments); *Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union*, 500 F.2d 921, 923 (2d Cir. 1974) ("[A]n arbitrator need not [observe] all the niceties [of] federal courts He need only grant . . . a fundamentally fair hearing.").

Interstate/Johnson Lane Corp.,⁴⁵⁰ even as it summarily rejected generalized facial challenges to the securities arbitration system. The reasoning of the Court's opinion in *Gilmer*, also written by Justice White, was closely tied to the procedural standards of the rules of the New York Stock Exchange.⁴⁵¹ As such, its invitation for more specific challenges to arbitration procedures necessarily implies that it is possible for such a proceeding to be found procedurally defective, an invitation that has since been accepted by a few lower courts.⁴⁵² In this regard, arbitration processes governed by other rules may not be as satisfactory as the Court found the New York Stock Exchange procedures to be in *Gilmer*, either in their structure or in their application. While White did not specifically state what the standard of proof would be to establish procedural deficiencies under the FAA, one may reasonably suppose that the Court may ultimately consider adopting the same "minimal levels of integrity" standard it used in *Hines* for collective bargaining arbitrations under the LMRA.

Finally, additional support for the expectation of minimal levels of integrity may also be found in the common law doctrine of fair procedures, a doctrine that has developed to assure some level of fair processes with regard to memberships in professional societies. Indeed, the *Graham* court expressly relied upon the fair procedures doctrine as a separate basis for invalidating the AFM arbitration provision,⁴⁵³ even though the case it cited for the proposition, *Pinsker v. Pacific Coast Society of Orthodontists*,⁴⁵⁴ did not arise in the adhesion context.

Pinsker arose when Dr. Leon Pinsker, licensed in California as both a dentist and an orthodontist, was denied membership in the orthodontists' professional membership societies, ostensibly because his partner, also a licensed dentist, was not a licensed orthodontist. According to the professional society defendants, this working relationship violated professional ethical rules barring the delegation of orthodontic duties to nonlicensed orthodontists. In challenging the rejection of his application, Pinsker claimed he should at least have been given an opportunity to rebut the charges that he had violated the nondelegation-of-work rule. The California Supreme Court, in an opinion by Justice Matthew O. Tobriner, agreed, stating that "[a]lthough the fair procedure required in this setting clearly need not include the formal embellishments of a court trial, an affected individual must at least be pro-

450. 500 U.S. 20, 21 (1991).

451. See *id.* at 30–32.

452. See *supra* note 369 and cases cited.

453. See *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 825–27 (1981).

454. 12 Cal. 3d 541 (1974).

vided with some meaningful opportunity to respond to the 'charges' against him."⁴⁵⁵ Other courts have also employed the common law doctrine of fair procedures.⁴⁵⁶

C. The Effect of Waiver: Expansion of Public Civil Justice

Recognition of the constitutional limitations on the waiver of procedural rights has a profound impact on our understanding of the breadth of our public system of civil justice. That is, the recognition of state action in some ADR hearings, and the attendant obligation to provide at least rudimentary levels of due process in such hearings, necessarily expands our concept of public civil justice to include those dispute resolution mechanisms beyond trial that are subject to the force of constitutional gravity because of the presence of state action.

This expansion of public justice is similar to the government's own expansion during the rise of the administrative state. Indeed, the rise of the administrative state during much of the twentieth century and the rise of the ADR movement at the end of the century bear several important similarities. Both were born into environments of distrust, particularly by the legal profession, for similarly stated reasons: concerns about the absence of process safeguards for participants in their relative processes.⁴⁵⁷ In the ADR context, this distrust was initially reflected in the courts in the adoption of

455. *Id.* at 545. Interestingly, in an earlier case involving the same parties, the court said it had the power to review the decision making of private professional societies because the "associations still wielded monopoly power and affected sufficiently significant economic and professional concerns so as to clothe the societies with a 'public interest.'" *Id.* at 552 (citing *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160 (1969)).

456. *See, e.g.,* *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 655-56 (5th Cir. 1977) (refusal to register a member's horse); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schs., Inc.*, 432 F.2d 650, 655-57 (D.C. Cir. 1970); *Dietz v. American Dental Ass'n*, 479 F. Supp. 554, 559 (E.D. Mich. 1979); *Blende v. Maricopa County Med. Soc'y*, 393 P.2d 926, 928-29 (Ariz. 1964); *Virgin v. American College of Surgeons*, 192 N.E.2d 414, 423 (Ill. Ct. App. 1963); *Kurk v. Medical Soc'y of County of Queens, Inc.*, 260 N.Y.S.2d 520, 525-26 (Sup. Ct. 1965); *Davidson v. Youngstown Hosp. Ass'n*, 250 N.E.2d 892, 895 (Ohio Ct. App. 1969). *But see* *Elizabeth Hosp., Inc. v. Richardson*, 269 F.2d 167, 168-70 (8th Cir. 1959) (finding no cause of action under Arkansas law for denial of membership).

457. The ABA's hostility to the rise of administrative law was particularly fierce. In 1938, the second major ABA committee to study administrative law, this time headed by Harvard Law School Dean Roscoe Pound, reported "ten tendencies" of administrative agencies that were particular cause for concern, including their powers to decide without a hearing, to hear only one side, to decide on evidence not produced at the hearing, and to make decisions on the basis of preformed opinions. *Report of the Special Committee on Administrative Law*, 63RD ANN. REP. ABA 331, 346-51 (1938). For a brief history of administrative law, see 1 DAVIS & PIERCE, *supra* note 437, § 1.3--7.

the ouster doctrine.⁴⁵⁸ More recently, it has been reflected in scholarly debate,⁴⁵⁹ as well as at the grass-roots level.⁴⁶⁰ In the administrative context, this distrust was played out at a more political level.⁴⁶¹ In both ADR and administrative law, legislation proved necessary to overcome the threshold obstacles to institutionalization.⁴⁶² Skirmishing continues to this day in both cases, but as a practical matter both have seen a turnaround in legal attitudes from skepticism to embrace.⁴⁶³

Moreover, both ADR and administrative law share a common mission, that of balancing the tension between bureaucratic management and individual justice in an informal context.⁴⁶⁴ In this regard, both operate under

458. See *supra* notes 119–124 and accompanying text.

459. See *supra* note 42 and accompanying text.

460. The epic battle over mandatory and binding arbitration in the employment context has been a particularly intense flashpoint of contention. At one point, a leading organization of employment-side plaintiffs' lawyers, the National Employment Lawyers Association, threatened to boycott the two leading providers of alternative dispute resolution services (the AAA and JAMS/Endispute) if they continued to accept cases arising from mandatory and binding arbitration agreements. See Reuben, *supra* note 73, at 61–62; Reuben, *supra* note 169, at 58–59. The U.S. Equal Employment Opportunity Commission (EEOC) has formally opposed such practices as an interference with its statutory mission, on grounds reminiscent of the ouster doctrine. See EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (Policy Statement No. 915.002, July 10, 1997). The National Labor Relations Board (NLRB) took a similar position, contending that mandatory arbitration can constitute an unfair labor practice. Bentley's Luggage Corp., [May–June 1996 & Supp.] Daily Lab. Rep. (BNA) No. 96, at A-11 (May 17, 1996) (describing the outcome of Bentley's Luggage Corp., NLRB, 12-CA-16658 (May 16, 1996)). The National Academy of Arbitrators also took the rare step of announcing its formal opposition to mandatory and binding arbitration. *National Academy of Arbitrators' Statement and Guidelines*, Daily Lab. Rep. (BNA) No. 103, at E-1 (May 29, 1997).

461. See 1 DAVIS & PIERCE, *supra* note 437, at § 1.3–7.

462. The Administrative Procedure Act of 1946 (APA) represented a compromise between competing interests that paved the way for the modern consolidation of administrative law as an integral part of the American governmental structure that it is today. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U. S. C. (1994)). The FAA and the UAA had a similar effect for ADR.

463. Despite ABA objections over the diminished role of the formal judiciary that continued into the 1970s, administrative law saw regular mileposts of institutionalization. The first comprehensive treatise in the field was published in 1951. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* (1951). The APA was amended in 1966 to include a Freedom of Information Act, § 552 of the APA. The Administrative Conference of the United States, an agency to monitor agencies, was established in 1968. By the late 1970s, the U.S. Supreme Court began to settle on a judicial policy of strong deference to administrative actions. See, e.g., *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844–45 (1984) (finding that the agency's interpretation of its authority will not be reversed if such interpretation is reasonable); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 439 U.S. 519, 543–44 (1978) (barring reviewing courts from adding to the procedures that agencies must use in rulemaking). For a discussion of ADR's modern embrace, see *supra* notes 126–138 and accompanying text.

464. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 269 (3d ed. 1992).

a theory of delegation of powers,⁴⁶⁵ and as a result, a central question for reviewing courts is whether the decision maker exceeded the scope of his authority and therefore acted *ultra vires*.⁴⁶⁶

There are also parallels in the roles played by the primary governmental actors in both administrative agencies and ADR hearings. To the extent that agency rulemaking represents a consensual democratic process balancing competing political interests, it is readily analogous to mediation in general, and to public policy mediation in particular.⁴⁶⁷ Administrative adjudication is similarly analogous to arbitration as a more relaxed adjudicatory process, although the two differ significantly in that administrative adjudication provides for judicial review while arbitration under the FAA and related state laws often does not.⁴⁶⁸ ADR fact-finding and evaluative processes also find commonality with the broad investigatory powers conferred upon administrative agencies to ferret out information necessary to “make rational use of its substantive powers.”⁴⁶⁹ This includes the power to require reports, to inspect books, records, and premises, to subpoena witnesses and documents,⁴⁷⁰ and to hold hearings.⁴⁷¹

Finally, ADR and administrative law are also analogous in terms of their process values, needs, and concerns. Both are intended to bring expertise and efficiency to decision making in an environment that stresses informality, substantive expertise, and interest-based participation. Similarly, both ADR neutrals and administrative agencies need great discretion in the fulfillment of their respective mandates, but they differ in that administrative agencies provide for greater accountability to the rules of law and to the public at large than is seen in ADR. Lastly, both ADR neutrals and administrative agencies are subject to similar types of mischief—that is, concentrations of power in repeat players, vague mandates for decision making, institutional biases, influence by special interests, and relatively low levels of accountability (even within administrative agencies).

465. See *id.* at 15.

466. See 9 U.S.C. § 10(a)(4); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW: A CASEBOOK* 65 (3d ed. 1991).

467. See generally LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987); SUSSKIND & FIELD, *supra* note 45; Gerald W. Cormick, *Strategic Issues in Structuring Multi-Party Public Policy Negotiations*, 5 *NEGOTIATION J.* 125 (1989); Philip J. Harter, *The Adolescence of Administrative ADR*, 21 *ADMIN. & REG. L. NEWS*, Spring 1996, at 2; Peter R. Steenland, Jr. & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 *U. TOL. L. REV.* 805 (1996).

468. See *infra* Part IV.C.2.d (commenting on written and reasoned opinions).

469. SCHWARTZ, *supra* note 466, at 164.

470. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 8, at 414 (1st Sess. 1941).

471. See 5 U.S.C. § 556.

I do not want to make too much of the analogy between ADR and administrative law, as it does have its imprecisions; after all, the former is a collection of processes that is undergoing institutionalization, while the other is a separate substantive structural entity within a larger system of government. However, these similarities between ADR and administrative law, particularly administrative adjudication, are reassuring in that they help provide a broader context for understanding the current paradoxical state of ADR seen in Part I, and, equally importantly, suggest a bright and powerful future for ADR under the unitary theory of public civil dispute resolution described in Part IV.

IV. CONSTITUTIONAL GRAVITY: INCORPORATING CONSTITUTIONAL DUE PROCESS INTO SEEMINGLY PRIVATE ALTERNATIVE DISPUTE RESOLUTION

The recognition in Part II that there can be state action in court-related ADR and contractual arbitration gives rise to an obligation to address the consequences of that finding.

This is a delicate task for several reasons. To begin with, there has been substantial reliance on the vast body of law that has developed under the current bipolar approach to ADR and public civil justice—particularly the FAA—and the introduction of constitutional standards must respect both that body of law and the reasonable expectations that it has created. Similarly, one must also be concerned with the possibility that the application of constitutional standards to ADR could cast a broader, and potentially nefarious, constitutional shadow on other areas of contract law. The application of federal due process standards to the ADR mechanisms used to resolve state law claims also inevitably raises significant issues of federalism, as it will, in the end, be federal courts that will be called upon to decide what those standards are in the context of specific cases that will often arise under state law. Finally, one must also acknowledge the possibility that the incorporation of due process standards into these ADR processes, if taken to its extreme, could subvert the very informality that makes these ADR processes attractive, rather than enhancing those processes.

Here in Part IV, I propose that these very real challenges can be met by uniting the strands of our understanding of ADR developed in Part I, state action in Part II, and the relationship between contractual and constitutional rights in Part III into a unitary theory of public civil dispute resolution that acknowledges the place of minimal but meaningful due process standards in those dispute resolution hearings that are driven by

state action.⁴⁷² In particular, a unitary theory of public civil dispute resolution joins trial and some of what is now called private ADR into a single system of interrelated dispute resolution processes, with the intensity of constitutional force decreasing the further removed the dispute resolution process becomes from the purview of the government. This constitutional force, or gravity, is determined by reference to the nature of the ADR process, the nature of the constitutional values at risk in the process, and the coerciveness of the role of the state in that process.⁴⁷³

So implemented, a unitary approach preserves the virtues of the various ADR processes while acknowledging their minimal but meaningful constitutional limits when they operate under the aegis of state action. While it does not eliminate the federalism problem—arguably an impossible task in an integrated system of federalism such as ours⁴⁷⁴—the minimal but meaningful nature of constitutional gravity under a unitary approach at least abates its impact by narrowing the field of possible issues that can be raised to those in which state and federal laws, and often the best of industry practices, are likely to be in substantial accord. Finally, a unitary theory of public civil dispute resolution also has the additional virtues of simplicity and predictability.

I begin Part IV by harmonizing the various dispute resolution processes into a general unitary theory of dispute resolution, before proceeding to demonstrate how constitutional due process norms may be incorporated into seemingly private dispute resolution processes, focusing primarily on arbitration and then on mediation, and to a much lesser degree, on advisory processes, particularly evaluation and fact finding.

A. Constitutional Gravity: The Structure of a Unitary Theory of Public Civil Justice

The concept of a unitary theory of public civil dispute resolution, built on a foundation of state action, when it is present, may best be illustrated through an analogy to the order seen in our own solar system. The power of the Constitution to protect life, liberty, and property from arbitrary confiscation by the government through the Due Process Clauses of the Fifth and Fourteenth Amendments, and to advance our democratic system of government, is the gravity that holds together a unitary theory of public justice. Just as the physical gravity of the sun keeps her planets properly in orbit

472. The unitary theory is my proposal for organizing and addressing the challenge created by the recognition of state action in seemingly private ADR. It is, of course, not the only possibility.

473. See *Goldberg v. Kelly*, 397 U.S. 254, 259 (1970).

474. See, e.g., Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76, 77 (referring to the notion that American federalism is more like a marble cake than like a layer cake).

around her, so too this constitutional gravity keeps the different methods of dispute resolution that are driven by state action from veering off into directions that can cause constitutional harms. Just as the intensity of the sun's gravitational pull on her planets diminishes the further away her planets are removed, so too the Constitution's gravitational pull diminishes the further the dispute resolution process is removed from the purview of the government.

With this understanding, it is easy to see that trial, as a dispute resolution method, is subject to by far the greatest constitutional gravity. It is adjudicatory in nature, and its jury form is expressly provided for in the nation's founding charter for both civil and criminal cases as a popular check against the arbitrary wielding of government power by the judiciary.⁴⁷⁵ Moreover, the entire trial process is linked to the public court, beginning with the filing of pleadings and responses and running through trial and appeal.⁴⁷⁶ Virtually all of this activity takes place in the public courthouse and is presided over by a judge with plenary power to administer and decide the case as he or she deems appropriate. This power includes both powers conferred by positive law—including constitutions, statutes, court and administrative rules, and the common law—as well as the trial judge's inherent powers, which may be drawn upon on occasion to fill in many gaps.⁴⁷⁷ Therefore, it is here, at trial, that constitutional values of due process, the rights to counsel and confrontation, decision making by juries in certain cases, and other statutory rights—such as those of evidence and procedure—see their greatest expression.

Moving outward in the solar system of unitary public civil justice, court-related and contractual arbitration orbit fairly close to trial. They are adjudicatory in nature and, like trial, are also built on a premise that truth will emerge from the clash between adversaries. As in trial, the role of the

475. See U.S. CONST. amend. VI, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. See also U.S. CONST. amend. VII, providing that:

[I]n 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.

Id.

476. See *supra* notes 27–30 and accompanying text.

477. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–45 (1991) (noting that federal district courts have inherent power to issue sanctions). For a general discussion of the inherent power doctrine, see *id.*

central government actor, the arbitrator, is highly coercive in that he or she is appointed to render a decision in the case, either by the parties themselves or by a public court.⁴⁷⁸ Because of these significant structural similarities, constitutional gravity applies with considerable force in arbitration, although not nearly so much as in formal trial itself. The informal nature of the arbitration process plays a significant role in diminishing the constitutional gravity, as the constitutional principles that support the various evidentiary, procedural, and substantive legal rules are muted by the fact that such rules need not be applied by the arbitrator.

Well beyond arbitration is court-related mediation, a process different in kind from arbitration and trial in that it is consensual in nature, and in that the mediator, the state actor in such cases, does not have the coercive authority to decide cases. Rather, the mediator's challenge is to help the parties resolve the dispute themselves through a structure and process that he or she establishes and administers. This structural difference has the effect of limiting instances in which state action will be found in mediation, as well as reducing the constitutional gravity exerted upon the mediator, although not completely eliminating it, when state action is present. Similarly, constitutional gravity on the mediation process itself is also reduced as it is in arbitration, as formal rules of law need not be the basis for decision making by the parties.

Beyond mediation lies a faint cluster of techniques that may be considered advisory (evaluation or fact-finding) processes. When such processes are engaged pursuant to government action, as in court-ordered neutral evaluation, constitutional force is even more diminished than in mediation because the role of the government actor in the resolution of the dispute is even less coercive than the active facilitative role seen in mediation. Rather, the fact finder collects facts to present to a third party who decides the disputes or the evaluator merely offers an opinion about the dispute to the parties (or their representatives), which the parties are free to take or reject. Similarly, while there may be rules of law that apply to the fact-finding process, such as notice or privilege, these are collateral to the larger process that ultimately decides the dispute. For these reasons, constitutional force is at its weakest in advisory processes.

Finally, outside the purview of government power is the process of negotiation between and among private parties. Like a nebula seen through-out the solar system of dispute resolution, negotiation has more of a pervasive presence that is part of and influences all of the other processes.⁴⁷⁹ Here

478. See 9 U.S.C. § 9 (1994); UNIF. ARBITRATION ACT §§ 5, 8, 7 U.L.A. 99, 116 (1997).

479. See Mnookin & Kornhauser, *supra* note 32, at 950–59.

there is no constitutional power because there is no government actor exerting coercive authority, only private parties and their agents talking and negotiating among themselves, albeit in the shadow of the law.

In sum, constitutional force applies differently in each of these processes because of their differing natures and needs.

B. The Essence of Due Process Under a Unitary Theory: Vindication of Constitutional Values

Having seen in Part II that constitutional force applies to ADR proceedings that are court-ordered, legislatively or administratively mandated, or in some cases contractual, because of the presence of state action, the next question for purposes of due process is: What process is due?

Apart from a few key guideposts, the Supreme Court has not spoken with great clarity on the contours of due process outside of the trial context, nor has it adopted and adhered to a single approach for making such determinations.⁴⁸⁰ Most of its pronouncements have been in the administrative context, which differs from ADR in that its procedural requirements are prescribed by statute, including, in particular, the Administrative Procedure Act (APA).⁴⁸¹ After a considerable evolution in methodology,⁴⁸² the Court has come to rely frequently on a three-part balancing test for determining what process is due in the administrative context. In particular, *Mathews v. Eldridge*⁴⁸³ calls for courts to balance the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁸⁴

That said, the *Mathews* test is not always applied by the Court⁴⁸⁵ and has been widely criticized by commentators. One criticism is that the test inherently tilts in favor of the government's position because, as an efficiency-

480. See MASHAW ET AL., *supra* note 464, at 273.

481. See *supra* Part III.C.

482. See generally 1 DAVIS & PIERCE, *supra* note 437, at § 1.4–7.

483. 424 U.S. 319 (1976).

484. *Id.* at 335.

485. See, e.g., *Medina v. California*, 505 U.S. 437, 444–45 (1992) (finding the *Mathews* analysis inapplicable to proceedings regarding the mental competency of a criminal defendant). See generally MASHAW ET AL., *supra* note 464, at 263 (arguing that the Court continues to vacillate between historical, fundamental fairness (or natural rights), and balancing approaches).

oriented measurement, it “weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest in the use of specific procedural protections.”⁴⁸⁶ Another criticism is that it is “difficult to apply, unpredictable in its results . . . , and based on factors more appropriate for consideration by a legislative body than by a court.”⁴⁸⁷ Still another is that its informational requirements are excessive,⁴⁸⁸ and, even then, the test is essentially contentless and easily manipulated by those with a results orientation.⁴⁸⁹

I agree with those criticisms and further question the amenability of *Mathews* to the analysis of contexts other than those involving requests for more formalized procedures than the government is providing.⁴⁹⁰

486. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 473 (1986).

487. 1 DAVIS & PIERCE, *supra* note 437, at § 2.5. For examples of inconsistent applications of *Mathews*, compare *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), with *Ingraham v. Wright*, 430 U.S. 651 (1977), and compare *Parham v. J.R.*, 442 U.S. 584 (1979), with *Vitek v. Jones*, 445 U.S. 480 (1980), and finally compare *Greenholtz v. Inmates*, 442 U.S. 1 (1979), with *Califano v. Yamasaki*, 442 U.S. 682 (1979). See generally MASHAW ET AL., *supra* note 464, at 301–02.

488. See Jerry L. Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423, 1438 (1981).

489. See generally Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

490. Virtually all of the U.S. Supreme Court cases that have employed the *Mathews* analysis have arisen pursuant to such requests for greater procedural protections than the government wanted to provide. See *Gilbert v. Homar*, 520 U.S. 924 (1997) (employment suspension); *United States v. Daniel Good Real Property*, 510 U.S. 43 (1993) (forfeiture of real property); *Heller v. Doe*, 509 U.S. 312 (1993) (involuntary commitment procedures); *Connecticut v. Doe*, 501 U.S. 1 (1991) (prejudgment attachment of real estate); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (attorney fees for representation of Veteran's Administration benefits claimants); *Ake v. Oklahoma*, 470 U.S. 68 (1985) (access to a psychiatrist in capital cases); *Illinois v. Batchelder*, 463 U.S. 1112 (1983) (suspension of a driver's license for failure to submit to a breath test); *Landon v. Plasencia*, 459 U.S. 21 (1982) (deportation proceeding); *Little v. Streater*, 452 U.S. 1 (1981) (payments for blood-grouping tests for purposes of determining paternity in a child support action); *Mackey v. Montrym*, 443 U.S. 1 (1979) (driver's license suspension for refusal to take a breath-alcohol test); *Parham v. J.R.*, 442 U.S. 584 (1979) (procedures for voluntary admittance of minors into a mental hospital); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of utilities for nonpayment); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (state medical school student dismissal); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (removal of foster children from foster homes); *Dixon v. Love*, 431 U.S. 105 (1977) (summary suspension of a driver's license for repeated traffic offenses); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment).

For cases expressly refusing to apply *Mathews*, see *Medina v. California*, 505 U.S. 437, 443–46 (1992) (finding the *Mathews* analysis inapplicable to proceedings regarding the mental competency of a criminal defendant), and *Zinerman v. Burch*, 494 U.S. 113, 127–39 (1990) (arguing that *Mathews* did not apply in assessing procedures for determining whether an adult suffering from mental health disorders was competent to give informed consent to voluntary admission into a mental hospital).

Consider, for example, the right to an impartial decision maker, arguably the most fundamental of due process rights⁴⁹¹ and one that is covered in greater detail below.⁴⁹² Is it possible that one's claim that a given tribunal in a government proceeding was biased or partial would be analyzed according to an efficiency-based balancing test? Of course not, and the Supreme Court has never even attempted as much.⁴⁹³ Similarly, to the extent that it has utility, *Mathews's* balancing may aid in assessing the validity of particular elements within a system of dispute resolution. However, it simply does not have the capacity to evaluate a dispute resolution system as a whole. Because of these weaknesses of the *Mathews* analysis, I join the weight of scholarship that supports a values-based approach to due process,⁴⁹⁴ proceeding in the remainder of this part to assess the constitutional issues in light of the degree to which they affirm or deny constitutional values, rather than the degree to which individual requests for greater process may be balanced against the government's need for efficiency and the additional costs attendant to ensuring the accuracy of decision making.

Again, Mashaw's catalogue of constitutional values that are seen in procedural due process—equality, predictability, transparency, rationality, participation, privacy, and intuitiveness⁴⁹⁵—provide a common ground for understanding. By equality, Mashaw means that one party's contribution of facts, legal interpretation, policy arguments, and so forth are not entitled to "greater respect" by the decision maker than another's.⁴⁹⁶ Mashaw describes predictability, transparency, and rationality as "a family of . . . values" that protect against party "befuddlement," "alienation, terror, and ultimately, self-hatred."⁴⁹⁷ Predictability fosters the ability of parties "to engage in rational planning about their situation," while transparency and rationality provide some assurance "that the issues, evidence, and processes were in fact meaningful to the outcome."⁴⁹⁸ Participation is an extraordinarily important

491. For a complete explication of the argument, see Redish & Marshall, *supra* note 486, at 475–91.

492. See *infra* Part IV.C.2.a.1.

493. See *infra* Part IV.C.2.a.1.a.i.

494. See, e.g., Friendly, *supra* note 23, at 1268; Mashaw, *supra* note 291, at 898–906; Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126 (J. Roland Pennock & John W. Chapman eds., 1977); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 151–77 (1978); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1 (1974); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 485–90 (1977); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 502 (1st ed. 1978).

495. See Mashaw, *supra* note 291, at 899–906.

496. See *id.* at 899–900.

497. *Id.* at 901.

498. *Id.* at 901–02.

value to both constitutional and ADR systems⁴⁹⁹ and needs little additional explanation other than to note Mashaw's emphasis on its potential to enhance self-respect and human dignity.⁵⁰⁰ Privacy, too, is familiar enough for Mashaw as "at base a demand to be let alone, to be respected as an autonomous being with legitimate claims to separateness."⁵⁰¹ Finally, Mashaw considers intuitiveness to be a "residual category" that would include values like "humaneness," "individualization," and "appropriate symbolism" to the extent they are not already included within the other previously described values.⁵⁰²

How these values are given meaning is the challenge in conceiving a unitary system of dispute resolution, as the nature of the process should determine the degree to which these values are implicated and fulfilled. In the trial context, of course, constitutional values are maximized and are manifest in the detailed rules of jurisdiction, procedure, evidence, and substantive law. It is a system of relatively complete formality, wherein constitutional force has its greatest strength.⁵⁰³ In less formal adjudicatory systems, such as those found in the administrative context, constitutional values are expressed in less detail. Judge Henry Friendly, in a famous article, lists the minimal mechanisms through which these due process values may be vindicated in administrative contexts under the APA: an unbiased tribunal, notice of the proposed action and the grounds asserted for it, an opportunity to present reasons why proposed actions should not be taken, the right to call witnesses, the right to know the evidence against oneself, the right to have a decision based exclusively on the evidence presented, the right to counsel, the making of a record, the availability of a statement of reasons for the decision, public attendance, and judicial review.⁵⁰⁴

In the ADR setting, largely unfettered by the types of affirmative procedural requirements seen in the APA—particularly requirements of

499. See *supra* notes 294–323 and accompanying text; *infra* Part IV.C.2.b.1.

500. See Mashaw, *supra* note 291, at 903.

501. *Id.* at 905.

502. See *id.* at 905–06.

503. But see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977) ("The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.").

504. See Friendly, *supra* note 23, at 1279–95. It should be noted that Judge Friendly's list is substantially similar to the basic elements of procedural due process described by the Court in *Goldberg v. Kelly*, as summarized by Professor Bernard Schwartz: to receive notice (including an adequate formulation of the subjects and issues involved in the case), to present evidence (both testimonial, typically under oath, and argument), to rebut adverse evidence (through cross-examination and other appropriate means), to appear with counsel, to have a decision based only upon evidence introduced into the record of the hearing, and to have a complete record (consisting of the transcript of the testimony and arguments, together with the documentary evidence and all other papers filed in the proceeding). See SCHWARTZ, *supra* note 466, at 414–15.

reasoned opinions and judicial review—constitutional due process values may be expressed as described in the following parts.

C. The Application of a Unitary Theory of Public Civil Justice

1. Trial

Trial already has been discussed in detail in Part I,⁵⁰⁵ and little elaboration is needed here other than to reiterate that constitutional gravity is at its zenith in the public trial system because the entirety of the process takes place within the purview of the government. The incorporation of due process values within this system is too familiar even to require citation.⁵⁰⁶

2. Arbitration

As explained above, arbitration is a dispute resolution process that is essentially adjudicatory in nature, similar in this respect to trial, except that the formal rules of law and procedure are not necessarily applied absent the agreement of the parties, and the awards of the arbitrators are generally final.⁵⁰⁷ For this reason, the force of constitutional due process, maximized at trial along with other formal rights of law, may be understood as applying with slightly less force in the arbitration context because of the unique process needs of arbitration.

In particular, arbitration calls upon flexibility of worldly judgment, fortified by substantive expertise, rather than on the arguably more mechanical application of legal standards that is the duty of trial courts.⁵⁰⁸ It is for this reason that rules of evidence and procedure do not apply in arbitration. Similarly, arbitration calls for a more proactive investigatory role by the arbitrator as well as the consideration of such factors as industry customs and practices, party preferences, and, perhaps most important, the greater use of specialized knowledge and experience in the exercise of decisional judgment than may be available in trial courts. Finally, in the contractual context, arbitration calls for the finality of arbitration awards, allowing for vacatur in only the most limited of circumstances.⁵⁰⁹ All of these are benefits

505. See *supra* Part I.A.1.

506. But see *supra* Part I.A.1.

507. See *supra* note 53 and accompanying text.

508. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

509. For an excellent review of the case law of both statutory and nonstatutory grounds for vacating commercial arbitration awards, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 745–800 (1996).

of the arbitration process that are a part of the process itself rather than the participants' use of the process,⁵¹⁰ and which any unitary theory of public civil dispute resolution must protect.

On the other hand, the very informality that is arbitration's strength also creates arbitration's greatest potential for mischief. The central concerns are for the impartiality of the neutral, equality of treatment of the parties, the ability of the parties to participate in a meaningful way, the potential for arbitration to exacerbate power imbalances, and the transparency and rationality of the process itself.⁵¹¹ The incorporation of minimal but meaningful constitutional standards can address most of these concerns while at the same time enhancing the values that are central to the arbitration function and the larger goals of a public system of civil justice, and while remaining generally consistent with the best practices and standards of a given industry. Those minimal but meaningful due process standards include the assurance of a neutral forum, the meaningful opportunity to present and confront evidence, and the qualified right to counsel. The failure to provide a party with any of these critical minimal standards during a court-related or FAA arbitration can constitute a due process violation, requiring the award to be vacated.

a. The Neutrality of the Forum

The relevant U.S. Supreme Court cases suggest that the promise of a neutral arbitration forum may be understood according to two essential dimensions—the impartiality of the arbitrator and the neutrality of the venue—each of which may give rise to a constitutional violation on a forum-based due process claim.

(1) The Impartiality of the Arbitrator

As a constitutional matter, one of the bedrock principles of due process is the right to have one's cause heard by an impartial tribunal,⁵¹²

510. Such efficiency-based claims as higher speed and lower cost of dispute resolution are often touted as benefits of arbitration. However, these are in large part dependent upon how the parties use the process, rather than the nature of the process itself. As an adjudicatory process, arbitration is susceptible to gamesmanship and manipulation that can easily dissipate the efficiency advantages that the process can provide. Put another way, obstreperous counsel can be just as obstreperous in arbitration as in trial. See *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974); *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 960 (1997); *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 363 (1994).

511. See *Mashaw*, *supra* note 291, at 899–906.

512. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

especially one without a personal interest in the outcome.⁵¹³ One of the leading authorities in this regard is *Tumey v. Ohio*,⁵¹⁴ a Prohibition-era case in which the Court unanimously agreed that Ed Tumey's constitutional rights to due process were violated when he was convicted of unlawfully possessing intoxicating liquor after a "Liquor Court" hearing presided over by the mayor of North College Hill, Ohio. Under the state and local statutes and ordinances, the mayor was authorized to serve as a judge in matters involving violations of the Ohio Prohibition Act, known as the Crabbe Act.⁵¹⁵ Part of the fines received for Crabbe Act violations went to pay for future enforcement efforts and municipal improvements, while another part went to pay for the mayor's judicial services, as well as the compensation of other court personnel.⁵¹⁶ As one might expect, the mayor was therefore compensated only when he convicted a defendant—he received about twelve dollars for an average first-time offender fine of one hundred dollars—but received no such compensation when a defendant was acquitted. In finding the statutory scheme unconstitutional, Chief Justice William Howard Taft noted that "[t]here are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment . . ." But, he added, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."⁵¹⁷ Rather, he said,

[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.⁵¹⁸

Taft's opinion critically distinguished between questions of judicial competence—such as kinship, personal bias, and remoteness of interest (which are generally matters left to legislative discretion)—and the kind of bias that would constitute a violation of due process. In this regard, Taft wrote, while

[a]ll questions of judicial qualification may not involve constitutional validity . . . it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject

513. For a fairly concise discussion of the doctrine's history, see Chief Justice William Howard Taft's opinion in *Tumey v. Ohio*, 273 U.S. 510, 522–531 (1927), and *infra* notes 700–709 and accompanying text.

514. 273 U.S. 510 (1927).

515. See *id.* at 520–21.

516. See *id.* at 523.

517. *Id.* at 532.

518. *Id.*

his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him.⁵¹⁹

The Court's reasoning in *Turney* has been applied in other criminal cases⁵²⁰ as well as in the administrative context,⁵²¹ and it should be extended to the ADR context as well, in hearings conducted under the color of state action.

In the arbitration context, two factors inform the assessment of an arbitrator's impartiality: the background of the neutral and the degree of disclosure of potential conflicts. That is, it may be assumed that there will be aspects of any given arbitrator's background, broadly defined, that may give rise to a possible conflict of interest in the eyes of one or more of the parties. Proper and adequate disclosure, however, can cure such a defect.⁵²²

(a) The Background of the Arbitrator

This factor speaks to the issue of bias and is complicated by the unique character of arbitration, or more accurately, arbitrators, especially as compared to public judges.⁵²³

The nature of an arbitrator's background can and should be an important consideration in the selection of an arbitrator. Unlike their judicial counterparts, who almost invariably come from legal backgrounds, the backgrounds of arbitrators vary widely and need not be legal at all.⁵²⁴ This is particularly salient given that arbitrators, again unlike their judicial counterparts, are both party-appointed and party-paid in contractual arbitration, and sometimes in court-related arbitrations as well.

This is both a strength and a weakness of the arbitration process. It is a strength in that it helps to fulfill what may be considered the central

519. *Id.* at 523.

520. *See, e.g., Connally v. Georgia*, 429 U.S. 245, 250–51 (1977) (finding that a justice of the peace whose responsibilities include the signing of search warrants, who does not receive a salary, and who is paid per warrant issued and not for warrants denied, has a sufficient pecuniary interest in the decision to be deemed biased and to invalidate the search warrant); *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972) (finding that the mayor of a small town could not serve as a traffic court judge given that fines collected were a "substantial" part of the city budget).

521. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (finding that a state agency regulating optometry that is composed of independent optometrists is biased in proceedings against optometrists who work for corporations because they have a pecuniary interest in limiting entry into the field and in excluding chain stores). For federal administrative law cases, see generally 2 DAVIS & PIERCE, *supra* note 437, § 9.8 and cases cited therein.

522. *See infra* Part IV.C.2.a.1.b.

523. Public judges of course can be accused of bias. For a study suggesting that various aspects of a judge's background can create a bias rising to the level of a due process violation for lack of impartiality, see Peter David Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 788–99 (1991).

524. *See supra* note 50 and accompanying text.

value of arbitration: the availability of substantive expertise in adjudicatory decision making.⁵²⁵ That is, courts or parties may select an arbitrator because he or she has a certain background that makes him or her particularly capable of understanding the parties, issues, and context of the dispute. On the other hand, it can be a rich source of potential bias, as conflicts of interest can be both direct and indirect. By “direct” conflicts, I refer to the broad class of conflicts that are readily familiar, such as prior financial relationships, pecuniary interest in the dispute, and so forth. By “indirect” conflicts, I am referring to the impact on judgment and decision making of the effects of such subtle heuristics as cultural and professional biases, which social psychologists, behavioral economists, and decisional analysts (among other social scientists) are now coming to understand.⁵²⁶ Put in more concrete terms, few would challenge the proposition that the facts of a securities fraud claim can be framed and interpreted very differently by an arbitrator who has spent a significant career on the brokerage side of the industry from how they would be by an arbitrator who has spent a career advancing class actions against brokers and companies.⁵²⁷

Similarly, arbitrators do not share the isolation that accompanies the judicial role in that they are often still engaged in the practice of their trades or professions. Although lawyers who move into the judiciary are often expected to leave their prior professional relationships behind because of the potential for conflicts of interest, in fact or in appearance, quite the opposite is true of arbitrators. The reason is largely historical. Before the onset of the modern entrepreneurial ADR movement, arbitration was generally seen as a public service by a profession’s elder statesmen rather than as a primary source of professional income.⁵²⁸ Therefore, arbitrators have long been expected to maintain their activity and contacts within their given profession.⁵²⁹ Indeed, this continued engagement can often be an additional source of authority for an arbitrator. It can, obviously, also create serious conflicts of interest arising from prior or ongoing arbitrations, representations, business dealings, personal investments, and the many other activities

525. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

526. For what is probably the most comprehensive compilation of research on the psychological, economic, social, and other dimensions of conflict and negotiation, see *BARRIERS TO CONFLICT RESOLUTION* (Kenneth J. Arrow et al. eds., 1995). See also SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993); Barbara A. Mellers et al., *Judgment and Decision Making*, 49 ANN. REV. PSYCHOL. 447 (1998); Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281 (1992).

527. For a contrary argument, however, see Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 514–21 (1997).

528. See *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring).

529. See *id.*

in the daily life of a modern professional.⁵³⁰ This is particularly true in the modern era of conglomerated professions and entrepreneurial ADR, in which interrelationships are increasingly complex and dispute resolution providers often compete for business, such as being the named provider in contractual dispute resolution clauses.⁵³¹

i. *Commonwealth Coatings*

These tensions with traditional notions of adjudicatory neutrality can be seen in the Supreme Court's only ruling to date on arbitral bias, *Commonwealth Coatings Corp. v. Continental Casualty Co.*,⁵³² in which the Court, in a plurality opinion, held that arbitrators must be held to the same standards of neutrality and impartiality as Article III judges.⁵³³

530. See *School Dist. v. Northwest United Educators*, 401 N.W.2d 578, 581 (Wis. 1987) (involving the discharge of a teacher, and an arbitrator who did not disclose that he had once been employed by the Wisconsin Education Association Council, which represented the teachers' union at the hearing); cf. *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994) (vacating the award for "evident partiality" because "an arbitrator may not know facts of which he may have been suspicious or of which he was on notice which, if true, would create a reasonable impression of partiality if not investigated and disclosed"); *Drinane v. State Farm Mut. Auto. Ins. Co.*, 606 N.E.2d 1181, 1185 (Ill. 1992) (holding that a "presumption of bias" arose from the arbitrator's failure to disclose that at the time of the arbitration he was pursuing, as a plaintiff's attorney, a claim against the same insurance company that was a party to the arbitration, but that the presumption was "overcome by the sworn statements of the individuals involved in the separate matters" that the arbitrator had not discussed the arbitration with the insurer or with its attorneys).

531. See, e.g., *MCI Telecomms. Corp. v. Matrix Communications Corp.*, 135 F.3d 27, 32 (1st Cir. 1998), cert. denied, 524 U.S. 953 (1998). In that case, an outside provider of marketing services for MCI sought to void a trial court decision to compel arbitration, after the discovery of an allegedly previously concealed contractual relationship between the provider of arbitration services specified in the MCI-Matrix contract and MCI. Among other things, the contract called for the provider to provide special administrative and other services to MCI, including quarterly reports analyzing the provider's settlements and recommendations, specialized training of arbitrators who would hear MCI cases, and financial incentives to the provider if it asserted jurisdiction over cases brought to it by MCI. See Memorandum in Support of Motion of Matrix Communication Corporation Under Fed. R. Civ. P. Rule 60(b) for Relief from Court's Order of October 10, 1996, Compelling Arbitration at 14-17, *MCI Telecomms. Corp.* (Nos. 96-2246, 97-1570). The memorandum also alleges that MCI has paid more than \$200,000 to the provider for dispute resolution services. See *id.*

532. 393 U.S. 145 (1968). The Court's holding in *Commonwealth Coatings* was later narrowed. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 n.3 (1986) (declining "to read *Tumey v. Ohio* as constitutionalizing any rule that a decision rendered by a judge with 'the slightest pecuniary interest' constitutes a violation of the Due Process Clause" (quoting *Tumey v. Ohio*, 273 U.S. 510, 524 (1927))).

533. While the arbitration at issue was conducted under the authority of the FAA and the Court's opinion was a direct construction of that act, surely court-related arbitration would require no less in terms of impartiality for purposes of our inquiry. See Susan Keilitz, *Court-Connected ADR: New Qualifications Guidelines Say Quality Buck Stops at the Court*, DISP. RESOL. MAG., Spring 1997, at 7. See generally SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING DISPUTE RESOLUTION PRACTITIONER'S: GUIDELINES FOR COURT-CONNECTED PROGRAMS (1998).

The case arose from a contracting dispute in which Commonwealth Coatings, a subcontractor, sued the sureties on the prime contractor's performance bond for money alleged to be owed for a paint job.⁵³⁴ The painting contract included an arbitration clause calling for a tripartite arbitration in which both Commonwealth Coatings and the sureties would select one arbitrator, and those two arbitrators would select the third. This arbitrator, the "neutral" arbitrator, had a large engineering consulting business in Puerto Rico and worked regularly with the prime contractor who was the target of Commonwealth Coatings's lawsuit. While they had not done business together in about a year, they had done substantial business intermittently over the preceding five years in a relationship that even included work on the project giving rise to the *Commonwealth Coatings* lawsuit. This relationship was not disclosed to Commonwealth Coatings or to anyone else involved in the arbitration until after the arbitration award had been rendered. The U.S. Court of Appeals for the First Circuit ruled against Commonwealth Coatings in its bid to have the award set aside on grounds of arbitral misconduct. The decision was reversed by a divided Supreme Court.⁵³⁵

Justice Black wrote the Court's lead opinion and was joined by Chief Justice Earl Warren and Justices William J. Brennan, and William O. Douglas in holding arbitrators to the same standard of impartiality as Article III judges and rejecting the argument that as "men of affairs,"⁵³⁶ arbitrators should not be held to the same standards of neutrality as traditional judges. For Black, the fact that arbitrators are "men of affairs" was all the more reason for higher standards of neutrality and disclosure:

It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but *we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.* We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.⁵³⁷

534. The facts recited hereafter are drawn from the Court's opinion in *Commonwealth Coatings*, 393 U.S. 145 (1968). Neither the opinion of the Court nor the First Circuit opinion it reversed included information on the nature of the arbitration award.

535. For the lower court's opinion, see *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 382 F.2d 1010 (1st Cir. 1967).

536. *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring) (gender-specific reference in original).

537. *Id.* at 148-49 (emphasis added).

Black went on to frame the rule of law, with reference to the then-existing, but not immediately applicable, professional standards for arbitrators and judges (the AAA disqualification rule and the Thirty-Third Canon of Judicial Ethics), stating: "This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."⁵³⁸

Justice White, joined by Justice Thurgood Marshall, concurred in the result but refused to hold arbitrators to judicial standards of neutrality, because arbitrators are "men of affairs" whose conflicts are inevitable:

It is often because [arbitrators] are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.⁵³⁹

White went on to frame his rule of law by stating:

[I]t is enough . . . to hold . . . that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.⁵⁴⁰

ii. Active, Passive, and Structural Bias

Surprisingly, perhaps, the Supreme Court has not returned to the question of arbitral bias since *Commonwealth Coatings*. Its lack of substantial reasoning in the case, and of a clear majority opinion, has left the lower federal and state courts to struggle with the applicable standards of conduct for arbitrators.⁵⁴¹ Many at least seem to bow to Black's lead opinion while at the same time applying a rule of reasonableness that would appear to be more

538. *Id.* at 150 (White, J., concurring).

539. *Id.* (White, J., concurring) (citations omitted).

540. *Id.* at 151-52 (White, J., concurring).

541. For a criticism of *Commonwealth Coatings* and a call for reform under California state law, see Matthew David Disco, Note, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 122-38 (1993).

consistent with White's concurring opinion.⁵⁴² In this regard, a useful distinction is sometimes drawn from the FAA⁵⁴³ between active (or "actual") and passive (or "evident") bias.⁵⁴⁴ Active bias typically refers to the actual bias of an arbitrator in a particular case, which may be demonstrated by an arbitrator's comments favoring one side during the hearing, for example, and is frequently joined with claims of arbitral misconduct.⁵⁴⁵ Establishing such bias is both rare and difficult.⁵⁴⁶ Passive bias, on the other hand, arises from past relationships with one of the parties that can give rise to an appearance of partiality.⁵⁴⁷ Some scholars have also suggested that structural bias may exist in an arbitration if the operation of the arbitration agreement or the rules under which the arbitration is conducted are tilted in favor of one of the parties.⁵⁴⁸

While active and passive bias plainly raise constitutional issues, it is possible, perhaps even likely, that a court would not reach those issues because of the availability of a statutory remedy under the FAA that expressly provides for "evident partiality" of the arbitrator to be a basis for vacating an arbitration award.⁵⁴⁹ Structural bias, however, raises more serious constitutional questions.

542. See, e.g., *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (finding the standard for determining whether an arbitration panel in a labor relations case was biased is whether a reasonable person would have to conclude the panel was partial to the other party to the arbitration); *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 423 (2d Cir. 1986); *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745-46 (9th Cir. 1985) (holding that the appearance of impropriety is insufficient, but that "a reasonable impression of partiality" is required); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (ruling that evident partiality "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (noting that "circumstances must be powerfully suggestive of bias"); *United Farm Workers v. Arizona Agric. Employment Relations Bd.*, 696 F.2d 1216, 1224 (9th Cir. 1983); *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 699 (2d Cir. 1978).

543. 9 U.S.C. § 10(a)(2) (1994).

544. See 3 MACNEIL ET AL., *supra* note 134, § 28.1.3; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 244-52 (1998).

545. See 2 MACNEIL ET AL., *supra* note 134, § 28.2.1.

546. See *id.* § 28.1.3.2; see, e.g., *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1257 (7th Cir. 1992) (holding an arbitrator's statement at a hearing of his personal views of the merits of the case to be neither misconduct nor evidence of bias); *Sheet Metal Workers Int'l Ass'n, Local No. 162 v. Jason Mfg., Inc.*, 900 F.2d 1392, 1398 (9th Cir. 1990) (finding multiple procedural decisions in one party's favor not evidence of bias); *Bell Aerospace Co. v. Local 516, UAW*, 500 F.2d 921 (2d Cir. 1974) (finding various evidentiary and interim rulings in favor of one party not evidence of bias); *Cook Chocolate Co. v. Salomon Inc.*, 748 F. Supp. 122, 128-29 (S.D.N.Y. 1990) (finding disagreements between one party's counsel and the arbitrators not evidence of bias), *aff'd*, 932 F.2d 955 (2d Cir. 1991).

547. See 2 MACNEIL ET AL., *supra* note 134, § 28.2.1.

548. See Bingham, *supra* note 544, at 244.

549. See 9 U.S.C. § 10(b) (1994).

As noted above, the first issue is that the Supreme Court has made it clear that a personal stake in a dispute constitutes intolerable bias as a matter of due process.⁵⁵⁰ Similarly, it has also recognized that economic bias, when established in a particular case, can rise to the level of a due process violation.⁵⁵¹ Both of these principles bear direct relevance to arbitrations conducted under the FAA and related state statutes. In those cases, the arbitrators receive compensation directly from one or both of the parties, thus creating a direct financial stake in the immediate dispute that simply is not found in the traditional trial system.⁵⁵² Such remunerations would seem to be a glaring contradiction of due process prohibitions against direct party payments to adjudicators that have been a part of the Anglo-American legal tradition for centuries.⁵⁵³

To be sure, one answer to such concerns is that the arbitrator's compensation is often allocated evenly among the parties, even in court-related programs, and therefore there is not a financial incentive to rule in favor of either of the parties, as there was in *Tumey*. Thus, the argument goes, the nature of the arbitrator's financial interest in the dispute is *having* the matter to adjudicate, rather than in the *outcome* of the dispute.⁵⁵⁴ It can also be argued that the arbitrator's broader interest in the perception of professional integrity will outweigh any pecuniary interests and temptations.⁵⁵⁵

However, these arguments provide little constitutional comfort upon closer scrutiny. For one, while arbitrators generally may not award attorney fees absent specific contractual authority,⁵⁵⁶ they do have the discretion to award other administrative expenses, including their own fees.⁵⁵⁷ More significantly, in this era of entrepreneurial ADR, the arbitrator often does have a subtle but substantial economic interest in the outcome of the case in that his or her ability to get future cases depends, at least in part, on party satisfaction. As a result, the arbitrator has an economic incentive or

550. See *supra* notes 512–522 and accompanying text.

551. See *Friedman v. Rogers*, 440 U.S. 1, 18–19 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973). These contexts are admittedly somewhat removed from the economic concerns at issue in arbitration and are cited only for the general proposition that economic interests can be a basis for a finding of unconstitutional bias in adjudicatory decision making.

552. In the public trial system, the neutrals are compensated by the government, which at least theoretically is a neutral party as to conflicts between private parties.

553. See *supra* Part IV.C.2.a.

554. See, e.g., *Connally v. Georgia*, 429 U.S. 245, 246 (1977) (involving a justice of the peace who was paid based on the number of search warrants he issued); *Ward v. City of Monroeville*, 409 U.S. 57, 59–60 (1972) (involving a town budget met only if the mayor, serving as a traffic court judge, issued sufficient fines); *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (involving a lower court judge who was paid only when he convicted criminal defendants).

555. See *Rau*, *supra* note 527, at 514–29.

556. See *WILNER*, *supra* note 48, § 43.01.

557. See *id.* § 42.02.

bias to issue rulings that are favorable to (or that at least do not offend) parties that are large institutional players, such as insurers or financial institutions, and other repeat players that are capable of bringing more cases to the arbitrator. This can be seen in awards that are compromised ("splitting the baby")⁵⁵⁸ or downright skewed in favor of the party capable of generating repeat business.

iii. The Repeat Player Problem

This so-called repeat player problem is structural in nature and has serious implications for the promise of adjudicatory neutrality in arbitration assured by the Constitution's Due Process Clause.⁵⁵⁹ It is of special concern in contractual arbitration, in which arbitration services are sold on a highly competitive retail basis,⁵⁶⁰ and in which a repeat player relationship with an arbitrator or arbitration service is often established by contract,⁵⁶¹ by informal business or professional relationships, or sometimes even by statute.⁵⁶² Such relationships might not be disclosed, in such cases defeating the constitutional due process goals of impartiality and transparency of process. Repeat player considerations can also be found in the court-related context, although with an arguably more subtle cast.⁵⁶³

558. For a criticism of so-called compromise awards, see PAUL R. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 66 (1966). See also Richard C. Reuben, *Mandatory Arbitration Clauses in Insurance Contracts Stir Controversy*, 15 RISK MGMT. NEWSL. 1 (1994).

559. See Rau, *supra* note 527, at 524-25; Reuben, *supra* note 9, at 637-38; see also Bingham, *supra* note 44. In one study, General Accounting Office (GAO) researchers found that one Chicago Board Options Exchange arbitrator had decided 47 percent of the cases the GAO reviewed, deciding in favor of the broker-dealer in 71 percent of those cases. See U.S. GENERAL ACCOUNTING OFFICE, *EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES* 2 (1994); see also David E. Robbins, *Securities Arbitration from the Arbitrators' Perspective*, 23 REV. SEC. & COMMODITIES REG. 171, 175 (1990) ("[O]ne too often sees the same faces week after week at certain arbitration forums. With all due respect, arbitration should not be a supplement to social security."); Margaret A. Jacobs, *Woman Claims Arbiters of Bias Are Biased, Too*, WALL ST. J., Sept. 19, 1994, at B1.

560. The ADR field has become so market driven that JAMS/Endispute, a leading ADR brokerage firm, recently selected a former executive with SuperCuts (a national retail hairstyling chain) as its chief executive officer, rather than someone with a dispute resolution background. See *Ex-General Foods Executive to Head Resolution Firm*, ORANGE COUNTY REG., Nov. 12, 1998, at C2.

561. See *supra* note 531.

562. See, e.g., ALA. CODE § 28-9-8 (1997) (disputes between alcoholic beverage wholesalers and suppliers); CAL. FOOD & AGRIC. CODE § 54452 (West 1999) (agricultural product distribution disputes); CONN. GEN. STAT. ANN. § 18-87(i) (West 1998) (state and local government disputes involving prison populations).

563. The repeat player problem can be diminished but certainly not eliminated in the court-related situations that provide for free arbitration or for the arbitrator's fees to be paid by the government. Many if not most court-related programs operate on the basis of a roster system, whether it be a formal roster in larger communities or an informal roster in smaller ones. The concern, of course, is with the arbitrator's shading decisions in a way that is calculated to ensure that they are selected for arbitrations again, for personal or political if not financial reasons. Admittedly, the

A quarter of a century ago, Professor Marc Galanter suggested that repeat players enjoy significant advantages over nonrepeat, or "one shot" players, including: the benefit of experience for purposes of changing how to structure the next transaction, and the ability to develop expertise, take advantage of economies of scale, pay for access to specialist advocates, cultivate informal continuing relationships with institutional incumbents, develop a reputation and credibility with the neutral, engage in long-term strategies that facilitate risk taking in appropriate cases, influence rules through lobbying and other uses of resources, play for precedent and favorable future rules, and absorb both actual and symbolic defeats.⁵⁶⁴

Conversely, Galanter suggested that "one-shotters" operate at a considerable disadvantage when compared to repeat players, including: having more at stake in a given dispute, being more interested in immediate rather than long-term gain, being more risk averse, having less interest in precedents and favorable rules, being unable to form continuing relationships with courts or institutional representatives, being unable to use experience to structure similar transactions, and having less reliable access to specialist advocates.⁵⁶⁵

While such problems have long been suspected and discussed in the abstract,⁵⁶⁶ empirical researchers more recently have begun to document the repeat player phenomenon statistically in the arbitration context, discovering evidence of homogeneity in arbitration pools, substantial asymmetries of information about the arbitrators between the repeat and nonrepeat players about the arbitrators, and actual disparities in the magnitude of successful outcomes between repeat and nonrepeat players.

For example, a widely cited 1994 General Accounting Office study found extreme homogenization among securities arbitrators: Fully 89 percent of all arbitrators who hear securities-related complaints, ranging from fraud

problem is arguably speculative in that there has been little, if any, empirical work done on this issue to date.

564. See Galanter, *supra* note 44, at 98–103.

565. See *id.*

566. See, e.g., James A. Gross & Patricia A. Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights*, 34 *BUFF. L. REV.* 645, 646 (1985); Francis O'Connell Jr., *The Labor Arbitrator: Judge or Legislator*, 18 *PROC. NAT'L ACAD. ARB.* 102, 107–08 (1965); William M. Saxon, *A Management Advocate's View in the Discipline and Discharge Case: Two Devils' Advocates on What Arbitrators Are Doing Wrong*, 32 *PROC. NAT'L ACAD. ARB.* 63 (1980). For a rich debate, compare John R. Phillips, *Their Own Brand of Industrial Justice: Arbitrators' Excesses in Discharge Cases*, 10 *EMPLOYEE REL. L.J.* 48 (1984), with Robert Coulson, *The Arbitrator's Role in Discharge Cases: Another Viewpoint*, 10 *EMPLOYEE REL. L.J.* 61 (1984). See also Richard Mittenthal, *Self-Interest: Arbitration's "Unmentionable" Consideration?*, 49 *DISP. RESOL. J.*, Mar. 1994, at 70, 90; Meyer S. Ryder, *The Impact of Acceptability on the Arbitrator*, *PROC. 21ST ANN. MEETING, NAT'L ACAD. ARB.* 94, 95 (1968).

allegations to sexual harassment, are white males with an average age of sixty, many of whom spent their professional careers in the brokerage industry.⁵⁶⁷ Reports also show the phenomenon of industry dominance in health care arbitration.⁵⁶⁸ One may reasonably suspect that more empirical research may turn up similar findings in other contexts as well.

Perhaps not surprisingly, empiricists are detecting similarly disturbing findings regarding the outcome of repeat player arbitrations. Professor Lisa B. Bingham, for example, has studied the outcomes of nonunion employment cases heard by AAA arbitrators under the AAA Commercial Arbitration Rules, and she found indications of a substantial bias in favor of repeat players.⁵⁶⁹ Generally speaking, Bingham found that the odds are 5-to-1 *against* the employee in a repeat player case, while the odds are 2.4-to-1 *in favor* of the employee in other cases.⁵⁷⁰ She also found that arbitrators award employees damages less often when the employer is a repeat player; in fact, employees arbitrating against one-shot employers win more than 70 percent of the time, while employees arbitrating against repeat player employers prevail only about 16 percent of the time. Similarly, Bingham found that the awards for employees are much lower when matched against repeat player employers—with employees recovering only about 11 percent of what they demand—than when matched against nonrepeat players, where recoveries averaged 48 percent.⁵⁷¹

Far more research is necessary to determine if these findings can be confirmed and to see if they are replicated in other areas of arbitration.

567. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 559, at 2.

568. See, e.g., S. Gale Dick, *Arbitration: An Industry Faces Its Critics*, 13 ALTERNATIVES TO HIGH COST LITIG. 29, 35 (1995) (quoting the director of a nonprofit advocacy group for malpractice plaintiffs to the effect that in malpractice cases “there is a limited book of business for arbitrators,” and that “[i]f you don’t work for Kaiser or another big HMO, you often don’t work at all”); Michael A. Hiltzik & David R. Olmos, *‘Kaiser Justice’ System’s Fairness Is Questioned*, L.A. TIMES, Aug. 30, 1995, at A1 (suggesting that Kaiser “opens 700 arbitration cases a year in California” and that “Kaiser arbitrations can account for as much as half the annual income of an active arbitrator”).

569. There is no reason to believe that AAA arbitrators are any worse in this regard than those arbitrators that work through other programs. To the contrary, it would probably be more accurate to draw an inference that the numbers are likely to be worse at most other brokerages of arbitration services because the AAA is the oldest and largest of the brokerage services and, in fact, has become increasingly selective in recent years, partly in response to questions raised about arbitrator quality. Moreover, many arbitrators are listed on multiple arbitration panels. It should also be noted, too, that the study analyzed cases before the AAA adopted the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship, which provides for greater procedural protections than the Commercial Arbitration Rules. See *generally* Bingham, *supra* note 544.

570. See Reuben, *supra* note 73, at 61 (reporting on the study, which included this separate calculation by the study’s author based on the study data).

571. See Bingham, *supra* note 544, at 233–34.

Still more research is needed to determine the reasons for such findings, although the reasons may well come to approximate the advantages suggested by Galanter a quarter of a century ago. Less noble, more self-serving motives, such as greed, can easily be hypothesized as well.

Assuming further documentation confirming the existence of a repeat player phenomenon, the problem raises serious constitutional due process worries because of its potential to eviscerate the due process guarantee of an impartial neutral in binding cases.⁵⁷² Bluntly stated, an arbitrator who has an economic incentive to rule in favor of one party or against the other cannot be called "neutral" in a constitutional sense.

(b) The Degree of Disclosure

Disclosure is typically the cure for conflicts-related problems, the theory being one of waiver or informed consent to the bias or conflict of interests.⁵⁷³ In the traditional public sphere, judges are subject to statutory rules regarding disclosure of prior relationships, as well as to professional ethical standards.⁵⁷⁴

In arbitration, disclosure is required in the commercial and securities arbitration contexts by the FAA⁵⁷⁵ and is called for in the collective bargaining context under the Code of Ethics and Procedural Standards for Arbitrators of Labor-Management Disputes.⁵⁷⁶ The nature and scope of disclosure is, for the most part, however, left to professional standards. The most significant of these are the Code of Ethics for Commercial Disputes, which has been adopted by the AAA and the American Bar Association,⁵⁷⁷ and the National Arbitration Association Code of Ethics and Interpretations for Arbitrators of Labor-Management Disputes, which has been adopted by the National Academy of Arbitrators (NAA), the AAA, and the Federal Mediation and Conciliation Service.⁵⁷⁸

572. See *supra* notes 512–522 and accompanying text.

573. See, e.g., ABA Model Rules of Professional Conduct 1.7 (1989); *infra* notes 574, 576–578.

574. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1998). See generally VIVI DILWEG ET AL., MODERN JUDICIAL ETHICS (1990) (basing suggestions on the MODEL CODE OF JUDICIAL CONDUCT).

575. See 9 U.S.C. § 10(a)(2) (1994); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968).

576. See NATIONAL ACADEMY OF ARBITRATORS ET AL., CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 2B(5) (1985) ("The burden of disclosure rests on the arbitrator.").

577. See CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon 2 (1977) ("An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality or Bias.").

578. The code states:

Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she

While these standards are arguably strong, they are also more prescriptive than descriptive, perhaps necessarily, and individual disclosure practices of arbitrators vary in terms of scope, specificity, and proximity, among other dimensions. This is a problem that is perhaps uniquely exacerbated by the entrepreneurial nature of modern ADR. Case load is largely a passive function for public judges and administrative hearing officers, who have cases assigned to them. As noted above, in the premodern era of ADR, arbitration was perceived to be a source of professional duty, not a source of professional income. Just the opposite is true in the modern era, in which arbitrators frequently abandon their professional practices in order to become full-time arbitrators and, in the contractual context, often are able to charge hourly rates *per party* that exceed their potential hourly rates within their professions. In law, this migration is seen both from the bench⁵⁷⁹ and from the bar.⁵⁸⁰ Moreover, case generation is an active process, in which the market for private dispute resolution services is intensely competitive, and marketing efforts can be equally fierce.⁵⁸¹

Like questions of bias in other contexts, the duty to disclose in arbitration should depend upon the unique facts and circumstances of individual cases.⁵⁸² The degree to which an arbitrator has made and communicated such disclosures, and the texture of those disclosures, necessarily bear on the question of whether there was, in fact, adequate consent to, or waiver of, the alleged bias or conflict of interest that is in issue. While compliance with professional standards is a consideration in this analysis, it cannot be seen as dispositive, as particular facts and circumstances may justify more or less disclosure than is called for by professional standards. In this regard, the sophistication and relationship of the parties may also bear relevance to the

is being considered for appointment or has been tentatively designated to serve.

Disclosure must also be made of any pertinent pecuniary interest.

NATIONAL ACADEMY OF ARBITRATORS, *supra* note 576, § 2B(1).

579. Some of the more prominent judges who have retired from judicial service to become arbitrators or mediators include Abner J. Mikva of the U.S. Court of Appeals for the D.C. Circuit, Arlin M. Adams of the U.S. Court of Appeals for the Third Circuit, and Malcolm Lucas of the California Supreme Court. See generally Margaret Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1; Benjamin Howell & Jenna Steel, *Going Private*, 20 CAL. LAW. (forthcoming May 2000).

580. An excellent example, but certainly not the only illustration, is Richard M. Chernick of Los Angeles. A prominent commercial litigator with Gibson, Dunn & Crutcher, one of the nation's most elite large law firms, Chernick rose to become president of the Los Angeles County Bar Association before resigning his partnership and abandoning his law practice to become a full-time arbitrator and mediator. See Richard Chernick, *Richard Chernick*, in ADR PERSONALITIES AND PRACTICE TIPS 43 (James J. Alfini & Eric R. Galton eds., 1998).

581. See, e.g., Anthony M. Aarons, *Packaging ADR: The Industry Is Still Searching for a Way to Make Money*, CAL. LAW., Feb. 1998, at 26 (detailing competition in the ADR industry).

582. See *supra* note 551 and accompanying text.

nature of disclosure that may be appropriate in a given case. A final consideration here is the quality of the disclosure. For example, it may not be enough to disclose merely that an arbitrator has arbitrated many cases before a party without also disclosing the character of the outcomes, if those outcomes might reasonably call into question the impartiality of the arbitrator.

The failure of an arbitrator to disclose potentially biasing economic relationships or prior experiences could also leave the award open to later attack on constitutional grounds for reason of defective waiver.⁵⁸³ For example, if there is an arbitration between two commercial entities, and the losing party subsequently learns that the arbitrator has a contractual arrangement with the prevailing party for future arbitration services that was not disclosed, in my view, the losing party may reasonably go to court to set aside the arbitration award on the constitutional ground that there was not a knowing and voluntary waiver of the right to an impartial tribunal because the most critical information had been withheld.⁵⁸⁴

Without question, this possibility opens the door for collateral challenges to arbitration awards, based on post hoc discovery of future relationships between arbitrators and parties, and therefore threatens to intrude on the finality of arbitration awards. But the calamity of this concern is more red herring than red flag. If the future relationship or potential relationship is properly disclosed, the claim will always fail—and indeed, it may even be sanctionable under Rule 11 of the Federal Rules of Civil Procedure⁵⁸⁵ and related state law provisions for frivolous or bad faith litigation. The waiver of the bias or conflict would have been knowing and voluntary because of the disclosure. On the other hand, if a party's post hoc inquiry or discovery reveals a bias in the form of a present or future professional relationship establishing a conflict, and it is proven in a court of law, then the vacatur of the arbitration award is justified because the waiver of the conflict of interest

583. The concept of defective waiver is seen in other relevant contexts. For example, waivers of the right to bring age discrimination claims have been found to render the release void or voidable. See, e.g., *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1270–71 (6th Cir. 1997) (finding releases of liability that fail to conform to the OWBPA are void and cannot be enforced), *cert. denied*, 522 U.S. 1108 (1998); *Blistein v. St. John's College*, 74 F.3d 1459, 1465–66 (4th Cir. 1996) (holding that defective waivers are voidable and subject to ratification by an employee's retention of severance benefits); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993) (finding that releases of liability that fail to conform to the OWBPA are void and cannot be enforced); *Wamsley v. Champlin Ref. & Chems., Inc.*, 11 F.3d 534 (5th Cir. 1993) (holding that defective waivers are voidable and subject to ratification by an employee's retention of severance benefits).

Similarly, a defective waiver of counsel can require reversal if the defect goes to the knowingness and intelligence of the waiver. See, e.g., *State v. Christensen*, 698 P.2d 1069, 1072–74 (Wash. Ct. App. 1985).

584. For a concrete example, see *supra* note 531.

585. FED. R. CIV. P. 11.

was defective, if not fraudulently induced, and vacatur would be necessary to vindicate the constitutional promise of arbitral impartiality.

(2) The Neutrality of the Venue

Forum neutrality may also be assessed according to the neutrality of the venue for purposes of due process. Here the inquiry focuses on the equality of the remedy.

The dramatic reversal in judicial attitudes toward arbitration, as represented by the Supreme Court's jurisprudence in the field, has already been discussed and need not be repeated here.⁵⁸⁶ One of the assumptions that has given the Court comfort as it has taken this relatively extraordinary step is its presumption that arbitration represents only a change in forum, not a change in the substantive rights of the parties. Thus, in *Gilmer*, the Court upheld the mandatory arbitration of ADEA claims in the securities industry, insisting that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."⁵⁸⁷

The assumption behind the change-of-forum doctrine is highly debatable, and I leave its more exhaustive deconstruction to others.⁵⁸⁸ The very suggestion, however, that a forum that guarantees such procedural safeguards as the right to the application of public law, the right to a neutral tribunal, and the rights to present evidence and receive appellate review is the functional equivalent of a procedure that permits but does not assure any such safeguards seems astonishing on its face.⁵⁸⁹ Indeed, while many courts have followed *Gilmer*,⁵⁹⁰ several others have given indications of either backing away from the assumption⁵⁹¹ or holding *Gilmer* to its logical consequences.

586. For a concise discussion, see Reuben, *supra* note 9, at 598–608; see also William M. Howard, *The Evolution of Contractually Mandated Arbitration*, ARB. J., Sept. 1993, at 27, 27–28.

587. *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

588. See, e.g., Carrington & Haagen, *supra* note 42, at 333–39.

589. Carrington and Haagen call this "simply false doctrine," stating that "[w]hatever its strength as a means of resolving disputes, traditional arbitration is inferior to adjudication as a method of enforcing the law, as Congress and the state legislatures have consistently understood." *Id.* at 349 (footnote omitted); see also Alleyne, *supra* note 131, at 384–85.

590. See Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1345 n.5 (1997) (suggesting that the D.C., Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have supported *Gilmer* one way or another).

591. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1195–97 (9th Cir. 1998) (holding that statutory employment claims cannot be subject to mandatory arbitration because legislative history revealed an intent to preserve the right to a jury trial in statutory cases); see also *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration of Title VII claim could not be compelled because the agreement at issue contained

Most notably, in *Cole v. Burns International Security Services*,⁵⁹² the U.S. Court of Appeals for the District of Columbia Circuit held that the change-of-forum doctrine compels an understanding that contractually compelled arbitration requires substantive review for arbitrator errors that are in “manifest disregard” of the law, just as in courts;⁵⁹³ otherwise, mandatory arbitration provisions in contracts between parties of unequal bargaining power would have to be stricken as unconscionable and therefore unenforceable because of the disparity of bargaining power between the parties. Remarkably, the court also extended this reasoning to hold that mandatory employment arbitration plaintiffs cannot be forced to pay arbitration fees when vindicating statutory and other rights because they would not be charged such fees in a public court.⁵⁹⁴

While the change-in-forum doctrine calls for the equal availability of remedies, contractual arbitration provisions all too frequently impose limits on remedies that are not found in the judicial forum. For example, Hooters of America, Inc., a popular restaurant-and-nightspot chain, in 1994 initiated a mandatory and binding arbitration policy, the assent of which was required of all employees as a condition of their continued or prospective employment. It provided, *inter alia*, that: (1) Employees must submit to arbitration before a panel selected exclusively by Hooters; (2) employees were not eligible for punitive damages; (3) employees were not eligible for compensatory damages; (4) employees were not eligible to seek changes in discriminatory practices; (5) employees were required to pay Hooters’ attorney fees; (6) employees were barred from seeking remedies before the appropriate state and federal agencies; (7) employees were subject to restricted discovery;

language that was “fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages”); *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247–48 (9th Cir. 1995) (finding that the arbitration clause in a franchise distribution agreement violated the Petroleum Marketing Practices Act “by compelling franchisee to surrender important statutorily mandated rights under the act, such as exemplary damages, attorney’s fees, and a one-year statute of limitations”); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 212 (D. Mass. 1998) (finding that brokers’ “structural dominance of the NYSE arbitration makes it an inadequate forum for the vindication of civil rights claims”), *aff’d*, 170 F.3d 1 (1st Cir. 1999); *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 621–23 (D.S.C. 1998) (refusing to compel arbitration of a Title VII claim because of inadequacy of the forum), *aff’d*, 173 F.3d 933 (4th Cir. 1999).

592. 105 F.3d 1465 (D.C. Cir. 1997); *see also* *Shankle v. B-G Maintenance Management Inc.*, 163 F.3d 1230, 1234–35 (10th Cir. 1999) (finding that an arbitration agreement requiring the employee-plaintiff to pay one half of the arbitrator’s fees, which the plaintiff was unable to do, did not provide the employee with a forum in which statutory rights can be effectively vindicated, as well as following *Cole*).

593. *Cole*, 105 F.3d at 1486 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

594. *See id.* at 1479–85.

(8) employees' witnesses were required to be sequestered while Hooters' witnesses were not; (9) only Hooters would have the opportunity to make a transcript of the proceeding; (10) the employees' remedy would be limited to the lesser of what Hooters or the law provides; (11) Hooters could change the rules at any time.⁵⁹⁵

In *Hooters of America Inc. v. Phillips*, a sexual harassment class action brought by waitresses of the chain, often called "Hooter girls," the U.S. District Court for the District of South Carolina refused to enforce the clause, finding that the arbitral forum it created was inadequate to protect the statutory rights conferred by Title VII, a decision affirmed by the Fourth Circuit.⁵⁹⁶ While the enormity and comprehensiveness of the imbalance reflected in this particular provision is extreme, its various component parts are certainly not unique—particularly with regard to its limitations on discovery⁵⁹⁷ and punitive damages⁵⁹⁸—and the case provides a good flavor of the potential for abuse that is available in contractual arbitration to render an arbitration conducted even by an unquestionably impartial neutral, in a neutral location, structurally biased against one of the parties in a way that would deprive that party of their due process right to a neutral forum.⁵⁹⁹

Contractual arbitration provisions like the clause involved in the *Hooters* case, and the proposed limits on punitive damages in securities arbitration, suggest that the Supreme Court's reconsideration of this change-of-forum assumption may be inevitable. Until then, however, the equality of the remedies presumed by the assumption should be considered an element of due process,⁶⁰⁰ the violation of which may be used to challenge the validity of a particular provision or to vacate an arbitration award entered under it.

595. See *Hooters*, 39 F. Supp. 2d at 590 n.4; see also *Hooters*, 173 F.3d at 936, 938–39.

596. See *Hooters*, 173 F.3d at 935.

597. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (refusing to void an 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 (6th Cir. 1990) (finding the mere allegation that discovery will be inadequate insufficient to void the agreement, given that 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 employers).

598. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (finding that parties to an arbitration agreement may choose, if they wish, to provide arbitrators with power to award punitive damages); *DeGaetano v. Smith Barney, Inc.*, No. 95 CIV.1613 (DLC), 1996 WL 44226, at *5 (S.D.N.Y. Feb. 5, 1996) (upholding an arbitration agreement of Title VII sex discrimination claims even though it barred punitive damages, attorney fees, and injunctive relief).

599. Even then, the waitresses at Hooters were fortunate to have found a court that was receptive to their challenge to the clause, as others may not have been willing to be so charitable.

600. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

b. A Meaningful Opportunity to Present and Confront Evidence

(1) An Opportunity to Present One's Case

In the full-blown adjudication that is a public trial, the presentation of evidence is strictly ordered to further the general goals of accuracy, truth seeking, and fairness.⁶⁰¹ Thus, there are sophisticated rules regarding burdens of proof, relevance, the foundation for certain types of evidence (e.g., scientific evidence), the use of hearsay and character evidence, cross-examination, and even the form in which questions must be asked.⁶⁰² Indeed, with motion practice, sidebars, and so forth, the technical wrangling over evidence can constitute a significant portion of the actual time spent in trial. Similarly, trial court rulings on such evidentiary matters also constitute a significant portion of the time spent by appellate courts reviewing the veracity of trial court decisions.

All of these steps are taken to maximize constitutional due process rights in a public trial, in which constitutional force has its greatest gravitational pull in our unitary solar system model. As an informal process, however, arbitration would be subject to less constitutional force under a unitary theory of public civil dispute resolution, an application that is fundamentally consistent with general arbitration practices.⁶⁰³ While arbitrators may apply formal legal rules and sometimes do,⁶⁰⁴ they are not bound to apply the traditional statutory and common law rules of evidence unless the delegation of authority to them by the government (in court-related arbitration) or the parties (in contractual arbitration) specifically includes this limitation on their arbitral discretion.⁶⁰⁵ The guiding principle is to permit the parties to present whatever evidence they would like to present,⁶⁰⁶ including hearsay evidence,⁶⁰⁷ which will then be considered by the arbitrator "for what it is worth."⁶⁰⁸ The

601. See *supra* Part I.A.1.

602. See *id.*

603. See ARNOLD M. ZACK & RICHARD I. BLOCH, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 13 (1983).

604. See, e.g., *Ambassador Convalescent Ctr., Inc.*, 83 Lab. Arb. Rep. (BNA) 44 (1984) (Lipson, Arb.) (looking to federal law regarding the admissibility of hearsay testimony).

605. See ELKOURI & ELKOURI, *supra* note 49, at 296-98.

606. See *id.* at 300-02. This is also true as a matter of professional ethics. See NATIONAL ACADEMY OF ARBITRATORS ET AL., *supra* note 576, § 5A ("An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.").

607. See ELKOURI & ELKOURI, *supra* note 49, at 325-27.

608. *Id.* at 725.

arbitrator's discretion on evidentiary matters is normally not a basis for substantive judicial review.⁶⁰⁹

The relative burdens of proof, strictly regimented in the trial system, also reflect the more relaxed approach of arbitration. While particular formulations may vary,⁶¹⁰ the general rule seems to be that the moving party must satisfy the burden of going forward—a minimal obligation—shifting to the party against whom the evidence is offered the subsequent burden of producing evidence in rebuttal.⁶¹¹ This is similar in kind to the burden of production in the trial context⁶¹² and is essentially consistent with the preponderance standard in administrative adjudications.⁶¹³ However, because the ultimate burden in arbitration is wholly one of persuasion, as distinguished from the establishment of entitlement under law, the burden of proof in arbitration may be more substantive in fact than it is in theory.

Discretion over evidentiary matters is an important part of the arbitration process. Little therefore would seem to be implicated by way of due process concerns as a categorical matter.⁶¹⁴ The context of particular cases can, however, reveal the outer boundaries of arbitral discretion. The Supreme Court has repeatedly recognized that “an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

609. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (holding that an arbitrator's refusal to consider evidence, even if erroneous, cannot be a basis for reversal unless it was made in “bad faith or so gross as to amount to affirmative misconduct”). To demonstrate the relationship between labor and nonlabor arbitration, it is worth noting that the court borrowed this standard of review from the FAA, noting that it was not applicable but that its standards were nonetheless useful. See *id.*

610. See ELKOURI & ELKOURI, *supra* note 49, at 324.

611. See *id.* at 324–25. For an argument that the burden of proof does not exist, see Benjamin Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 742 (1957) (“To insist that the complaining party carries the burden of proof . . . is manifestly absurd. Neither side has a burden of proof or disproof, but both have an obligation to cooperate in an effort to give the arbitrator as much guidance as possible.”).

612. See MODEL CODE OF EVIDENCE Rule 11(b) (1942) (stating that in a “Preliminary Hearing by [a] Judge,” “subject to Rule 704 (rule governing effect of presumptions), the proponent of the witness or evidence or the claimant of the privilege has both the burden of producing evidence and the burden of persuasion of the fulfillment of the condition”).

613. See 5 U.S.C. § 556(d) (1994); *Steadman v. SEC*, 450 U.S. 91, 101–02 (1981) (holding that violations of securities laws must be proved by a preponderance of the evidence rather than by clear and convincing evidence); *Sea Island Broad. Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980) (finding that the “preponderance of evidence” standard is the traditional standard in civil administrative proceedings and is the one contemplated by the APA).

614. Under a *Mathews* analysis, the individual's right to greater process protections would be outweighed by the government's interest in efficiency, and there is a low likelihood that additional procedures would increase the accuracy of the process—especially in light of the fact that accuracy under law is not a goal of arbitration, and in light of professional and practice standards favoring the admission of evidence rather than its exclusion, “for what it is worth.” ZACK & BLOCH, *supra* note 603, at 14.

is notice 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.*"⁶¹⁵ Significantly, this fundamental principle of notice and the opportunity to be heard has been repeatedly construed to include "meaningful" participation in the hearing rather than mere technical compliance with formalities.⁶¹⁶ A systematic failure of an arbitrator to hear evidence from one party, while receiving it from another, could deny the aggrieved party the opportunity to participate in the hearing in a meaningful way and could therefore violate due process in a manner sufficient to justify vacating the award as a constitutional matter, just as it would call for vacatur under the FAA.⁶¹⁷ Because vacatur of an arbitration award is so rare on evidentiary grounds, the constitutional claim may prove more effective, although proof problems can be significant, particularly in cases in which the parties elected not to establish a formal record. The question of what constitutes a systematic refusal to consider evidence is a question of fundamental fairness that can be answered only on a case-by-case basis.

615. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added); see also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (finding that the failure of a mother and her successor husband to notify the divorced father of the pendency of proceedings to adopt their daughter deprived the father of due process of law so as to render the adoption decree constitutionally invalid).

616. See *Washington v. Harper*, 494 U.S. 210, 235 (1990); *Barry v. Barchi*, 443 U.S. 55, 66 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Bell v. Burson*, 402 U.S. 535, 541 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong*, 380 U.S. at 552 ("A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." (citation omitted)); *Mullane*, 339 U.S. at 314.

617. See, e.g., *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 138–39 (6th Cir. 1996) (arguing that the manifest disregard standard for reviewing FAA claims would allow for vacatur of punitive damages if no evidence supported the arbitration panel's award); *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (finding that vacatur is appropriate under 9 U.S.C. § 10(c) (1982) when the exclusion of relevant evidence so affects the rights of a party that it may be said that the party was deprived of a fair hearing); *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F. Supp. 1276, 1285 (S.D.N.Y. 1979) ("In handling evidence an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing."); *Trident Tech. College v. Lucas & Stubbs, Ltd.*, 333 S.E.2d 781, 788 (S.C. 1985) (arguing that the "touchstone in considering claims of arbitrator misconduct is fairness"). But see *Flexible Mfg. Sys. Party Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) (finding that insufficiency of evidence is not a ground for setting aside an arbitration award under FAA (citing *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995))); *Bell Aerospace Co. v. Local 516, Int'l Union United Auto., Aerospace and Agric. Implement Workers (UAW)*, 500 F.2d 921, 923 (2d Cir. 1974) (holding that an arbitrator's consistent conclusions and reliance on evidence favorable to one of two unions involved in a jurisdictional dispute did not establish evident partiality, in the absence of a showing that the arbitrator was biased or prejudiced, that he was predisposed to favor either party, or that he acted out of any improper motives).

(2) An Opportunity to Confront Adverse Evidence

Corollary to the right to present evidence in arbitration is the right to confront adverse evidence. The right to confront adverse witnesses is secured in criminal cases by the Sixth Amendment to the U.S. Constitution,⁶¹⁸ and, while it has been strongly protected in that context, it has not been viewed as absolute.⁶¹⁹ Rather, the Supreme Court has looked at the totality of the circumstances, noting that the clause's central purpose—to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversarial proceeding before the trier of fact—is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.⁶²⁰

Similarly, in the civil context, despite language in *Goldberg* stating that the failure to provide for confrontation or cross-examination would be “fatal to the constitutional adequacy”⁶²¹ of a given procedure, the Court has taken a more flexible approach to what in the end is ultimately a right of response. The Court has not extended the Sixth Amendment right to confrontation and related rights to the civil context, viewing the ability to counter adverse evidence during the course of an adversarial hearing as a matter of due process instead.⁶²² Even then, the Court has refused to find that due process necessarily compels an opportunity for confrontation or cross-examination in a variety of contexts, looking instead to the nature of the process to determine what is required to satisfy what is ultimately a right of response.⁶²³

618. See U.S. CONST. amend. VI.

619. See *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (holding that the Confrontation Clause did not categorically prohibit a child witness in a child abuse case from testifying against the defendant at trial, outside the defendant's physical presence, by one-way closed circuit television). But see *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988) (finding that the placement of a screen between the defendant and child sexual assault victims during testimony against the defendant violated the defendant's Confrontation Clause rights).

620. See *Craig*, 497 U.S. at 845–46.

621. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

622. See, e.g., *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (“[A]s a general rule the employer's interest is adequately protected without the right of confrontation and cross-examination, again so long as the employer is otherwise provided an opportunity to respond ‘at a meaningful time and in a meaningful manner.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). Still, “minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses.” *Id.* at 264.

623. See, e.g., *Vitek v. Jones*, 445 U.S. 480 (1980) (transfer of prisoners to mental institutions); *Parham v. J.R.*, 442 U.S. 584 (1979) (commitment of children to mental institutions); *Goss v. Lopez*, 419 U.S. 565 (1975) (short-term suspensions from school); *Wolff v. McDonell*, 418 U.S. 539 (1974) (prison proceedings).

In this regard, *Goss v. Lopez*⁶²⁴ suggests a particularly useful example of the flexibility of due process for purposes of the incorporation of a constitutional right of response into seemingly private arbitrations when appropriate. The case involved a challenge to an informal suspension procedure in an Ohio public high school that permitted students to be suspended unilaterally, while reserving a right of appeal to the county board of education. The Supreme Court affirmed a lower court's finding that the procedure violated due process because it did not provide the students with a presuspension hearing at which they could tell their side of the story. Said the Court:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.⁶²⁵

Taking notice of the fact that such suspensions are common in public schools, and that imposing additional due process requirements on them could constitute a severe administrative and fiscal burden on school officials and local governments under *Mathews*, the Court continued: "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charges, or to call his own witnesses to verify his version of the incident."⁶²⁶ In the language of a unitary theory of dispute resolution, the Court recognized that the short suspension procedure is an informal process, and that the expectations of due process were simply less than they are in a more formalized informal process, thus mitigating the need for the types of due process protections that would be available in such processes, such as cross-examination and confrontation rights in administrative adjudications. But even here, due process requires that a party be provided a right to respond to present her side of the story.

Such a flexible approach for purposes of constitutional expectations is also consistent with the traditions and practices of arbitration.⁶²⁷ Arbitrators

624. 419 U.S. 565 (1975). For an argument that the Court should eschew the intermittent balancing approach in favor of the *Goss* analysis, see 2 DAVIS & PIERCE, *supra* note 437, § 9.7.

625. *Goss*, 419 U.S. at 581–82.

626. *Id.* at 583.

627. For a case recognizing the possibility of a confrontation right in contractual arbitrations under the FAA but rejecting the claim on factual grounds, see *Dexter v. Prudential Insurance Co. of America*, No. CIV.A.96-2192 KHV, 1999 WL 156170, at *2 (D. Kan. Mar. 17, 1999).

generally uphold the rights of confrontation and cross-examination, but not as strongly as courts of law.⁶²⁸ Some arbitrators handle the problem preemptively, by refusing to accept evidence that is conditioned on nondisclosure to the other party or that is not otherwise available to be subjected to the rigors of scrutiny by an adverse party.⁶²⁹ Others choose to admit the evidence but give it less weight.⁶³⁰

Either approach would appear to be constitutionally sufficient on its face under a unitary theory. As noted above, an arbitrator has—and needs—substantial discretion in the admission of evidence, and this is a value of arbitration that should be protected. Once an arbitrator admits adverse evidence, however, minimal but meaningful notions of due process in an adjudicatory procedure like arbitration would require the arbitrator to permit the affected party the opportunity to respond to that evidence in a meaningful way.⁶³¹ An arbitrator's failure to permit such a response can give rise to a due process violation, albeit one that again may be difficult to prove, particularly in the potential absence of a transcript or a written and reasoned opinion accompanying the arbitration award.⁶³² Materiality, however, is also an important concept in this regard, for certainly an arbitrator's refusal to permit a response on minor issues obviously cannot be the basis for vacating the award on the basis of a due process violation. Rather, it would need to be established that the refused rebuttal was material to the arbitrator's decision-making process and that it is reasonably possible that the arbitrator would have reached a different conclusion if the evidence had been permitted.⁶³³

628. See ELKOURI & ELKOURI, *supra* note 49, at 316; COOPER & NOLAN, *supra* note 59, at 275–76.

629. See ELKOURI & ELKOURI, *supra* note 49, at 316. See, e.g., Murray Corp. of Am., 8 Lab. Arb. Rep. (BNA) 713 (Feb. 14, 1947) (Wolff, Arb.) (setting aside an employee disciplinary action based on the employer's refusal to reveal the identity of informant). But see Los Angeles Transit Lines, 25 Lab. Arb. Rep. (BNA) 740 (Nov. 21, 1955) (Hildebrand, Arb.) (upholding the anonymity of professional "spotters" who check on bus drivers).

630. See ELKOURI & ELKOURI, *supra* note 49, at 318; see also Rich Mfg. Co., 46 Lab. Arb. Rep. (BNA) 154 (Jan. 7, 1966) (Block, Arb.) (holding that accusations of employee disrespect are given less weight when customers, while named, did not testify at arbitration).

631. See *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34 (1st Cir. 1985). "Vacatur is appropriate only when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Id.* at 40 (quoting *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968)).

632. See *Hoteles*, 763 F.2d at 34; see also *infra* Part IV.C.2.d.

633. Such a formulation is similar to that used to determine if evidentiary error has caused "miscarriage of justice," under California law. See *People v. Watson*, 46 Cal. 2d 818, 836 (1956) (en banc).

c. A Qualified Right to Counsel

The right to counsel is secured in criminal cases by the Sixth Amendment and applied to the states through the Due Process Clause of the Fourteenth Amendment.⁶³⁴ The right to counsel in civil cases is not expressed as an independent constitutional provision. Rather, it has always been assumed to exist in civil cases as a matter of due process.⁶³⁵ Indeed, in its related criminal opinions, the Supreme Court has implied that the right to counsel in civil cases is implicit in the concept of Fifth Amendment due process,⁶³⁶ although not with the force seen in the criminal context.⁶³⁷

With so little guidance directly on point, it is especially helpful to look at how right-to-counsel issues have been treated in the administrative context. There we see a split among the cases, depending upon the nature of the hearing. A right to counsel has been held to be a requirement of due process when the hearing is of an adversarial nature,⁶³⁸ but it has not been found to be essential in hearings that are nonadversarial in nature.⁶³⁹ The student and prisoner misconduct cases are exceptions to this general rule, but that aberration may be explained on the ground that both students and prisoners have lesser constitutional protections because of the need for substantial supervisory discretion and expedition in handling the many different types of disciplinary challenges that they represent.⁶⁴⁰

634. See, e.g., *supra* note 616; see also *Gideon v. Wainwright*, 372 U.S. 335 (1963).

635. See Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1327 (1966). For an historical explanation of the absence of a specific right to counsel in civil cases, see WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8–9 (1955); Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515, 556 n.281 (1995).

636. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932); *Cooke v. United States*, 267 U.S. 517, 537 (1925). For lower court decisions, see *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873–74 (D.C. Cir. 1984), and *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117–18 (5th Cir. 1980).

637. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 25 (1981) (finding no right to appointed counsel in civil cases).

638. See *Goldberg v. Kelly*, 397 U.S. 254, 270–271 (1970).

639. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333–34 (1985).

640. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (noting that “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system” (quoting *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977))); *Goss v. Lopez*, 419 U.S. 565, 582–83 (1975).

[Students subject to disciplinary processes are not entitled] to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call [their] own witnesses to verify [their] version of the incident. . . . [Such] further formalizing [of] the suspension process and escalating [of] its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

Id.

Because arbitration is an adversarial process, it would seem that a qualified right to counsel—limited, that is, to a right to retain and be represented by counsel if one so chooses, not a right to have counsel appointed⁶⁴¹—must be available as a constitutional matter in arbitration, just as it is at trials and administrative hearings. In fact, the right to counsel is provided for by professional industry standards.⁶⁴² There are no reported cases that have decided the question of a right to counsel squarely under the FAA. However, all of the cases that have considered this issue in passing have assumed the presence of the right, albeit one that can be easily waived.⁶⁴³ The Supreme Court has recognized that in adversarial proceedings, lawyers can “help delineate the issues, present the factual contentions in an orderly manner, conduct cross examination, and generally safeguard the interests of the recipient.”⁶⁴⁴ If these policy rationales are important in an adversarial context in which there are statutory rules to guide the proceedings, as well as the availability of judicial review, they are even more important in the arbitration context, in which the arbitrator is not bound by rules of law, and which provides only the most limited basis for review—a point implicit in Justice Black’s discussion of bias in *Commonwealth Coatings*.⁶⁴⁵

Moreover, the availability of counsel is essential to help the party in arbitration assess the matter for purposes of comparing the likelihood for success at a trial conducted under legal standards. This is true not only before the arbitration, as part of the preparation for the arbitration, but during the arbitration, when settlement still remains an option before the matter has been submitted and the award has been issued.⁶⁴⁶ Moreover, the standards for review are limited primarily to arbitral misconduct, including a decision

641. See *Lassiter*, 452 U.S. at 22–23; see also *Goldberg*, 397 U.S. at 270.

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” . . . We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.

Id. (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

642. See *supra* notes 168–172 and accompanying text.

643. See, e.g., *Fallick v. Kehr*, 369 F.2d 899, 901 (2d Cir. 1966) (implying the availability of the right to counsel in arbitration); *Araiza v. National Steel & Shipbuilding Co.*, 973 F. Supp. 963, 969 (S.D. Cal. 1997) (same); *Valentino v. Smith*, No. CIV-91-564-AR, 1992 WL 427881, at *7 (W.D. Okla. Sept. 30, 1992) (implying a right to counsel, but holding that it had been waived by the party’s failure to assert it in a timely fashion); *Nasta v. Paramount Pictures Corp.*, No. 87 Civ. 1599 (WK), 1991 U.S. Dist. LEXIS 12578, at *16 (S.D.N.Y. Sept. 10, 1991) (recognizing a waivable right to counsel in arbitration); *Rosengart v. Armstrong Daily, Inc.*, 169 N.Y.S.2d 837, 838 (Sup. Ct. 1957) (recognizing a waivable right to counsel in arbitration), *aff’d*, 179 N.Y.S.2d 659 (App. Div. 1958).

644. See *Goldberg*, 397 U.S. at 270–71.

645. See *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968).

646. See 2 MACNEIL ET AL., *supra* note 134.

that would exceed the scope of the arbitral agreement.⁶⁴⁷ Few lay parties can be expected to understand such a nuanced and technical issue, much less be able to research the law and marshal the facts in such a manner as to present a case that an award in fact was ultra vires. Similarly, how the arbitrator conducts the hearing may provide indirect evidence of bias that could lead an experienced advocate to take a harder look at the background of the arbitrator.⁶⁴⁸ Again, such sophistication is too much to expect of most parties who are not legally trained, at least as a general matter.

There is, of course, no constitutional requirement that parties retain counsel. Indeed, because the environment is less formal, parties may reasonably choose to represent themselves or to be represented by a nonlawyer, such as an accountant, a family member, or a friend. Such flexibility is among the advantages of arbitration and should be respected under a unitary theory. The more difficult cases are those in which one party chooses to be represented, while the other chooses not to be represented. The specter of imbalance and unfairness would seem to be quite visible. However, in such cases, it will be important to recall that the decision to proceed to arbitration without counsel represents a waiver of a constitutional right, in particular the right to counsel, just as it does in trial and in administrative adjudications. Such a decision should therefore be analyzed according to the same criteria discussed above for determining the validity of the waiver of a right to have the claim heard in the trial forum: that the waiver be knowing and voluntary.⁶⁴⁹ One would expect this threshold would be easily met in most cases, as the decision on the question of whether to retain counsel, regardless of the reason for the decision,⁶⁵⁰ may reasonably be believed to be one that is sufficiently deliberative to satisfy constitutional requirements, even if it may seem objectively unwise in the context of a given case.

It should also be noted that a right to counsel would appear to satisfy even the requirements of *Mathews*, as it is likely that the presence of an attorney will substantially enhance the accuracy (or, more precisely, the quality) of a proceeding in which a lay party has an interest in life, liberty, or property that is substantial enough to justify the cost of an arbitration. Moreover, the administrative costs to the government or, in the case of arbitration, the

647. See 9 U.S.C. § 10(a)(4) (1994); UNIF. ARBITRATION ACT § 12(a)(3), 7 U.L.A. 280 (1997).

648. It is doubtful that by themselves, however, such comments could not be the basis for a finding of bias.

649. See *supra* Part III.C.

650. See, e.g., *Department of Labor v. Triplett*, 494 U.S. 715, 721–23 (1990) (upholding restrictions on attorney fees in the Black Lung Benefits Act of 1972); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333–34 (1985) (sustaining a federal law limiting to \$10 the fee for lawyers representing veterans on claims stemming from service-related disabilities).

government actor (or arbitrator) are minimal. While it is true that the matter may take longer because of the presence of counsel, there is no material direct cost to the arbitrator; to the contrary, there may actually be a benefit in the form of additional fees that additional hearings would generate.

Finally, because arbitrators often, if not generally, permit or even encourage representation by counsel, the constitutional requirement of a qualified right to counsel would only serve to identify and to eliminate some of the worst practices in the field, such as contractual arbitration clauses that prohibit a party from being represented at trial.⁶⁵¹ It would not require a dramatic change in the practices of most arbitrations. Indeed, many industry guidelines explicitly provide for the right to representation.⁶⁵² The recognition of such a qualified right as a constitutional matter would only underscore what good policy and practice already require.

d. A Comment on Written and Reasoned Opinions

I have so far demonstrated how the incorporation of minimal but meaningful constitutional protections into arbitration would help assure the neutrality of the arbitrator and the forum, affirm the right of both parties to a meaningful opportunity to present evidence and confront adverse evidence, and ensure the qualified right to be represented by retained counsel. These safeguards relate to the process of the arbitration hearing itself. What happens at the end of the process, when the time for decision has come, is also important, and it raises the difficult question of whether written and reasoned opinions accompanying arbitration awards are constitutionally compelled as a matter of due process.⁶⁵³

The FAA and the state versions of the UAA do not require arbitrators to make findings of fact or conclusions of law or otherwise to reveal the reasoning behind their awards in separate opinions that would accompany the

651. See, e.g., *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ.1613 (DGC), 1996 WL 44226, at *5-6 (S.D.N.Y. Feb. 5, 1996) (upholding an arbitration agreement of Title VII sex discrimination claims even though it barred punitive damages, attorney fees, and injunctive relief); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-58 (1995) (holding that parties to an arbitration agreement may choose, if they wish, to provide arbitrators with the power to award punitive damages).

652. See *supra* notes 167-170 and accompanying text.

653. When an award is accompanied by an opinion or explanation, it is a matter of professional practice to note clearly where the award ends and the opinion begins. Cf. NATIONAL ACADEMY OF ARBITRATORS, *supra* note 576, § 6.

arbitration award.⁶⁵⁴ Instead, the FAA and the UAA are silent on the subject and leave behind no legislative history that helps explain the silence. As a result, arbitrations conducted under the FAA and related state laws are something of an anomaly in the broad field of arbitration, as opinions are customary in labor arbitration,⁶⁵⁵ international commercial arbitration,⁶⁵⁶ and analogous agency adjudications under the APA.⁶⁵⁷ The notion of written and reasoned opinions has also been embraced by the U.S. Supreme Court in its construction of the APA,⁶⁵⁸ and by most serious commentators as one of the few basic elements of due process.⁶⁵⁹

While the use of written and reasoned opinions in these contexts is uncontroversial, their propriety inspires a more spirited debate in FAA and related state laws. This division is reflected in the viewpoints taken by two of the largest providers of arbitration services, the AAA and the CPR Institute for Dispute Resolution. The AAA Rules for Commercial Arbitration, reflecting what may be viewed as the traditional approach, do not require arbitrators to disclose their reasoning and, indeed, the organization in the past has expressly discouraged the practice as a hedge against judicial review.⁶⁶⁰ As a result, in most AAA arbitrations the parties only receive the bottom-line arbitration award or decision without an explanation. On the other hand, CPR's rules, reflecting an arguably more modern approach,⁶⁶¹

654. See 3 MACNEIL ET AL., *supra* note 134, § 37:10. For many lower court rulings that have applied this principle, see *id.* § 37.11 n.6 and cases cited therein. For an endorsement of this concept in dicta, see *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956).

655. See ELKOURI & ELKOURI, *supra* note 49, at 133–134.

656. See Rau, *supra* note 527, at 532.

657. See 5 U.S.C. § 557(c)(3)(A) (1994).

658. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

659. See generally MASHAW ET AL., *supra* note 464; SCHWARTZ, *supra* note 466; Friendly, *supra* note 23.

660. See AAA COMMERCIAL ARBITRATION RULES R-44 (rev. 1999); see also AMERICAN ARBITRATION ASS'N, A GUIDE FOR COMMERCIAL ARBITRATORS 24 (1993).

Courts will not review arbitrators' decisions on the merits of the case, even where the conclusions are different from those that a court might reach. But a carelessly expressed thought in a written opinion could afford an opportunity to delay enforcement of the award. The obligations to the parties are better fulfilled when the award leaves no room for attack. In situations where [the arbitrator feels] it necessary to write such an opinion, it should be contained in a separate document.

Id.

661. Even the newer AAA Rules for Employment Disputes now call for a statement of reasons. See NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES § 34(C) (1999) ("The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise.").

require that arbitrators "shall state the reasoning on which the award rests unless the parties agree otherwise."⁶⁶²

Some scholars have suggested that constitutional due process compels the requirement of written and reasoned opinions.⁶⁶³ However, the fact is that the courts have never recognized a right to a written and reasoned opinion at the trial level in civil cases,⁶⁶⁴ much less a right to appellate review.⁶⁶⁵ While it is common in federal courts for magistrates and district judges to draft opinions, they do so as a matter of statutory rather than constitutional obligation; under the Federal Rules of Civil Procedure, judges who conduct bench trials are required to issue findings of fact and to state conclusions of law that will support their opinions.⁶⁶⁶ Conversely, appellate judges are under no such duty under the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure and certainly have not been compelled as a matter of due process to write reasoned opinions.⁶⁶⁷

Because the Constitution has not been held to require written opinions of public judges, it is difficult to construct a constitutional argument for treating arbitrators differently under a unitary theory of public civil dispute resolution. As noted earlier, trial is the apex of constitutional due process.⁶⁶⁸ Even as a policy matter, the question is quite challenging, pitting the legiti-

662. CPR NON-ADMINISTERED ARBITRATION RULES, Rule 13.2 (rev. 1993). Frequently, the parties agree not to have a written opinion when they learn that they must pay for the arbitrator's drafting time.

663. For a strong argument that there is a constitutional right to reasoned opinions, see Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982); see also Sternlight, *supra* note 347, at 95-98.

664. See *Arizona v. Washington*, 434 U.S. 497, 516-17 (1978) (rejecting a procedural due process challenge to a state trial judge's failure to make an explicit finding of "manifest necessity" or to articulate all the factors considered in ordering a mistrial). It has been argued that the holding in this case is limited, however, because the Court found that the basis for the mistrial order was adequately disclosed by the record. See Morgan, *supra* note 663, at 353. For the rare exception in which the Court has required reasons, see *North Carolina v. Pearce*, 395 U.S. 711, 726 (1978) (finding that due process required an explanation when a more severe sentence was imposed after a retrial following a successful appeal, and that under such circumstances, the reasons for the stiffer sentence "must affirmatively appear" and "the factual data upon which the increased sentence is based must be made a part of the record").

665. See *Pearce*, 395 U.S. at 724 ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1996))); see also *McKane v. Durston*, 153 U.S. 684 (1894).

666. See FED. R. CIV. P. 52(a).

667. There has been discussion in recent years about the promulgation of a rule that would require the appellate courts to write opinions for all cases, but the concept, while strongly favored by the bar, has not been enthusiastically received by the bench. See Telephone Interview with John Rabiej, Rules Counsel, Administrative Office of the U.S. Courts (Apr. 20, 1998).

668. See *supra* notes 26-31 and accompanying text.

mate expectations of the arbitration process against the equally legitimate expectations of the parties engaged in that process.

(1) The Benefits of Written and Reasoned Opinions

For the parties, written and reasoned opinions accompanying the award fulfill an important democracy-serving function, enhancing the integrity and legitimacy of the arbitration process. In particular, written and reasoned opinions, even brief ones not tethered to legal standards, provide rationality and transparency to an otherwise arbitrary and potentially awesome process. Parties know why the arbitrator ruled the way he or she did. The opinions also serve persuasive and educational functions, contributing to both the parties' acceptance of the award and their ability to use it to adjust their future relationships. For these reasons, there is some evidence that written and reasoned arbitration opinions are preferable to both the arbitrators and the parties.⁶⁶⁹

Written and reasoned awards also provide a degree of predictability—though not in the sense of precedential value, because even those areas in which written and reasoned awards are customary do not allow their use as controlling authority. Rather, they can be persuasive evidence at best in individual cases and, more broadly, can coalesce into a collective arbitral wisdom, known in the European commercial arbitration community as the *lex mercatoria*,⁶⁷⁰ that may be drawn upon by both the parties and their arbitrators. In this regard, to the extent that arbitration awards are published, they serve a powerful informational function, providing information about possible arbitrators and how such arbitrators might view their cases. (In this way, too, the broadening of available information about arbitrators and arbitration can help alleviate the repeat player problem discussed above.⁶⁷¹)

669. See, e.g., Harold W. Davey, *What's Right and What's Wrong with Grievance Arbitration: The Practitioners Air Their Views*, 28 ARB. J. 209, 215 (1973). For a study with less decisive results in the construction industry, see Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 469 (1988). See also Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985).

670. For a general discussion of the *lex mercatoria*, see Dezalay & Garth, *supra* note 151, at 295–300.

671. See *supra* Part IV.C.2.a.1.a.iii. While acknowledging the usefulness of “track record” evidence to guide parties in selecting arbitrators, Professor Bingham nonetheless cautions against the use of such evidence of an arbitrator’s past rulings as a basis for courts to assess active arbitrator bias, noting statistical problems of randomness.

It is not possible as a practical matter to determine whether a given arbitrator is ruling statistically significantly more often for one side than the average arbitrator, given the current state of confidentiality for awards, and the lack of public record-keeping. It is also risky as a matter of fundamental fairness if no arbitrator’s case load is random, since one can not determine statistically whether that arbitrator’s track record has departed

(2) The Burdens of Written and Reasoned Opinions

Despite such individual and systemic advantages, the use of written and reasoned opinions does raise serious policy concerns regarding the privacy, finality, and integrity of arbitration.

Privacy can be an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum. There are countless reasons why both parties may wish to have a confidential but binding resolution of their dispute, and this should be respected under a unitary theory. A requirement of written and reasoned opinions would seem to jeopardize this value by making the dispute potentially public through the filing of an opinion along with an arbitration award when it is confirmed by a public court.

While the privacy concern is real, it does not seem to dispose of the policy question of whether arbitration awards should be written and reasoned. For one, written and reasoned opinions accompanying awards are standard practice in international commercial arbitrations, and there is no reason to believe that the privacy interests are greater in domestic commercial arbitrations than they are in international commercial arbitrations. Moreover, in most cases there is no reason to believe that the arbitrator's opinion will be publicly disseminated through publication just because it has been rendered. In fact, in the labor context, in which written and reasoned opinions have been customary for years, only an estimated 10 percent of the opinions issued are actually published.⁶⁷² Finally, at least in contractual arbitration, given the fact that written and reasoned opinions obviously are not required for judicial confirmation of arbitration awards, there is no reason why the dissemination of the arbitrator's opinion has to go beyond the immediate parties. Rather, the confidentiality of an arbitration proceeding in the end is a matter of party choice, and the parties can simply assess and assume any risk in publicizing their dispute when they file the motion to confirm the award.⁶⁷³ While society may lose some value in the opinions if the parties decide against making them public, it must be remembered that it is, after all, the parties who "own" the dispute as an initial matter, not the public.⁶⁷⁴

from the mean because of arbitrator bias or because of some selection bias in the nature of the cases referred to that arbitrator.

Bingham, *supra* note 544, at 247.

672. *See id.* at 231.

673. The same choice could be given to parties in court-related arbitration programs, although judicial and legislative policymakers may discern a greater public interest in the fuller disclosure that written opinions necessarily provide about their arbitration procedures, and about their arbitrators, and may opt in favor of requiring that an award be accompanied by an opinion for purposes of confirming the award.

674. *See* Menkel-Meadow, *supra* note 145, at 501–02.

A more fundamental worry, in my view, is the capacity for written and reasoned opinions to lead to expanded judicial review that can undermine the power of arbitration to bring substantive expertise to adjudicatory decision making, arguably one of the most vital values of arbitration as a process. After all, there are many instances in which nonlawyers may make the best arbitrators,⁶⁷⁵ and many cases in which the basis of arbitral decision making can or should be without reference to legal standards. Yet the possibility of expanded judicial review would seem to require holding nonlawyer arbitrators to legal standards and would further narrow the gap between litigation and arbitration by transforming arbitration into a lesser form of litigation—call it “Litigation Lite.”⁶⁷⁶

Despite this potentially corrosive impact on the arbitration process, there is clearly a significant trend emerging in favor of enhanced judicial review of arbitration awards. This may be seen in the plethora of industry standards and protocols specifically providing for such review.⁶⁷⁷ The courts, too, seem quite open to this development, as reflected in two emerging but distinct lines of cases.

In one line of cases, judges apparently concerned about the loss of legal rights in mandatory arbitration are taking a more expansive approach to the “manifest disregard” doctrine, which, in jurisdictions in which it has been adopted, permits courts to go beyond the statutory grounds for vacating arbitration awards specified in the FAA and related state laws and to vacate arbitration awards that are in “manifest disregard” of the law.⁶⁷⁸ Thus the Second Circuit in *Halligan v. Piper Jaffray, Inc.*⁶⁷⁹ recently overturned an arbitration award against an age discrimination plaintiff, finding that the arbitrator was aware of the state of the law governing the case and, in the absence of a written opinion explaining the award, could only have disregarded that law or the evidence manifestly when ruling against the plaintiff in the face of overwhelming factual evidence supporting the plaintiff’s claim.⁶⁸⁰ While this is an aggressive application of manifest disregard, it is still fairly conventional in its structure. Chief Judge Harry T. Edwards of the District of Columbia

675. A favorite example is an episode of the popular television show *L.A. Law*, in which a dispute between two clowns about whether one stole the act of another was decided by a third clown respected by both parties. *L.A. Law: McKenzie, Brackman, Barnum & Bailey* (NBC television broadcast, Feb. 10, 1994).

676. For a fuller explication of this argument, see generally Sabatino, *supra* note 76, at 1289. See also John P. Cleary, *Filling Mastrobuono’s Order: The NASD Arbitration Policy Task Force Ensures the Enforceability of Punitive Damages Awards in Securities Arbitration*, *BUS. LAW.*, Nov. 1996, at 199.

677. See *supra* Part I.C.3.

678. For a comprehensive discussion of manifest disregard, see Hayford, *supra* note 509, at 774–78.

679. 148 F.3d 197 (2d Cir.), *cert. denied*, 526 U.S. 1034 (1998).

680. See *id.* at 203–04.

Circuit, however, took manifest disregard to a new level. In *Cole v. Burns International Security Services*,⁶⁸¹ the court held in a Title VII case that such review can only be meaningful if it “is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.”⁶⁸² If taken at face value, the *Cole* standard would suggest that there is little difference between arbitration and trial for purposes of judicial review, at least in statutory cases, given that the central duty of appellate courts in statutory cases is to ensure that trial judges have properly interpreted and applied statutory law.⁶⁸³ Such an approach, if taken seriously, could be fatal to the legitimate goal of finality in arbitration.

The second line of cases is even more disturbing, in my view, as it finds the courts increasingly permitting parties to define contractually the terms and scope of the judicial review of arbitration awards, even beyond those grounds expressly enumerated in the FAA and related state laws. In the lead case, *Lapine Technology Corp. v. Kyocera Corp.*,⁶⁸⁴ the parties, two businesses, entered into a contract that included an arbitration clause expressly providing that “[t]he arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law.”⁶⁸⁵ It also directed a court to vacate, modify, or correct an award “(i) based upon any of the grounds referred to in the FAA, (ii) where the arbitrators’ findings of fact are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.”⁶⁸⁶

In upholding the arbitration review provision, a splintered Ninth Circuit panel noted that the parties had imposed on the arbitrators much the same burdens faced by a federal trial court, which must “find the facts specially and state separately its conclusions of law thereon.”⁶⁸⁷ Because the statutory purpose of the FAA is to enforce the validity of the terms of contractual agreements to arbitrate, the majority concluded that the parties’ “contractual provision supplements the FAA’s default standard of review and allows for de novo review of issues of law embodied in the arbitration award.”⁶⁸⁸

681. 105 F.3d 1465 (D.C. Cir. 1997).

682. *Id.* at 1487.

683. For a discussion and critique of *Cole*, see Thomas J. Stipanowich, *The Growing Debate Over ‘Consumerized’ Arbitration: Adding Cole to the Fire*, DISP. RESOL. MAG., Summer 1997, at 20, 22.

684. 130 F.3d 884 (9th Cir. 1997).

685. *Id.* at 887.

686. *Id.*

687. FED. R. CIV. P. 52(a).

688. *Kyocera*, 130 F.3d at 889. *But see id.* at 891 (Kozinski, J., concurring) (“I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.”); *id.* (Mayer, J., dissenting) (arguing that the

A majority of the courts that have considered the question of contractual judicial review have agreed with the *Kyocera* approach.⁶⁸⁹ Among the federal appellate courts, only the Seventh Circuit has rejected this position, as of this writing.⁶⁹⁰ In *Chicago Typographical Union v. Chicago Sun-Times, Inc.*,⁶⁹¹ Chief Judge Richard Posner said: "If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract."⁶⁹²

As the Posner opinion suggests, the constitutional and other questions raised by contractual standards of review are substantial and far-reaching.⁶⁹³ For example, what if the burden of proof defined by contract for the review of an arbitration award were greater (or less) than would be required for a similar case arising from a public court? Would the reviewing court be obliged to apply the more (or less) stringent standard? Moreover, might *Kyocera* be extended to permit more forum shopping than *Carnival Cruise Lines, Inc. v. Shute*,⁶⁹⁴ and *The Bremen v. Zapata Off-Shore Co.*,⁶⁹⁵ ever contemplated by allowing, for example, parties to name a particular federal judge to hear an appeal of an arbitration award? Suppose, too, that the parties named a federal judge who would not have jurisdiction over the matter but for the contractual authorization. Enforceable? Similarly, would parties be permitted to apply only some aspects of relevant substantive law, but not

FAA provides no authority "explicitly empowering litigants to dictate how an Article III court must review an arbitration decision").

689. See *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 U.S. App. LEXIS 21248, at *14-*18 (4th Cir. Aug. 11, 1997) (per curiam), cert. denied, 522 U.S. 1110 (1998); *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995); *New England Utils. v. Hydro-Quebec*, 10 F. Supp. 2d 53, 61-62 (D. Mass. 1998); *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984); *Moncharsh v. Heily & Blase*, 832 P.2d 899, 912-14 (Cal. 1992) (en banc); *Marsch v. Williams*, 23 Cal. App. 4th 238, 244-45 (Ct. App. 1994); *Pacific Gas & Elec. Co. v. Superior Court*, 15 Cal. App. 4th 576, 590 (Ct. App. 1993); *Primerica Fin. Servs., Inc. v. Wise*, 456 S.E.2d 631, 634 (Ga. Ct. App. 1995); *Tretina Printing, Inc. v. Fitzpatrick & Assocs.*, 640 A.2d 788, 792-93 (N.J. 1994); *Westinghouse Elec. Corp. v. New York City Transit Auth.*, 623 N.E.2d 531, 535 (N.Y. 1993).

690. For lower court decisions, see *Chicago Southshore & South Bend Railroad v. Northern Indiana Commuter Transportation District*, 682 N.E.2d 156, 159-60 (Ill. App. Ct. 1997), and *Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333, 1338 (Ill. App. Ct. 1982).

691. 935 F.2d 1501 (7th Cir. 1991).

692. *Id.* at 1505.

693. For a debate on the subject, see Stanley McDermott III, *Contracting for Judicial Review: Expanded Judicial Review of Arbitration Awards Is a Mixed Blessing that Raises Serious Questions*, DISP. RESOL. MAG., Fall 1998, at 18, and Carroll E. Neesemann, *Contracting for Judicial Review: Party-Chosen Arbitral Review Standards Can Inspire Confidence in the Process, and Is Good for Arbitration*, DISP. RESOL. MAG., Fall 1998, at 18.

694. 499 U.S. 585 (1991); see *supra* note 392 and accompanying text.

695. 407 U.S. 1 (1972); see *supra* note 392 and accompanying text.

others (even specific cases)? The potential for abuse seems enormous, particularly in contracts of adhesion.

Such questions ultimately led the drafters of the RUAA to delete a provision that would have permitted parties to include judicial review provisions in their agreements to arbitrate, after an intense debate on the floor of the Uniform Law Commission.⁶⁹⁶ The Supreme Court may in the end be compelled to decide the contractual review problem. Even if such contractual provisions are upheld, one must question their impact on the arbitration process itself. Such "legalization" of arbitration clearly has the potential to defeat arbitration's goals of simplicity and informality, to disrupt the experience and substantive expertise in decision making that compels the use of arbitration as a dispute resolution process, and to heighten the judicial role (and case load) in a process that many select as an alternative to judicial processes.

One suspects that the rise in the call for increased judicial review from so many quarters is a well-meaning response by judges, scholars, practitioners, and other policymakers to very real concerns about perceived abuses in the contractual arbitration context that arise from arbitral rulings that depart from the expectations of public law.⁶⁹⁷ However, it does so by legalizing and thereby distorting the integrity of the arbitration process. In my view, this laudable goal may be accomplished within the current structure of arbitration by simply adhering faithfully and powerfully to the principle that knowing and voluntary agreements to arbitrate should be enforced if they are valid under state contract law. If the submission to arbitration is truly knowing and voluntary, and the process comports with minimal but meaningful notions of due process, there seems to be little reason to disturb the finality of the arbitrator's judgment, regardless of its consistency with legal standards. In such a situation, the parties would know they were bargaining for a process that did not necessarily assure the proper application of law or the right of appeal, and the fairness of the process would be assured. The finality of the process should be assured without the necessity of judicial intervention. In sum, the parties, the process, and our larger democracy would likely be well served by expanded use of written and reasoned opinions. However, the use of such opinions to expand judicial review may well prove counterproductive

696. See Christopher H. Hoving, *NCCUSL Finishes First Reading of Revised Arbitration Act*, ADR REP., Aug. 4, 1999, at 2.

697. There is a much stronger argument for judicial review in the court-related context because the parties are often not in those processes voluntarily. Therefore, assumption-of-risk notions that would compel finality in the contractual context are inoperable in the court-related context. Some relief from arbitral error on matters of law may be appropriate.

over time and is a step that should be taken with extreme caution if the integrity of the arbitration process is to be preserved.

3. Mediation

Mediation is a fundamentally different method of dispute resolution from arbitration and, as noted above, is only accountable to the Constitution when it is court-related.⁶⁹⁸ It is consensual rather than adjudicatory in nature, which means that the role of the government actor in mediation is to help the parties reach their own resolution of the dispute, rather than to decide who is right, how assets are to be distributed, and so forth. The implications of this central distinction are felt throughout the process of incorporating constitutional values into the mediation process, calling for a much lower level of constitutional force than was seen in arbitration, even though some of the concerns are the same, such as with mediator impartiality.

In the discussion that follows, I suggest that due process compels a right to a neutral forum and a qualified right to counsel. A breach of either of these rights, by practice or by statute,⁶⁹⁹ may lead to a violation of constitutional due process sufficient to warrant the vacation of a confirmed mediation agreement arising from a mediation conducted under the aegis of state action.

a. The Right to a Neutral Forum

As we saw in arbitration, the right to a neutral forum is an essential element of due process in mediation, although to a lesser degree because the forum need not provide for an equality of the remedies.

(1) Impartiality of the Mediator

While qualifications are among the most controversial issues in mediation,⁷⁰⁰ impartiality is one of the few qualities that is commonly agreed to be indispensable in a mediator, just as it is in an arbitrator.⁷⁰¹ It is this neutrality

698. See *supra* notes 198–201 and accompanying text; Part II.B.2.c.

699. See *infra* note 715 and accompanying text.

700. See SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (1995); SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES (1989). See generally W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL'Y 95 (1995).

701. See Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 35, 35–37 (1991) (arguing that neutrality is central to the theory and

that enables the mediator to gain the confidence of the parties that is necessary to make the process work, regardless of whether the mediator's style is facilitative or evaluative, or whether the mediation is conducted according to caucus, noncaucus, or hybrid models.

The fact that a mediator is not a decision maker for the parties significantly diminishes concerns relating to a mediator's background for purposes of possible due process violations. This is not to suggest that bias cannot be a serious issue in mediation, or that concerns regarding repeat players have no currency in the mediation context. Certainly a skillful but biased mediator can have a substantial influence on the parties' settlement. This is particularly true in situations in which there is a substantial power imbalance between the parties, given that one of a mediator's duties is to attempt to minimize or to overcome the power imbalance as much as possible.⁷⁰² In this regard, it is easy to see how a biased mediator can exploit such an imbalance to the detriment of the nonfavored party or parties through techniques that silence, trivialize, or affirmatively reject their views and opinions.⁷⁰³ Similarly, bias concerns may also be heightened in evaluative mediations, in which the mediator is providing an opinion on the merits of the parties' relative positions, precisely for the purpose of influencing the parties' settlements. To the extent that there is a range of evaluative techniques—from the expression of an opinion that is tantamount to the role of a mutually agreed-upon technical expert to that of a strong-arming settlement conference⁷⁰⁴—it may be said that the more evaluative and coercive the mediation, the greater the concerns about the impact of possible bias. Finally, mediators are subject to the same repeat player concerns that were seen in arbitration.⁷⁰⁵

As in arbitration, however, the allegation of bias must be weighed against the degree of disclosure of past, present, and potential future conflicts.⁷⁰⁶ The greater the disclosure, the less the likelihood of harm that would be caused by the potentially biasing factors.

practice of mediation). See generally NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 137–49 (1987).

702. For a discussion of the issue, see KOVACH, *supra* note 66, at 104–05.

703. See generally Grillo, *supra* note 42.

704. See generally JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 130–46 (1984) (listing a total of 12 styles and approaches to mediating conflict, including “muscle” mediation, in which the mediator acts as “closet arbitrator,” telling the party what is fair and appropriate, and arguing that this style should be avoided); see also James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991). “Bashers” focus primarily on criticizing each side's position in a “mad dash for the middle.” See *id.* at 70.

705. See *supra* Part IV.C.2.a.1.a.iii.

706. See *supra* Part IV.C.2.a.1.b.

That said, it clearly would be difficult for a plaintiff to prove that even a biased mediator's conduct rose to the level of a due process violation because of the nature of the role of the mediator in the mediation process, the wide latitude that must be afforded to the pool of mediators, and the availability of disclosure to trigger a valid waiver of any evident partiality. After all, the decision on how to resolve the dispute ultimately is in the hands of the parties, and the most significant structural procedural protection of mediation is any party's ability to terminate the mediation for any reason by simply walking out of the room.⁷⁰⁷

One can imagine, however, at least two situations in which there could be such a violation. The first is the situation in which the mediator in fact decides the dispute. As noted in Part I, it is not uncommon to have a dispute resolution process that calls for mediation and then, if that is unsuccessful, arbitration.⁷⁰⁸ Many commentators consider it unethical for the same person to serve as both the arbitrator and the mediator in such situations—and in all likelihood it is agreed uniformly that the decision to change processes from mediation to arbitration lies with the parties alone, absent structural rules imposing time or other limits on the mediation process.⁷⁰⁹ Yet, particularly with unsophisticated parties, it is also possible for a mediator to convert the mediation into an arbitration and to decide the dispute without the parties even realizing what has happened.⁷¹⁰ Such a situation could rise to the level of a due process violation if proven to be intended to benefit one of the parties, because the mediator's unilateral decision to change the process from one that is consensual to one that is adjudicatory would by definition exceed the scope of the parties' delegation of authority to the mediator as a matter of process, and because it would also exceed the scope of the waiver of trial rights that led to the mediation.

One may also contemplate a due process violation arising from a situation in which the power imbalance between the parties is great, the mediator has an ongoing pecuniary relationship with the stronger party (especially for future mediation services), there has been little or no substantive disclosure

707. See ROGERS & MCEWEN, *supra* note 66, § 1:01.

708. See *supra* note 81 and accompanying text.

709. See Lon L. Fuller, *Collective Bargaining and the Arbitrator*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 29–30 (Mark L. Kahn ed., 1962); Chris Manos & Carson Taylor, *Dispute Resolution Options Open Doors to Amicable Settlements*, MONT. LAW., Jan. 1998, at 1, 35–36 (discussing pros and cons of med/arb).

710. See, e.g., Reuben, *supra* note 5, at 53–54 (discussing an occurrence in which a mediator in a dispute between business partners converted the process into an arbitration and issued an award substantially favoring a represented party, to the detriment of the unrepresented party, based on issues beyond the scope of the initial mediation).

of the conflict of interests, the weaker party is unrepresented and is either physically or emotionally incapable of participating effectively in the mediation, and the mediator's style is heavily evaluative and coercive. Divorce and child custody or visitation mediations might seem particularly susceptible to such problems.⁷¹¹

In both situations, the burden on the proponent of a due process claim is admittedly great, possibly unattainable in many if not most cases—particularly in light of the fact that mediation sessions are rarely recorded and transcribed—but that is as it should be. Minimal but meaningful due process violations in informal systems of dispute resolution, particularly consensual systems like mediation, should be reserved for the most egregious of abuses, to allow for the flexibility necessary to permit those processes to work. Due process is a shield, not a sword. That shield, however, is one that should be available to allow the individual who believes her due process rights to a fair and impartial neutral have been violated the opportunity to prove her claim in a court of law.

(2) Neutrality of the Venue

Parties in mediation are just as entitled to a neutral venue when state action is present as are parties in trial or arbitration. Again, however, our concerns here are substantially diminished by the consensual nature of the process. It is possible for forum-based claims to arise from the situs to address the same contextual concerns discussed in arbitration,⁷¹² although the weakness of such claims must be acknowledged. Unlike arbitration, however, one would not expect to see due process claims arising from any disparity in available remedies. The promise of mediation as a consensual process lies fundamentally in its ability to generate creative, integrative options for dispute resolution that may include, but may also exclude or exceed, the distributive capacity of many legal remedies. The availability of legal rights and remedies can often serve as barriers to negotiated settlement in mediation, creating impasse rather than resolution. For example, the availability of punitive damages in trial is often a contentious issue, which the parties may in the course of negotiations have to agree to take “off the table” of a possible settlement agreement (surely in exchange for other concessions) in order to continue the march toward settlement. To deprive the mediator and the parties of such an opportunity would be inconsistent with the flexibility and crea-

711. See generally Grillo, *supra* note 42; Lerman, *supra* note 42.

712. See *supra* Part IV.C.2.a.1.a.ii.

tivity in dispute resolution that is essential to the mediation process. Indeed, in my view, it would pervert the mediation process beyond recognition.⁷¹³

Finally, to the extent that there may be any question, it is doubtful that a right to equal remedies would be available in mediation under a *Mathews* analysis. Apart from the disclosure of potentially adverse information, there would be no harm to the party, because the party always has the option to decline settlement and to terminate the mediation, assuming the mediation takes place in a properly noncoercive environment.⁷¹⁴ Moreover, while the administrative burden on the government actor (the mediator) would be negligible if existent at all, the degree to which legal remedies are available in mediation is an irrelevant consideration, because the goal of the process is settlement according to the needs and interests of the parties, rather than achieving a resolution of the dispute that is necessarily accurate under law.

b. A Qualified Right to Counsel

While the right to retain counsel is broadly available in traditional public litigation, the presence of counsel is a controversial issue in mediation.⁷¹⁵ In brief, the central question is the degree to which counsel should be permitted into the mediation, if at all, given that the purpose of the mediation is to help the parties resolve their disputes themselves, with or without reference to legal standards. For this reason, many mediators refuse to permit parties to bring lawyers with them into the mediation, even though best practices would at least call for them encourage a party to consult with an attorney after a mediation agreement has been reached.⁷¹⁶ A few state statutes also prohibit attorney attendance in court-related mediations,⁷¹⁷ although the clear majority of state statutes that address the issue act to

713. See ROGERS & MCEWEN, *supra* note 66, § 2:02.

714. See *infra* notes 725–730 and accompanying text.

715. See, e.g., KOVACH, *supra* note 66, at 112–14; Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Shelby R. Grubbs, *Preparing for Mediation: An Advocate's Checklist*, TENN. B.J., Mar./Apr. 1996, at 14; John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997); David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best To Serve the Client's Interest*, 8 ME. B.J. 38 (1993); Leonard L. Riskin, *A Quick Course in Mediation Advocacy*, A.B.A. J., Aug. 1996, at 56.

716. See Friedman & Himmelstein, *supra* note 153, at 7–8.

717. See MONT. CODE ANN. § 40-4-302(3) (1999) (divorce); S.D. CODIFIED LAWS § 25-4-59 (Michie 1999) (same).

permit parties to bring counsel to mediations if they so choose.⁷¹⁸ Statutes that preclude the availability of counsel would be unconstitutional in court-related mediations because, as discussed above, they operate under the aegis of state action.⁷¹⁹

Even assuming attorneys are permitted into the room, there are substantial questions over the role that the attorney should play. Some attorneys treat mediation like a settlement conference and do all the talking on behalf of their clients. Others simply sit back and wait for their clients to ask questions. Naturally, there is quite a range of activity between these ends of the spectrum, and compelling arguments can be made for and against the use of counsel, and the nature of the role of counsel, in the context of particular cases.

Our recognition that court-related mediation can constitute state action certainly informs this professional debate, compelling the honoring of a qualified right to counsel in mediation sessions if one so chooses—that is, as with arbitration, limited to the right to be represented by retained counsel if one so chooses, not a right to appointed counsel.

As our discussion of the right to counsel in arbitration observed, the Supreme Court has typically distinguished between adversarial and nonadversarial processes in the administrative context for purposes of deciding the availability of a constitutional right to counsel.⁷²⁰ The Court has found that the right to counsel attaches in the former but not in the latter.⁷²¹ In *Gagnon v. Scarpelli*,⁷²² the policy reasons for refusing to find a right of appointed counsel in nonadversarial hearings were articulated by the Court in the context of such a claim in an informal parole and probation revocation proceeding:

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available

718. See, e.g., NEB. REV. STAT. § 42-810 (1998) (counsel may attend mediation); N.D. CENT. CODE § 14-09.1-05 (1997) (mediator may not exclude counsel); OKLA. STAT. tit. 12, § 1824(5) (1998) (conciliation court); OR. REV. STAT. § 107.600(1) (1997) (marriage dissolution, attorney may not be excluded); *id.* § 107.785 (same); WIS. STAT. § 655.58 (1998) (authorizing counsel to attend mediation).

719. See *supra* Part II.B.2.

720. See *supra* Part IV.C.2.c.

721. See *supra* Part IV.C.2.c.

722. 411 U.S. 778 (1973).

evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views.⁷²³

Moreover, in another case, the Court has suggested that "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay"⁷²⁴

While mediation is an informal process, there are strong arguments to distinguish the administrative law cases and to support a qualified right of counsel in mediation. As a preliminary matter, it is worth underscoring the fact that the Supreme Court has never rejected a right to retained counsel in civil cases. Rather, the cases in which the Court has articulated the adversarial-nonadversarial distinction within the right to counsel have come in the context of constitutional claims for the appointment of counsel.⁷²⁵ This is a significant distinction by itself, because the impact of the recognition of the claimed right to counsel on the government fisc is substantial in appointed cases—indeed, under a *Mathews* analysis, it could be dispositive—while such an impact is negligible, if it exists at all, when applied in the context of the right to retained counsel in mediation.

Moreover, the administrative context is one in which the need for the efficient handling of mass or minor claims is at its greatest. Significantly, most of these claims are governed under the APA, which provides a fairly specific set of procedural protections, including the right to a written statement of reasons and appellate review.⁷²⁶ Neither of these profoundly important procedural protections, or any other for that matter, is provided in mediation. Rather, as noted above, the most significant procedural protection that the mediation process provides is the ability of either party to terminate the mediation at any time for any reason.⁷²⁷ Beyond that, mediation is a fluid process in which the absence of other procedural protections, the inherent problem of power imbalances, and the possibility that information disclosed

723. *Id.* at 787 (cited with approval in *Wolff v. McDonnell*, 418 U.S. 539, 569–70 (1974)).

724. *Wolff*, 418 U.S. at 570. For an argument that such concerns prove a myth under the weight of empirical research, see Craig A. McEwen et al., *Bring In the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

725. See, e.g., *Wolff*, 418 U.S. 539.

726. See 5 U.S.C. § 555(b) (1994).

727. While the good faith of the parties is assumed, at least one prominent mediation scholar has argued that it should be a statutory requirement. See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997). For a contrary view, see Edward F. Sherman, 'Good Faith' Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL. MAG., Winter 1997, at 14.

can be used to a party's detriment outside the mediation all compel the recognition of a right to retained counsel. Each of these issues bears further discussion.

(1) Absence of Procedural Protections

While the unfettered exit option may seem to be the ultimate procedural protection, in practice it may be inadequate in many cases without an attendant right to counsel because of the unique vulnerabilities of the parties in mediation. For one, a weaker party may not have the personal fortitude to simply walk out on a mediation. Moreover, it is difficult for a lay person to know when to exercise the right to walk out of a mediation, just as it is difficult for the lay person to understand the full legal consequences of an ultimate mediation agreement or to appreciate fully the impact of the dynamics of the mediation on their ultimate judgment about the acceptability of a mediation agreement, such as the effect of a power imbalance. By definition, nonlawyers reasonably may be presumed not to have an understanding of the law that is sophisticated enough to permit them to be able to weigh the merits of a proposed mediation agreement against the remedies that might be available at trial. Also, decision making in mediation often comes at the end of a process that can be emotionally and physically taxing, when the sobriety of judgment is most vulnerable to the influences of passion or fatigue. As a result, a party in mediation is particularly susceptible to accepting a settlement that might seem right in the heat of the moment but might be less attractive upon closer scrutiny. Counsel may not, of course, be able to dissuade an insistent party in mediation from accepting an agreement that may seem unwise or ill-advised. However, at least such a decision will be made with the benefit of counsel that is presumably more emotionally detached. In this way, in the absence of other structural procedural protections, the availability of counsel is a minimal but meaningful constitutional safeguard that will, among other things, give content to the exit option.

(2) Power Imbalances

The absence of other procedural safeguards in mediation is particularly troubling in light of the difficulty the mediation process has in dealing with the power imbalances that are so often a part of, if not a cause of, conflicts that come to mediation.⁷²⁸ Rather than balancing the playing field structurally through rules or procedures seen in adjudicatory proceedings, mediation's

728. See *supra* note 42 and accompanying text.

informality can have just the opposite effect and can actually exacerbate existing power imbalances.⁷²⁹ As a result, a weaker party might be subtly, even inadvertently, discouraged from participating effectively in the mediation.⁷³⁰ Similarly, a party in such a situation might readily accept a settlement that on its face seems to accomplish her goals but that may raise questions about substantive fairness. For example, a woman in a divorce mediation might give up substantial property and pecuniary rights to which she would be entitled at law in order to get the thing she values most, primary custody of her children.⁷³¹

Again, it is not the place of the law to determine the wisdom of such a trade-off. Personal preferences and the nuances of particular situations can vary widely. However, counsel should be available to assure the ability of parties to participate effectively in the mediation, despite disparities of power and bargaining strength, and to test the proposed settlement against a party's long-term goals and needs.⁷³²

(3) The Permeability of Confidentiality

Confidentiality, like mediator impartiality, is one of the cornerstones of the mediation process. It fosters a climate that promotes the frank exchange of feelings, facts, and ideas by creating a zone of safety wherein intimate thoughts and concerns will be heard, respected, and kept private. This promise is typically one of the first matters addressed by the mediator in the first minutes of the first mediation session, to help set a tone of candor for the overall mediation effort.⁷³³

Despite such assurances, however, confidentiality in mediation is not nearly so absolute in practice as it might seem, and the presence of counsel may at times be most advisable to prevent a party from disclosing inside the mediation information that may be used to the client's detriment outside of the mediation.

For example, while several states have privilege statutes protecting confidentiality in mediation, the majority of those statutes are also subject to significant exceptions.⁷³⁴ One particularly salient and common exception effectively requires mediators to comply with legal duties to report certain

729. See AUERBACH, *supra* note 42, at 136.

730. See Grillo, *supra* note 42, at 1585–86; Lerman, *supra* note 42, at 72.

731. See Grillo, *supra* note 42, at 1594–95; Lerman, *supra* note 42, at 72.

732. See ROGERS & MCEWEN, *supra* note 66, § 1:02, at 1-13; *id.* §§ 4:01–13, at 4-1 to 4-47.

733. See KOVACH, *supra* note 66, at 82–87.

734. See ROGERS & MCEWEN, *supra* note 66, § 9:04; see also UNIF. MEDIATION ACT § 8 (Draft Mar. 2000).

activities that could have criminal consequences, such as child abuse.⁷³⁵ This evidence could easily be elicited (even if untrue) during the course of a divorce or child custody mediation. Similarly, several states also have mediation confidentiality statutes that simply do not apply in subsequent criminal proceedings, meaning that testimony about anything said during the course of a mediation could be compelled and used as evidence to convict a party to the mediation, to the extent that it is relevant to the prosecution of a later criminal case.⁷³⁶ Finally, not all mediations are successful, and, upon termination, may give way to subsequent civil trials. While confidentiality statutes may bar the disclosure of statements made during the course of the mediation, the reality is that the sensitive information that is the mortar of mediation has already been disclosed to one's opposition, as have the strengths and weaknesses of one's case. Creative lawyering, of course, can often effectively defeat the privilege of confidentiality once the information has been disclosed. This is one reason that many a lawyer has decried mandatory mediation in court-related programs as being more of a discovery tool than a settlement device.

As can be seen, even when the parties are balanced, the mediation can present a substantial legal risk to the unsuspecting participant that the availability of a right to counsel can significantly and reasonably cure.

(4) Advisory Processes

In most situations, evaluative processes and fact-finding likely will not be subject to constitutional constraints because they will not be governmentally compelled. Yet even in those situations in which evaluators or fact finders are state actors, any constitutional concerns are substantially diminished by the nature of the role being played by the state actor.

In particular, these processes are neither adjudicatory nor consensual. Rather, they are collateral processes intended to aid or facilitate the decision making of a third party or parties by providing additional information. This third-party decision maker can be either one or all of the parties themselves (in the case of a neutral evaluator, for example), or an adjudicator (arbitrator, judge, or administrative officer). Therefore, minimal but meaningful consti-

735. See, e.g., CONN. GEN. STAT. § 46b-53(c) (1999) (domestic violence); WASH. REV. CODE ANN. § 26.09.015(3) (West 1997) (marriage dissolution). See generally UNIF. MEDIATION ACT § 8(a)(5) (Draft Mar. 2000).

736. See, e.g., IOWA CODE § 216.15B(2) (1997); MASS. GEN. LAWS ch. 150, § 10A (1998); OHIO REV. CODE ANN. § 2317.023(C)(3) (Anderson 1997).

tutional safeguards in this context should be confined to the qualified right to counsel during the government-compelled fact-finding or evaluative session. Much of the previous discussion of the right to counsel in arbitration and mediation informs this analysis. As in those processes, one has a right to an impartial fact finder or evaluator if that fact finder or evaluator is established to be a state actor. This would likely be in those limited situations in which the fact finder or evaluator is directly appointed from a government-approved roster by a court, legislature, or government agency.

As such, bias remains our central constitutional concern in these contexts. While it is certainly possible that a fact finder can be biased, the effect of that bias can be readily neutralized by the presence of counsel to make sure that the fact finder is in compliance with any substantive or procedural limitations on their fact-finding authority, and that the party being investigated does not disclose any detrimental information that would be privileged or beyond the scope of the fact-finding mandate. Moreover, an attorney may be expected to be sensitive to the possibility of bias or other mischief during the investigation and to take appropriate steps to remedy it, such as moving to disqualify the fact finder, highlighting information that is relevant but being overlooked or trivialized, and refusing to permit inquiry into areas that are privileged or beyond the scope of the fact-finding mandate including, if necessary, the seeking of an injunction. Similarly, an evaluator may also be biased, but counsel can readily remedy such bias by putting an evaluator's assessments and judgments into perspective, or by recommending that another evaluator be brought in for a second opinion. The right to counsel if one so chooses is the essential minimal but meaningful due process safeguard in these more remote ADR processes.

CONCLUSION

In describing the current state of the ADR movement in Part I, I noted the puzzling inconsistencies in the empirical data on ADR, most notably that institutional support tends to remain high while actual voluntary usage of ADR tends to remain relatively low. I further submitted that at least part of the reason for this puzzling inconsistency may be a legitimacy barrier arising from the absence of enforceable constitutional standards in ADR, as currently understood according to a bipolar paradigm. While hailing its many virtues in providing for dispute resolution that may be more effective and efficient than traditional litigation, I suggested that the proverbial glass may be half full, rather than half empty, and questioned whether the glass would continue to fill. After more than a quarter-century of growth, ADR no longer enjoys the fresh bloom of its younger days, and, indeed, even its

more zealous advocates are coming to acknowledge the legitimacy of the concerns of ADR's critics.⁷³⁷

In my view, the recognition of the minimal but meaningful due process standards described in this Article will help make it possible for the glass to continue to fill. One ADR scholar has described the first decade of modern ADR as being "one of experimentation, the second, one of implementation[,] . . . [and] the third, and current decade[,] . . . one of regulation."⁷³⁸ This may be seen not only in attempts to establish standards by which the profession may operate and be regulated, such as the efforts to draft a new Uniform Mediation Act and to revise the existing UAA, but also in the new wave of ADR expansion now underway, particularly in the judicial and administrative contexts.

While many of these efforts to regulate ADR have arisen from outside the ADR community, it is notable that every major reform effort that has arisen from within the industry has sounded in themes of due process, from the various "due process protocols,"⁷³⁹ to ethical guidelines,⁷⁴⁰ to reform commissions.⁷⁴¹ These proposals are far more detailed in prescribing procedures and standards than those minimal but meaningful constraints that may be constitutionally required—the impartiality of the tribunal, the right to present and confront evidence, and the qualified right to counsel—depending upon the process.

One's faith in the importance of recognizing such a limited constitutional dimension need not be limited to intuition, anecdotal evidence, and scholarly prescience. New and important empirical research is beginning to document not only the existence of structural weaknesses in ADR that raise

737. See, e.g., Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 57 (1999).

738. Kimberlee K. Kovach, *Section Poised for an Important Year*, DISP. RESOL. MAG., Fall 1997, at 3.

739. See *supra* Part I.C.3.

740. See, e.g., CPR-GEORGETOWN PROPOSED MODEL RULE OF CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL (Draft Spring 1999); see also AAA/ABA/SPIDR MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994); Elizabeth Plapinger & Carrie Menkel-Meadow, *ADR Ethics: Model Rules Would Clarify Lawyer Conduct When Serving as Neutral*, DISP. RESOL. MAG., Summer 1999, at 20.

741. See generally SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, *supra* note 533; ALTERNATIVE DISPUTE RESOLUTION IN CIVIL CASES, REPORT OF THE TASK FORCE ON THE QUALITY OF JUSTICE SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION AND THE JUDICIAL SYSTEM (Aug. 1999) (final report of California statewide commission appointed by state Supreme Court Chief Justice Ronald M. George to analyze and make recommendations with regard to problems with court-related ADR programs); THE CENTER FOR DISPUTE SETTLEMENT, INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION (1992).

constitutional implications, but also the success that the imposition of due process standards can have in enhancing the fairness, and the perception of fairness, of such processes.⁷⁴² To be sure, there will still be the potential for abuses under a unitary approach to public civil justice that recognizes the constitutional character of harms caused by private actors that are fairly attributable to the state. Such is the nature of the human condition. However, under a unitary approach, unlike the current bipolar understanding, there would also be constitutional remedies that would be consistent with the broader fabric of the law and with the reasonable and intuitive expectations of parties involved in those processes.

That said, one must be realistic and recognize that the unitary theory I have suggested seems both implausible and inevitable at the same time. Its implausibility may be inferred from the heavy weight of the current bipolar understanding, according to which ADR and litigation exist in two separate and exclusive spheres. Moreover, the incremental nature of the work of courts mitigates against judicial adoption of a broader theory such as the unitary theory advanced here, because courts are asked to decide upon particular questions of fact and law in the context of specific cases, rather than upon a broad theory with highly integrated components. Finally, there are always generalized concerns about the unanticipated issues that inevitably arise, and understandably so.

The tempered nature of a unitary theory of dispute resolution can overcome at least some of these barriers by accommodating both the strong public policy reasons supporting ADR and the demands of the state action doctrine. The minimal but meaningful due process standards I have described incorporate into seemingly private ADR processes constitutional standards that are sensitive both to the concerns that can arise in those processes and to their unique needs.

There are, of course, constitutional issues other than due process that may bear relevance to ADR once the constitutional border of ADR has been recognized, as a couple of more salient examples illustrate. One is the degree to which equal protection concerns may be implicated by ADR, such as through statutory ADR schemes that permit one but not all parties to route a case into ADR; some courts already have found such schemes constitutionally troublesome.⁷⁴³ Similarly, the First Amendment right of the press to have access to ADR hearings presents a serious clash between the rights of the public to democratic participation (and government oversight) and the needs of ADR processes for privacy that has only barely, and tepidly,

742. See *supra* notes 173–176 and accompanying text.

743. See generally Katz, *supra* note 98.

been addressed by courts and commentators.⁷⁴⁴ Both are issues most worthy of careful thought and intelligent discussion.

Finally, though not necessarily constitutional in nature, the recognition of a constitutional dimension also has important implications for court funding. That is, the recognition of state action in seemingly private ADR processes, or the embrace of a unitary theory of dispute resolution, provides additional support for the funding of such programs, if not an obligation. Governmental processes for public dispute resolution other than trial seem at least as worthy of adequate public funding as the single process for public dispute resolution contemplated by the current bipolar model, namely, trial. Indeed, once a means of measurement is established to quantify the relationship between the use of ADR processes and the number of conflicts that escalate into more formalized disputes requiring trial, researchers may find that public investment in funding ADR processes yields a greater return than expanding funding for trial processes through the creation of more judgeships, speciality courts, and other administrative devices that merely restructure case management rather than reduce the flow of cases by preventing unnecessary conflict escalation. At a minimum, the expansion of public justice through a more accurate understanding of ADR calls for renewed consideration of the funding question.

Despite the arguments against its adoption, there is an air of inevitability about the recognition of state action in some seemingly private ADR processes, if not the embrace of a more fully developed unitary theory of public civil dispute resolution. The more court-related ADR expands, the more reasonable it is to expect questions to be raised in judicial forums over due process, the First Amendment, equal protection, and possibly other constitutional issues. The more those constitutional questions are raised in the court-related context, the greater the likelihood that courts will recognize that those processes are driven by state action and therefore compel at least rudimentary notions of due process as a constitutional imperative. In time, the illogic of having different standards of fundamental fairness applicable in the court-related and contractual contexts—especially given that the same neutrals frequently serve in both spheres—may lead to the crumbling of that wall in practice if not in theory. At that point, the wall between the public and private dispute resolution systems will become imperceptibly thin, the elements of a unitary system of dispute resolution will begin to align, and the best promises of ADR will be well on their way to being finally fulfilled.

744. *See id.*