Taking Contracts Private: The Quiet Revolution in Contract Law

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INTRODUCTION

In his treatise on contract law, Professor Arthur Corbin ruminated on the evolution of the doctrine of consideration. Knowledge of the early English law and custom would, he observed, be of historical interest and perhaps of practical value as well, in helping us understand the evolution of this doctrine. “However,” he concluded,

[we] must be content . . . without this knowledge, and must discover our contract law and our doctrine of “consideration” from the reports and records of recent times . . .

The reports and records of recent times! Courts and jurisdictions scattered over all the continents and the seven seas! Cases by the million! Libraries so labyrinthine as to require a guide! The leaves of the books like the leaves of the trees! Who can now read all the reports of cases dealing with the law of consideration . . .? Certainly not the writer of this volume.¹

Like Professor Perillo (and Arthur Corbin, for that matter), I am by vocation a professor of contract law, which means that my professional life consists mostly of teaching, writing and thinking about what we conventionally refer to as the law of “contracts”: legally binding agreements. Unlike most of us teachers, however, who only occasionally manage to put pen to paper, Joseph Perillo has done a prodigious amount of thinking and writing,² and his efforts—like

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¹ Arthur L. Corbin, Corbin on Contracts § 109, at 162 (one vol. ed. 1952).
² Law teachers will be certainly familiar with (and quite possibly users of) both Joe Perillo’s casebook and his one volume treatise on Contracts (both initially with John D. Calamari; the casebook now with Helen H. Bender); students may also know these and also are more likely than professors, perhaps, to be familiar with his Outline of Contracts series (again, originally with Professor Calamari). He has also produced a series of insightful articles about various aspects of contract law, and other areas as well. And, of course, he has more recently taken on the enormous task of supervising and partially writing the revised version of Corbin on Contracts. Joe has also been a very supportive colleague over the years, to me and to other law teachers in his fields,
those of Arthur Corbin, in whose large footprints he quite confidently treads—have been devoted not to laying down a personal dictum of what the law should be, fueled by some private vision of a utopian economic or social order, but rather to the discovery of what courts are actually doing (and why), in order to suggest what we might expect them to do in the future. In Corbin’s “working rules” of contract law were necessarily no more than that, always subject to further refinement and revision, because the work of the courts would never come to an end. In the passage quoted above, Professor Corbin eloquently describes the reports of decided cases as being so unimaginably great in number that they must defy the efforts of an ordinary mortal—even so extraordinary a one as Corbin himself—to study and catalog. We must simply do the best we can, he says, and proceeds to do just that.

Nowadays, of course, all is different. Thanks to the silicon chip and the World Wide Web, legal researchers can in a few minutes accumulate amounts of information that in Corbin’s day would have taken months, even years of painstaking effort to pull together. Stacks of three-by-five cards, reaching end-to-end nearly to the moon, with laboriously hand-scribbled notes of citations, facts, holdings—these were the stuff of legal research when giants like Williston and Corbin roamed the earth. Today, with a few well-placed keystrokes, one can count virtually (yes, pun intended) every tree in the forest, and most of their leaves as well. Endless afternoons in musty libraries, lugging stacks of heavy volumes from shelf to desk and back, wearily blinking through tiny column after column of “Shepard’s Citations”—gone, all gone.

But other things have changed, as well. A century ago, disputes over contract formation and interpretation routinely found their way into the legal system—onto trial court dockets, into appellate reports, and occasionally even into casebooks and treatises. For reasons that perhaps defy tidy categorization (some of which will, however, be

and I have always been grateful for his interest and encouragement. It's nice to have a chance to say so in print. For an example of Joe’s sharp eye at work, see infra note 95.

3. In his preface to volume 1 of the revised Corbin treatises, Professor Perillo declares his fealty to the central themes of Corbin’s work: “evolution, uncertainty and the need to validate theory with close analysis of court decisions.” 1 Corbin on Contracts iv (Perillo ed., 1993).

4. Corbin’s original preface to his treatise, discussing his view of contract law as a collection of “working rules,” is reproduced in 1 Corbin on Contracts vii-x (Perillo ed., 1993).

5. Professor Corbin was not always so diffident. In his preface to the revised edition of Corbin’s treatise, Professor Perillo discusses Corbin’s role as a [non-initial-caps] legal realist, an “evolutionist.” In the course of that discussion, he quotes this passage from a letter Corbin wrote to Robert Braucher: “I have read all the Contract cases for the last 12 years; and I know that ‘certainty’ does not exist and that the illusion perpetrates injustice.” Id. at iii.
suggested below), the one-time flood of reported cases has slowed to a trickle. Who today can read all the significant contract-law cases as they appear in "the reports and records of recent times"? Virtually anybody, it appears—anybody with some time to kill and a decent attention span. For the past few years I have taught at Hastings College of the Law a seminar course which I call "Case Studies in Contract Law," in which students are invited to undertake an in-depth examination of a recent California case (in state or federal court) involving issues of contract law. To prepare for the course, I have each year surveyed both the California and Federal reporters, looking for California decisions that present interesting contract issues. To say they are few and far between is to overstate their number. Far and away the most pervasive contract-related issue litigated during this period has been this: Will the court enforce an arbitration contract in the parties' written agreement? And the court's answer, usually, is yes. Sometimes grudgingly, sometimes enthusiastically,
but—yes, it will. 8

8. The articles listed in the preceding footnote have as a common theme the expansive role that arbitration has played over the past several decades, differing only in their conclusions about the desirability of that development. Somewhat surprisingly, of the ten California (state and federal) cases listed in note 6, supra, the court ruled against enforcement of the arbitration clause in seven. Circuit City, 279 F.3d at 892-95 (holding that clause in employment contract was unconscionable under California law); Pagarigan, 120 Cal. Rptr. 2d at 894-95 (holding that adult children were not bound by arbitration clause in agreement they signed on behalf of late parent where they lacked authority to sign on his behalf); Buckner, 119 Cal. Rptr. 2d at 491 (holding adult daughters of deceased were not bound in wrongful death action by arbitration clause he signed during his lifetime); Mercuro, 116 Cal. Rptr. 2d at 679 (finding some aspects of arbitration scheme unconscionable); Flores, 113 Cal. Rptr. 2d at 382-83 (determining that arbitration clause was procedurally and substantively unconscionable); Benasra, 112 Cal. Rptr. 2d at 359 (holding that president of company was not bound as individual by arbitration clause in contract he signed only in representative capacity); Cruz, 111 Cal. Rptr. 2d at 402 (finding that healthcare patient’s claims for injunction and restitution were not subject to arbitration). Note the marginality, however, of several of these attempts to enforce the arbitration clause (Benasra, Buckner, Pagarigan). And of course, Circuit City, at an earlier stage, was a notable triumph for the pro-arbitration forces, closing off the possibility that the
Why should this matter to me, or to you, or to anyone concerned about the working of the American legal system? It matters because the pressure for mandatory arbitration represents another step, and a giant one, in the privatization of American contract law. This may strike some readers as an odd, even oxymoronic observation, given that in most analytic schemes, contract law—often referred to as “the law of private agreement”—is generally considered already to be “private” law, as opposed to various types of “public” law such as criminal law or the law of torts.9 Of course, some would maintain that there is no bright line between public and private law.10 As my discussion below may indicate, I would probably be comfortable in their company. But my point here, while related, is a slightly different one: Whether contract law in the first instance is or is not “private” law, the process by which contract disputes are resolved is indeed a “public” process, and in the course of that process, “public” values are brought to bear. The “rule of law” of which the American legal community is justly proud involves not only the application of “rules” of law, but also the working of a legal “process,” in a public forum, as part of a public discourse. Like private police forces11 and gated communities,12 the privatization of law represents a removal of important aspects of civic life from the public realm to a realm in which economic and social power are even more likely to play a significant role—a kind of leveraged buy-out, if you will, of the public weal.13

Arbitration as a process of dispute resolution between willing and relatively equal parties may well represent an untrammeled social

13. I use the phrase “even more likely” because obviously these factors do already play a major role in the outcome of legal disputes. See generally Marc Galanter, Contract in Court: Or Almost Everything You May or May Not Want to Know About Contract Litigation, 2001 Wis. L. Rev. 577.
good, and American courts were probably mistaken to resist its spread
in the early years of the twentieth century.14 Armed with the Federal
Arbitration Act,15 determined judges have completely overcome that
initial resistance.16 But “mandatory” arbitration—arbitration imposed
by pre-dispute clauses in contracts of adhesion which, as a practical
matter, the non-drafting parties have no real power to avoid or
disapprove—will, if allowed to continue unchecked, largely deprive
American courts of the ability to play the important social role they
played so effectively throughout the last century.17 And it will take
away, from those individuals and enterprises who need it most, the
protection of the law. Whatever else arbitration may be, it is not
“law”—the kind of findable, studiable, arguable, appealable,
Restateable kind of law that has characterized the Contract area for
over a century. The piece-by-piece dismantling of American contract
law is happening under our noses, right now. Maybe this process
cannot be stopped, but at least we should recognize it for what it is:
the abdication of any public responsibility for justice based on
something more than raw economic power.18

In this article, I comment on the state of contract law in general, the
adhesion contract problem, and the use of arbitration in contract
cases, from three temporal perspectives: the middle twentieth century,
the present day, and the foreseeable future. Having painted what I
hope will be a realistic picture, albeit with a concededly broad brush, I
close by sketching a few ways in which the shape of things to come
might be changed for the better.

I. TWENTIETH-CENTURY CONTRACT LAW

It has become a commonplace observation among contract writers
and teachers that American contract law underwent a major evolution
during roughly the middle half of the last century, from the “classical”
contract law exemplified by the teaching and writings of Professors
Langdell and Williston to what some of us at least are accustomed to
calling “modern” contract law. That transformation was

14. See generally Brafford, supra note 7. The same story is told in one way or
another in many of the articles cited in note 7 and the cases cited in note 59. The
history of this period is fully recounted in Ian R. Macneil, American Arbitration Law
16. See infra note 59.
17. As Professor Richard Speidel has pointed out, the term “mandatory
arbitration” is perhaps misleading when used to refer to arbitration pursuant to pre-
dispute agreement. Speidel, supra note 7, at 1069. Nevertheless, it appears to have
become the standard phrase for this concept. See, e.g., Alderman, Edwards, Green,
and St. Antoine, supra note 7.
18. Note I am not asserting here that “justice” cannot or will not be the product of
some or even most arbitration proceedings; rather, that by enforcing pre-dispute
arbitration clauses in contracts of adhesion, the courts are deferring almost entirely to
private dispute resolution, “just” or not.
foreshadowed in the writings of Professors Corbin and Llewellyn, embodied first in portions of Article 2 of the Uniform Commercial Code ("U.C.C."), and then spelled out in painstaking detail in the Restatement (Second) of Contracts. Even at this meta-level of generalization, it has to be conceded that the division between classical and modern periods is not nearly so neat. Glimpses of "modernism" can be seen in the first Restatement of Contracts, and the Restatement (Second) has "classical" (or perhaps "neoclassical") aspects. But the observation seems accurate enough in broad outline to be useful as a basis for comparing the contract law of, say, 1930 with that of a half-century later—the earlier "formalism" (or perhaps "conceptualism") of a "rules-based" system being contrasted with the more "standards-based" system of the later date.

Apart from the possible operation of a "Statute of Frauds," the classical system certainly did not rule out the possibility of enforceable oral contracts. Nevertheless, to the extent that a written agreement was created by the parties, that document usually ruled supreme; the "duty to read," accompanied by a "plain meaning" approach to interpretation and a "four-corners" parol evidence rule, along with a judicial disinclination to allow equitable defenses, meant that anyone who signed a document that he or she was intended to have contractual effect could expect to be bound by whatever terms it contained. Along with a strong preference for basing decisions wherever possible on questions of law rather than fact, this Dominance-of-the-Document formalism seems from our vantage point to have been the essence of classical contract law. Perhaps reflecting the dominant laissez-faire ethos of American culture during the half-century or so ending around 1930, this was a law for the lion, not for the lamb; the well-heeled and well-counseled would find classical contract law generally in their corner, while those less fortunate could expect to fare less well.

By 1980, the wind had shifted, and indeed was to some extent likely to be tempered for the shorn lamb. As noted above, Professor Arthur

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20. E.g., Restatement (Second) of Contracts § 73 (1981) [hereinafter Restatement Second] (retaining the pre-existing duty corollary to the consideration requirement, as qualified (but not abrogated) by § 89 regarding modifications).
22. For an example, see the hoary chestnut beloved of casebook editors and contracts teachers, Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891), featuring an oral promise by Uncle William to pay his nephew $5000 if the latter would abstain from a variety of activities (smoking, drinking liquor, etc.) until reaching age 21.
23. Or "had reason to know," as the objective theory would add. See, e.g., Restatement Second, §§ 19, 20, 201.
Corbin had first in a series of articles and then in his multi-volume treatise painstakingly examined the way in which courts in fact applied contract doctrine in their decisions, and his influence had to some extent been reflected in the first Restatement of Contracts. While Corbin was professedly non-doctrinaire in his approach, his antipathy to the parol evidence rule in particular was evident and influential. Professor Karl Llewellyn had focused his sector of the Legal Realism movement on contract law, particularly as seen through the lens of sale-of-goods, and had identified many ways in which classical contract doctrine impeded the process of getting to sensible outcomes in disputes between “business men.” In Article 2 of the U.C.C., Llewellyn provided a variety of tools with which courts could transcend rule-based doctrine to appreciate and effectuate the commercial aims of the parties; concepts like “trade usage,” “course of performance” and “course of dealing,” and “good faith” encouraged courts to facilitate market transactions while at the same time rewarding ethical behavior. In the Restatement (Second) of Contracts, many of Llewellyn’s U.C.C. innovations were incorporated and given broader application. With these two pillars of modern

27. Professor Scott D. Gerber has recently referred to Arthur Corbin as “the leading opponent of the parol evidence rule.” Gerber, An Ivy League Mystery: The Lost Papers of Arthur Linton Corbin, 53 S.C. L. Rev. 605, 638 (2002); see Arthur L. Corbin, 3 Corbin on Contracts (1951); Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L. Q. 161 (1965). Although the Restatement (Second) cites both Williston and Corbin generally as authorities for its parol evidence rule provisions, it is generally understood to embody Corbin’s approach to that subject rather than Williston’s. See generally John D. Calamari and Joseph M. Perillo, A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation, 42 Ind. L.J. 333, 333, 353 (1967), which in characteristically clear and persuasive Calamari-and-Perillo fashion explicates the different points of view obscured behind the apparent semantic agreement between Williston and Corbin, and demonstrates that the Restatement adopts the Corbin approach, a result applauded by the authors. Corbin’s views “merit adoption because they conform better to the expectations of contracting parties as to what the law should be.”
29. Although married to formidable contract and commercial law teacher and writer Soia Mentschikoff, Karl Llewellyn persistently referred to the actors in his legal drama as “business men,” a usage which for some of us older folks may conjure up images of club chairs, brandy, and cigars. E.g., Karl N. Llewellyn, Common-Law Reform of Consideration: Are There Measures?, 1941 Colum. L. Rev. 863, 872 (referring to both “business men” and “non-business men”).
31. Compare, e.g., Restatement Second §§ 33, 205, with U.C.C. §§ 2-204, § 2-
contract law firmly in place, courts could transcend the literal terms of a signed writing to reach an outcome consonant with the reasonable expectations of a justifiably aggrieved party, even though that party labored under a disadvantage in the formation of the agreement at issue.\(^{32}\)

Although these new insights could transform the way in which contract disputes generally were adjudicated, they only partially grappled with the problem that by the mid-twentieth century Karl Llewellyn, Friedrich Kessler and others had identified and explored: the “contract of adhesion.”\(^{33}\) The ever-increasing use of standardized forms meant that in a vast number of cases, contracts were drafted by one party and merely “signed onto” by the other, with actual bargaining being confined to a few variables such as price, quantity,

103(l)(b); compare also Restatement Second §§ 222, 223, with U.C.C. § 2-208.


33. Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943); Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704 (1931). In addition to Kessler and Llewellyn, Professor Todd Rakoff identifies Professors Arthur Leff and David Slawson as the other most influential writers in the area of adhesion contracts. See Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1174, 1206-15 (1983); see also Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131 (1970); W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971). See generally Stewart Macaulay, Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards, 19 Vand. L. Rev. 1051 (1966). In a recent, remarkably interesting article, Alan M. White and Cathy Lesser Mansfield report that empirical testing demonstrates that most consumer form contracts are beyond the comprehension of the consumers who are required to sign them. Asserting that the law of consumer contracts is in need of a “reality check” similar to the loosening-up of contract law that was accomplished for business in the mid-twentieth century, they conclude as follows:

The realities of today’s marketplace... cry out for a new theory of consumer contract and statutory law that is based on reality... Consumer contract law should not be based on the false notion that by signing one of these form contracts, the consumer knows of, understands, and has assented to the terms of the writing... By holding onto the freedom-of-contract doctrine as the main common law component, and using disclosure laws as the main statutory component of consumer law, the legal system is engaging in the fiction of a free and informed market, while turning a blind eye to the realities of the marketplace and to the fact that consumers cannot understand and do not actually assent to the terms of the consumer contracts they sign.

time and place of delivery, etc.\textsuperscript{34} Add to that the power of the stronger party in many cases to insist on presenting its form on a “take-it-or-leave-it” basis, and you have a situation in which contracting parties typically have no real choice in most of the terms of the contracts they make—often, as a practical matter, not even the choice of just saying no. In a contract-law world supposedly based on the assent of the parties, the contract of adhesion posed a conundrum: how could there be true assent to terms which one party had not read, probably would not have understood even if she had, and in any case would not have been deleted or modified by the other? Of course, this tension was to some extent already implicit in the classical system’s imposition of a “duty to read,” as suggested above, but the standardized form—particularly as used in mass-market transactions or other extremely “adhesive” circumstances—exacerbated the problem by making it nearly impossible in practice to read and understand (much less to bargain over) most of the terms in the contract one was making. Anyone with the slightest knowledge of today’s world knows that most mass-transaction contracting takes place in an environment in which it is clear that, except for a few “dickered” terms, bargaining is neither expected nor permitted,\textsuperscript{35} and even reading the relevant documents is implicitly discouraged.\textsuperscript{36} Imposing a general “duty to read” is one thing; imposing such a duty in circumstances \textit{where we know it cannot or will not be performed} is Catch-22 with a vengeance.\textsuperscript{37}

\textsuperscript{34}. Llewellyn referred to these as the “dickered” terms, a somewhat antique phrase that has persisted in the literature of adhesion contracts. Karl Llewellyn, The Common Law Tradition 370 (1960).

\textsuperscript{35}. \textit{See generally} Rakoff, \textit{supra} note 33, at 1220-29.

\textsuperscript{36}. This despite the fact that—as we all know from experience in our daily lives—many documents include boilerplate language in which the signer asserts that he or she has read and understands the document being signed.

\textsuperscript{37}. In his 1983 article, Todd Rakoff offers the following clear and convincing analysis of the adhesion contracting process:

There is little that the individual adherent can do to improve his position. From the standpoint of ordinary contract law, the obvious failure of adherents to read and understand form documents appears to be the core problem involved in the use of contracts of adhesion. On fuller examination, this failure proves to be merely the most visible symbol of a pervasive and complex institutional practice. Once the practice comes to exist generally, the fact that a particular adherent reads and understands the particular form that he signs is irrelevant. The internal rigidity of the firm will itself be likely to prevent a knowledgeable adherent’s objection to any form term from generating bargaining behavior, even if the objection is coupled with a threat to take his trade elsewhere. Yet the effect is magnified when both the adherent and the drafter know, or at least sense, that other adherents are not attempting to bargain, for then the request that the firm change its standard practice becomes mere eccentricity. Similarly, that the adherent reads one form does not establish that he has read or shopped many others, or that it would be rational for him to do so. But even if a particular adherent undertakes that task, the widespread ethos of not shopping for terms submerges his effort and contributes to the likelihood that, regarding most
Besides the concepts mentioned above, the U.C.C. in § 2-302 provided one more tool for achieving justice, to be resorted to in cases where nothing else would serve that purpose: the concept of "unconscionability." Not a new invention of Llewellyn's but a recycling of an older equitable notion, "unconscionability" provided a safety valve for courts seeking to avoid outcomes dictated by contract language but beyond the level of visceral tolerance. And for a while it did indeed serve that purpose, particularly in cases involving egregious overreaching by merchants in dealing with consumers, often ones who were poor or otherwise particularly vulnerable. For a decade or two, unconscionability decisions studded the case reports with regularity. Eventually, however, consumer-protective legislation addressed the most pervasive and recurring types of overreaching, and the courts' disposition to employ unconscionability analysis, even in consumer cases, appeared to wane. In non-consumer cases, even where the parties were distinctly unequal in bargaining power, its use was never widespread.


While the rules to be applied in resolving contract disputes were thus evolving, the institutional modes of doing so were also undergoing some change. In the early years of the twentieth century, business enterprises began seeking to avoid the delays and expense involved in conventional litigation by employing a process that its proponents claimed could be faster and cheaper, and as good or better in its outcome, than resorting to the courts: commercial arbitration. Less hampered by elaborate and perhaps unnecessary rules of evidence and procedures of discovery, or by archaic and over-formal rules of substantive law, arbitrators would (it was asserted) be able to reach decisions that were not only faster and cheaper than those produced by the courts, but also better, because they were more in tune with the commercial realities of the dispute. And where rules of classical contract law often appeared to dictate a zero-sum outcome with a clear winner and loser, arbitrators might be able to fashion a compromise decision that would perhaps not completely satisfy either party, but would give them both something they could live with.

Initially many courts were not enthusiastic about enforcing arbitration clauses. For whatever combination of reasons, both English and American courts persisted in regarding agreements to arbitrate as non-binding, essentially revocable at will by either party. But the general satisfaction of commercial parties with the arbitration process, and the press of other business on increasingly crowded court dockets, pushed strongly in favor of supporting consensual arbitration in commercial cases by making arbitration clauses enforceable despite a later change of heart by one of the parties. In 1925, Congress passed the Federal Arbitration Act, designed to overcome whatever pockets of judicial resistance might remain, and to provide a clear path to arbitration for those who had agreed to settle their disputes by that means.

Summing up, then: by the latter part of the twentieth century, we find contract law in general transformed by concepts of commercial reasonableness, good faith and fair dealing, and unconscionability, permitting—even inviting—the court to bring to bear on the

41. For an example, see United States Asphalt Refinery Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915), in which the judge rehearses the various reasons advanced over the years for refusal to enforce arbitration agreements between competent parties, finds none of them convincing, but follows the existing rule anyway. Professor Macneil comments that the cited decision persuaded advocates of arbitration that the judiciary would remain "permanently and mulishly" committed to the rule that arbitration agreements remained revocable at the will of either party. Ian R. Macneil, American Arbitration Law: Reformation—Naturalization—Internationalization 30 (1992). Professor Macneil's work recounts the history of arbitration in America up through 1991.
42. 9 U.S.C. §§ 1-16 (2002).
43. See generally Macneil, supra note 41. Professor Macneil refers to the FAA as the "United States Arbitration Act," or "USAA," the name it bore before being codified in 1947. See Macneil, supra note 41, at 211 n.3.
resolution of contract disputes both a transactional and a social perspective. But at the same time we find the adhesion contract problem increasingly pressing, yet essentially unsolved—tagged, like a wild bear, for identification purposes, but nevertheless largely free to roam where it might choose. And we find an increasing resort to commercial arbitration, supported now by a legal establishment that previously disdained it, diverting away from the courts countless disputes, at least some of which would otherwise have been litigated to decision, perhaps even to appellate review, and possibly to publication, thereby feeding the common law of contract.

II. POST-MODERN CONTRACT LAW

By the time the Restatement (Second) of Contracts was officially promulgated in 1979, it probably seemed to many observers that American contract law had reached a more or less steady state of predictable, incremental movement in the direction of further “modernization,” following the trends described above. But two decades later, as the millennium turned, change turned out to be neither predictable nor always incremental. Both in theory and in practice, “post-modern” contract law has been neither cohesive nor coherent.

The '80s and '90s saw a boom in contract scholarship, of which Grant Gilmore’s The Death of Contract (1974) was the symbolic precursor.44 Where many scholars of an earlier era had mostly been content to parse doctrine and debate the merits and demerits of new decisions, the post-modern scholars seemed almost indifferent to the notion of contract law as an existing common-law system. The relational theorists, practitioners of critical legal studies, and law-and-economics analysts had many differences, but they did have in common the vision of a society shaped in important ways by its contract law.45 This would, however, be a contract law neither dependent on nor particularly accessible through the study of judicial decisions—at least not those reached in the existing “modern/neoclassical” contract universe of the U.C.C. and the Restatement (Second). Post-modern contract scholarship has been


45. And, for that matter, vice versa. Arguably the seminal works in these genres would be Ian R. Macneil, The Many Futures of Contracts, 47 S. Cal. L. Rev. 691 (1974); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Richard A. Posner, Economic Analysis of the Law (1972 and subsequent editions). Readers may have other candidates.
voluminous, verbose, and vociferous, but it does not depend for its existence on an ever-refreshing crop of new decisions. Page after page of theoretical writing marches inexorably to conclusions unimpeded by any but the most perfunctory nods in the direction of case citation.\(^4\)

While the academy was thus diverted, a new generation of judges—some drawn from the ranks of law-and-economics theorists, some merely the politically and economically conservative products of a conservative era—began trying to steer contract law into a U-turn. The generally “liberal” cast of mid-twentieth-century contract law was seen by this new generation (not entirely without justification) as having been conducive to the pursuit of “social” goals of a somewhat communitarian or even redistributive nature.\(^4\) But with privatizing and deregulation the new order of the day, contract law was now to be regarded as just one of many legal spheres in which the free market should be allowed to dominate to the greatest extent possible. This “New Conceptualism” embraced with fervor all the earlier-disdained incidents of classical formalism—the “duty to read,” the “plain meaning” rule, a vigorous parol evidence rule, a high tolerance for “puffing,” etc.—with the effect, intended or not, of reducing or eliminating any constraints on the activities of the drafters of form contracts.\(^4\)

Not surprisingly, the adhesion contract problem was now seen by many judges—up to and including justices of the United States Supreme Court—as essentially a non-problem. As long as the adhering party had (at least theoretically, but often only that) a chance to read and review the contents of the agreement to which he or she was formally adhering, the minimal amount of “assent” necessary to the formation of a contract would be present, and practical considerations often appeared to play no role in the analysis. Don’t like the terms you’re offered? (Assuming you could conceivably have the faintest idea what they are, that is.) Just say no.\(^4\) This self-

\(^4\) In the spirit of the text, I will refrain from providing supporting citations. Again, knowledgeable readers will have candidates of their own.


proclaimed "common sense" view of contracting extended not only to the question of assent beforehand, but even to the addition after-the-fact of whatever terms the drafter might like to add—so long as these did not rise (or fall) to the level of full-blown "unconscionability," a burden of persuasion that is at best difficult, at worst literally impossible to satisfy.\textsuperscript{50} At the same time, the appearance and rapid explosion of on-line selling has added a new dimension to an already complex problem. Although in one sense it is merely the old form-contract wine in a new electronic bottle, the "click-through" contract—requiring an even lower level of manifested assent than the "signature" of an earlier time—adds new urgency to the plight of the non-drafting, "adhering" party in a mass-market society.\textsuperscript{51}

This renewed judicial deference to the drafter exhibited in recent years has many examples, but two contractual devices in particular deserve mention: the forum selection clause and the choice-of-law clause.\textsuperscript{52} Short of taking your case out of court altogether, the best strategic move may be to force your potential adversaries to litigate in a forum convenient for you (and not incidentally, often inconvenient for them), with rules of law advantageous to your side.\textsuperscript{53} Given the multitude of things that one could choose to haggle over when a contractual relationship is being created, clauses like these are

\textsuperscript{50} E.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). This opinion, which seems to be achieving all the notoriety its author could have wished for, if not quite all the acquiescence, is the subject of a symposium in the Touro Law Review, beginning with an article by Thomas W. Joo, \textit{Common Sense and Contract Law: Fear of a Normative Planet?}, 16 Touro L. Rev. 1037 (2000).


\textsuperscript{52} The newly-promulgated revised U.C.C. Article 1 would substantially amend the prior choice of law rules, in former U.C.C. § 1-105, substituting in new § 1-301 a provision that provides for consumers some protection against being deprived of consumer-protective rules of law, while at the same time substantially broadening the power of a contractual document to choose in non-consumer cases virtually any state or, in some cases, foreign country as the jurisdiction whose rules of law apply. See Fred H. Miller, \textit{Intrastate Choice of Applicable Law in the UCC}, 54 SMU L. Rev. 525 (2001); Kathleen Patchel and Boris Auerbach, \textit{The Article 1 Revision Process}, 54 SMU L. Rev. 603, 611-613 (2001).

\textsuperscript{53} See Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. 2002), where a unanimous court blessed a choice of law clause restricting the plaintiff to suit in Virginia, one of only two states that does not provide for class action suits. The arbitration clause was available in a "scroll-down" form on the defendant's website, and was found "in the final section of the main text of the Agreement, which, when printed out, totals thirteen pages (including two lengthy appendices)." The court also noted that many consumers "presumably read the Agreement [if at all?] in a scroll box on their computer monitors, where only a small portion of the document is visible at any one time." \textit{Id.} at 1010 (alteration added).
unlikely to be singled out as deal-breaking or even bargaining-chip points, even if the drafter of a proposed contract is in fact amenable to bargaining at all. So if a dispute should later develop about the quality of the goods or services provided by the drafter of the agreement, any potential plaintiffs are likely to find themselves in territory both distant and unfamiliar—a pleasant prospect on a tropical cruise, perhaps, but not so pleasant in the aftermath of a disastrous one.\footnote{44}

Even more than those devices, however, mandatory arbitration clauses have become not merely favorites but darlings of the courts. The growth of commercial arbitration has in recent years burgeoned into the widespread inclusion of arbitration clauses not only in contracts between commercial enterprises (evenly matched or otherwise) but in a host of other types of agreements as well, such as those between health-care providers (or insurers) and their patients,\footnote{55} between merchants of goods and services and their customers,\footnote{56} between banks and their customers,\footnote{57} and between employers and their employees.\footnote{58} The United States Supreme Court,\footnote{59} followed

\footnote{44. See Shute, 499 U.S. 585; Walker, 107 F. Supp. 2d 1135. In the latter case, a suit under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (ADA), District Judge Thelton Henderson first decided that the choice of forum clause requiring plaintiffs to sue in Florida was enforceable, following Shute. Walker v. Carnival Cruise Lines, Inc., 63 F. Supp. 2d 1083 (N.D. Cal. 1999). Subsequently he granted a motion for reconsideration, and ruled that disabled California plaintiffs (who had boarded defendant’s ship, the ironically named “Holiday,” in California) could present their claims in his court in California. Walker, 107 F. Supp. 2d 1135. Judge Henderson’s second opinion is remarkable for its attention to the hardship that the disabled plaintiffs would face in traveling to Florida (and also for its readiness to confess error in the original granting of defendant’s motion for dismissal), but shares with his first opinion the same indifference to the realities of adhesion bargaining exhibited by cases like Shute. Compare Carnival Cruise Lines, 63 F. Supp. 2d at 1087-89, with Walker, 107 F. Supp. 2d at 1138. The case was ultimately settled on a basis that not only provided some compensation to the plaintiffs and substantial compensation to their attorney but also facilitated the settlement of another suit pending against the same cruise line, in turn leading ultimately to renovation of the defendant’s ships to accommodate disabled passengers. See generally Matthew Gluck, Walker Couldn’t; The Holiday Wasn’t (unpublished paper written for seminar course at Hastings College of Law, on file with Fordham Law Review).


59. See the following United States Supreme Court cases (in chronological order): Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-05 (1967) (finding that FAA was based on full reach of interstate commerce power; charge of fraud in inducement of contract arbitrable unless fraud directed specifically to arbitration clause); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (“[The FAA establishes] liberal federal policy favoring arbitration agreements.... [A]s a matter of federal law, any doubts concerning the scope of...
loyally, and for the most part enthusiastically, by the lower federal courts,\(^6\) has made the strong preference for enforcement of arbitration clauses a matter of federal preemption, so broadly and firmly expressed as to make it nearly impossible for even those state judges or state legislatures who might be so moved to exercise any restraining influence at all.\(^6\)

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61. E.g., Doctor's Assocs., 517 U.S. at 688 (finding that FAA preempts state law requiring arbitration clause to be conspicuous on first page of contract); Southland, 465 U.S. at 16 (holding that FAA preempts state law voiding arbitration clause). The Supreme Court's pro-arbitration attitude in the latter case may if anything have been hardened by a remarkable concurring opinion below in the Montana Supreme Court by Justice Trieweiler (who also wrote the majority's opinion upholding the Montana statute as consistent with the FAA and federal jurisprudence thereunder), in which he attacked the arrogance of federal judges and defended the ability and the right of Montana to police its own affairs, arbitration-wise, a remarkable example of principled courage or pigheadedness, depending on your point of view; Casarotto v. Lombardi, 886 P.2d 931, 939-41 (Mont. 1994). I have previously had occasion to note (favorably) Justice Trieweiler's forthrightness in another case, Sherrod, Inc. v. Morrison-Knudsen Co., 815 P.2d 1135, 1138-39 (Mont. 1991) (Trieweiler, J., dissenting) (disagreeing with majority's reasoning in finding that the parol evidence rule prevents showing of fraud in the inducement). See Knapp, supra note 19, at 1320-30. In a more recent decision, the Montana Supreme Court has again demonstrated its independent streak. In Kloss v. Edward D. Jones & Co., No. 00-507, 2002 WL 1293057, at *9, *11 (Mont. June 13, 2002) (Trieweiler, J., writing for the court), the court held that an investor (an "elderly widow" with "no apparent special expertise in the stock market") was not bound by the arbitration clauses in her contracts with...
This pro-arbitration stance of the courts—widely regarded as going far beyond anything clearly mandated by the FAA itself—has defendant brokerage house, because they were adhesion contracts, the defendant owed her a fiduciary duty to explain the effect of the arbitration clauses, and she had failed to make a knowing and intelligent waiver of her fundamental right under the Montana constitution to a jury trial on her various claims. In a separate concurrence, joined by three other members of the court including Justice Trieweiler, Justice Nelson explored at length the issue of waiver of trial by jury, asserting that the United States Supreme Court had never directly ruled on the jury waiver issue addressed by the Montana court in *Kloss.* Id. at *11. In a concluding footnote, Justice Nelson conceded that there may be "little point railing against the present state of the law favoring arbitration," but that in light of the history of the FAA, Justices Scalia and Thomas in their assertions that *Southland* should be overruled are "dead right." Id. at *14, n.3; see infra note 62.

62. See the dissenting opinions in chronological order written by the following Justices of the Supreme Court in the indicated cases: *Prima Paint,* 388 U.S. at 407 (Black, J., dissenting) (joined by Justices Douglas and Stewart); *Southland,* 465 U.S. at 17 (Stevens, J., dissenting in part); id. at 21 (O'Connor, J., dissenting) (joined by Chief Justice Rehnquist); *Mitsubishi,* 473 U.S. at 640 (Stevens, J., dissenting) (joined by Justices Brennan and in part by Marshall); *Shearson,* 482 U.S. at 242 (Blackmun, J., dissenting) (joined in part by Justices Brennan and Marshall); id. at 268 (Stevens, J., dissenting); *Gilmer,* 500 U.S. at 36 (Stevens, J., dissenting) (joined by Justice Marshall); *Allied-Bruce,* 513 U.S. at 284 (Scalia, J., dissenting); id. at 285 (Thomas, J., dissenting) (joined by Justice Scalia). While the issues presented in the various cited cases differed, and the cited opinions (some dissenting, some concurring in part) went to different aspects of the FAA's construction, it seems nevertheless fair to say that all the named Justices have at one point or another expressed disagreement with the Court's aggressively expansive course in this area. The careful reader will have noted that this roster includes not only some revered prior members of the Court, now deceased, but also a majority of the members of the present Court: Chief Justice Rehnquist and Justices O'Connor, Scalia, Stevens, and Thomas. The catch is that Justice O'Connor, without recanting her original view that *Southland* was wrongly decided, concurred in *Allied-Bruce* on the basis purely of stare decisis. 513 U.S. at 284. After first noting that the Court's ruling in *Allied-Bruce* would "displace many state statutes carefully calibrated to protect consumers," id. at 282, Justice O'Connor went on to reiterate views she had earlier expressed about the Court's construction of the FAA over the years:

I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass. . . . [O]ver the past decade, the Court has abandoned all pretense of ascertaining Congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation. . . . I have no doubt that Congress could enact . . . a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute. Id. at 283. Nevertheless, she went on, *Southland* is over ten years old, many cases have relied on it, and contracts have "undoubtedly" been made in reliance on it. Though "faulty," it has not proved "unworkable." Id. at 283-84.

In his dissent in *Allied-Bruce,* after noting that attorneys general of twenty states had there joined in requesting the Court to overrule *Southland,* Justice Scalia provided an effective response to Justice O'Connor:

I do not believe that proper application of *stare decisis* prevents correction of the mistake. Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. Abandoning it does not impair reliance interests to a degree that justifies this evil. Primary behavior is not affected: No rule of conduct is
proved so strong that it not only trumps most state-level attempts at resistance, it also overcomes other policies that one might have thought would enjoy stronger judicial support. Although the Act appears to pay deference to the need for a real "contract" to arbitrate, the federal courts have been particularly insensitive to the peculiar problems of adhesion contracting. They have also been relatively indifferent to arguments that the right to a jury trial deserves judicial protection against unwitting or unwilling "waiver," even though many of the cases sent to arbitration would otherwise retroactively changed, but only (perhaps) the forum in which violation is to be determined and remedied. I doubt that many contracts with arbitration clauses would have been foregone, or entered into only for significantly higher remuneration, absent the Southland guarantee.

Id. at 284-85. In the future, Justice Scalia concluded, he would not dissent from judgments relying on Southland, but at the same time would "stand ready to join four other justices in overruling it." Id. at 285. On the general lack of support in the statute or its history for the Supreme Court's finding of a come-hell-or-highwater pro-arbitration policy in the FAA, see Alderman, Brafford, Harding, Harrington, Schwartz, supra note 7. For a full-scale critique of the Court's "bizarre transformation of American arbitration law" in Southland, see Macneil, supra note 41, at 139-47; see also supra note 61 (discussing Kloss v. Edward D. Jones & Co.).

63. The FAA provides that arbitration agreements may be attacked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000).

64. From Green Tree Financial Corp. – Alabama v. Randolph, 531 U.S. 79 (2000), to Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. Ct. App. 2002), Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), and Rollins, Inc. v. Foster, 991 F. Supp. 1426 (M.D. Ala. 1998), one senses in the courts' opinions not merely a willingness but an eagerness to proclaim both to the adherent in that case and to the legal community in general that, when it comes to contracts, the law of the land is the law of the jungle: Might indeed does make Right. It is impossible to tell whether the judges are truly as naive as they profess to be about the realities of bargaining in the real world, or whether they just don't care. Of course, there are federal judges and then there are federal judges. For a salutary corrective, see the opinion of Senior District Judge John T. Nixon in Cooper v. MRM Investment Co., 199 F. Supp. 2d 771 (M.D. Tenn. 2002), holding that plaintiff employee with a sexual harassment claim against her former employer (a Kentucky Fried Chicken franchisee) would not be remitted to arbitration pursuant to a signed arbitration agreement. In the course of his discussion of why the plaintiff's contract was an adhesion contract, and unconscionable for a variety of reasons, Judge Nixon makes, in a footnote, the following observation:

This Court is aware of the difficulties facing employers, who must deal with many employment discrimination claims, many of which are ultimately found to be without merit. The Court is also mindful of the large number of employment discrimination cases in the federal court system. However, this Court will not overlook the clear unconscionability of these arbitration agreements in order to achieve greater efficiency or convenience. This issue is simply too important. These cases do not "clog" the federal docket—they belong in federal court. Employees must not be forced to either forgo employment or forgo their right to a day in court, and Courts must not use the perceived problems associated with employment discrimination to prevent employees, and society at large, from vindicating the rights that Congress enshrined in the Civil Rights Acts.

Id. at 779 n.7.
have been tried to a jury. Perhaps most surprisingly, the Supreme Court and many lower courts have—after initial indication to the contrary—been receptive to the notion that claims based on the statutory right to be free of various types of invidious discrimination can be forced into arbitration, despite the clear public interest in seeing those rights effectively vindicated in a public forum. If even the right to litigate claims of racial discrimination or sexual harassment will be deemed to have been waived by unintended or effectively unavoidable “agreements,” it follows that under the present legal regime the right to litigate a mere breach of contract claim in court is going to receive little or no protection from attrition by adhesion.

Your logical follow-up question, however, may be: okay, suppose all that is true, so what? Why does that matter? Given the undisputed fact that for a large part of the twentieth century an increasing volume of commercial disputes was voluntarily diverted by the parties from public courtrooms into private chambers of arbitration, thereby relieving the strain on overburdened courts without visibly damaging either the commercial life of the country or the American legal system, why should the recent expansion of arbitration into these other areas be a cause for concern?

My response, elaborated below, is that it does indeed matter, for several reasons: the effect on the parties to contract disputes, the effect on the development of the law of contract, and the effect on American society as a whole.

III. THE FUTURE OF CONTRACT LAW?

In this section of my discussion, I will suggest the negative effects that seem to me likely to follow if the current enthronement of private

65. See generally Sternlight, supra note 7, at 56-59 (discussing the Supreme Court’s development over the years of a four-factor balancing test for waiver of constitutional rights, and suggesting that at least some of its holdings in the arbitration area would have gone the other way had the Court consistently applied its own case law regarding waiver of the right to a trial by jury in civil cases); see also Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 Ohio St. J. on Disp. Resol. 669 (2001) (discussing the types of cases going to arbitration and cases going to litigation, and the impact this has on any empirical study of award amounts); supra note 61 (discussing Kloss v. Edward D. Jones & Co.).


67. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (finding that an employee’s claim under Age Discrimination in Employment Act is subject to arbitration); Farac v. Permanente Med. Group, 186 F. Supp. 2d 1042 (N.D. Cal. 2002) (holding that employee’s Title VII claim was subject to arbitration, and stating that the prior holding in the Ninth Circuit was effectively overruled by Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)).
arbitration continues unabated into the coming years of the new century. Some of these, stemming from the nature of the arbitration process itself, have been extensively documented by other commentators, but they seem to me to bear reiteration here; others have to do more with the general effect of shunting disputes from a public forum into a private one.

Arbitration has been enthusiastically touted over the years as being faster, cheaper, and perhaps better in substance than litigation as a means of resolving commercial disputes. Presumably the legions of contracting parties who have voluntarily employed the process over the years must agree that it has at least some of these advantages, or they would not have chosen it over adjudication by a court. But even where parties of equal bargaining power are concerned, arbitration is not costless. Where the parties are unequal, those costs taken together may make it more difficult or even impossible for the weaker party to obtain a just resolution of her claims.

Arbitration is, first of all, not free. Commercial arbitrators are paid for their services, as, of course, are judges. However, judges' remuneration comes out of everyone's taxes (yours, mine and those of the parties as well), while arbitrators' fees must come out of the pockets of the parties. Two disputants with equally deep pockets may gladly pay the cost of arbitrators' fees as a trade-off for speedier resolution of their dispute. There are many reasons why time is money, particularly to those who have plenty of the latter and never enough of the former. But where the claimant is an individual buyer of goods or services, an employee, a health-care patient, a bank customer, or even a small business attempting to pursue a claim against a much larger one, the cost of arbitrators' fees may be prohibitive. Courts entertaining challenges to arbitration have steadfastly declined to entertain the notion that imposing arbitration on an unwilling party could be unconscionable per se, but in at least

68. See Speidel, supra note 7:
A basic assumption is that arbitration, controlled by the parties and managed by an experienced, impartial institution, is quicker, less formal, and less costly than adjudication in court. It is a confidential procedure that strives to achieve a fair, final outcome between the parties without setting a precedent, for future disputes.

Id. at 1070. See also Alderman, supra note 7, at 1243-44; Brafford, supra note 7, at 334-35; Schwartz, supra note 7, at 69-81.

69. See Alderman, supra note 7, at 1249-53. See generally Martin Domke, Domke on Commercial Arbitration, § 4:42 (Willner ed. 2001). See the discussion of arbitration costs that would have been borne by plaintiffs in various cases, in State ex rel. Dunlap v. Berger, 567 S.E.2d 265, 281 n.13 (W. Va. 2002) (stating that costs range from hundreds to thousands of dollars in filing fees, daily hearing fees, room rental, etc.).

70. Gilmer, 500 U.S. at 26, along with other cases cited therein, is generally regarded as foreclosing any argument that arbitration per se could be unconscionable. Courts that find arbitration clauses unenforceable (wholly or in part) because of unconscionability do so by identifying the presence of unconscionability that is both
some cases courts have been persuaded by well-marshaled evidence that the procedures applicable under the arbitration agreement at issue would be unconscionably expensive for a particular claimant.\footnote{E.g., \textit{Berger}, 567 S.E.2d at 265; \textit{O’Donoghue v. Smythe}, Cramer Co., No. 80453, 2002 WL 1454074, at *5 (Ohio App. July 3, 2002) (holding that proven minimal cost of arbitration coupled with remedy limitation in contract rendered arbitration unconscionable in the circumstances).}

In some cases, the choice of arbitration carries another cost for an unwilling plaintiff, difficult to quantify but real nonetheless: loss of the right to a trial by jury. It is, I believe, a commonplace observation among knowledgeable lawyers that a plaintiff whose case could have been tried to a jury in a courtroom suffers an immediate and substantial economic loss if her case is shunted into arbitration: a loss in settlement value.\footnote{Schwartz, \textit{supra} note 7, at 60 (“While the jury is probably still out on this issue, there is a general perception that arbitrators give smaller awards than juries.”).} Of course, like most sermons, this plays one way to the choir and another to the nonbelievers outside the church. To those who see the legal system as tilted at almost every point against those with few resources and in favor of those with many, a plaintiff’s chance to tell her story to a jury may seem one of the few gleams of egalitarian hope in a darkly plutocratic world. On the other hand, those who deeply distrust both juries and lawyers (well, plaintiffs’ lawyers, anyway) will seize on this as making their point for them—jurors are likely to be bleeding-heart populists, who, moved by unscrupulous ambulance-chasers, will gladly give away the store, as long it is somebody else’s. Assuming the truth lies somewhere in the middle, it still follows that many plaintiffs who could and would receive substantial compensation for their claims, either from a jury at trial or from a defendant fearing such an outcome, will receive much less—either in award or in settlement—if denied access to a jury.\footnote{Jeffrey Robert White, \textit{Mandatory Arbitration: A Growing Threat}, Trial, July 1999, at 32, 34 (“Empirical studies are sketchy . . . but the data support what defense and plaintiff counsel already know: Arbitration of tort claims results in far less frequent liability and substantially lower awards than jury verdicts.”).}

Moreover, denial of access to a court of law in most cases means exactly that—denial of access not merely to a court, or even to a jury, but to the law itself. With a forum-selection clause shunting the case to a distant courtroom, or a choice-of-law clause applying the rules of a foreign jurisdiction, there is at least the prospect of finding and arguing and getting the benefit of \textit{some} rule of law, even if not the one that plaintiff would have preferred. But arbitrators in most cases are not bound to follow the law, nor are their decisions appealable to a court of law for any but the most egregious of defects. Mere failure to follow the law is not such a defect.\footnote{The FAA lists several grounds on which a court might vacate an arbitrator’s} The result is that whatever the

\begin{itemize}
\item \textit{procedural”} (generally, often by finding the contract to be one of adhesion) and
\item \textit{substantive”} in one or more particular respect. \textit{See also infra} note 117 and accompanying text.
\end{itemize}
rules of law may be, arbitrators are not bound to follow them, and their handiwork is subject to only the most perfunctory of judicial oversight. Arbitrators of course may choose to follow the law—nothing requires them not to—but if they do, it's not because they have any obligation to do so, and it's not something that a litigant or her attorney can count on going in. Knowledgeable attorneys may have some sense of the approach that an arbitration panel is likely to take to a given type of case. Still, the arbitrators bring their own "law" with them, and they take it with them when they leave.

Another respect in which a party forced into arbitration may be denied the benefit of otherwise applicable rules of law is with respect to the remedies available. In an ordinary breach of contract suit, damages under conventional rules of law may be substantial. If the plaintiff's claim sounds in tort, or under a statute, a successful litigant's award might also include punitive damages, or statutorily mandated damages, possibly including attorney fees. And many types of claims—contractual or otherwise—could, under the rules of civil procedure, be combined in class actions, effectively making it economically feasible to pursue aggregated claims where it would not be to assert them singly. Some arbitration schemes negate the possibility of punitive damages or other damages of various types; some expressly exclude class actions. Judges are not in accord as to whether these limitations on the arbitrators' power are defects substantial enough to invalidate an arbitration clause as being unconscionable; some courts have so held, but many others disagree. Particularly in mass-market transactions, where a potential defendant makes many similar contracts involving relatively small amounts, protection from class actions is, effectively, insulation from any accountability whatsoever for wrongful conduct.

The cumulative effect of the above costs may result in another kind of cost, and a potentially devastating one—denial of access to counsel.

award, generally involving fraud, corruption, evident bias or misconduct on the part of the arbitrators. 9 U.S.C. § 10(a) (2000). There is some case law permitting a challenge on the ground of "manifest disregard" of the law. Wilko v. Swan, 346 U.S. 427, 436 (1953). This concept is not well-developed in the case law but apparently involves not mere error of law, but a conscious refusal to follow some clearly governing rule or principle. See generally Domke, supra note 69, § 34.08. An award may also not be upheld if it is "arbitrary and capricious" or "completely irrational." Id. §§ 34.10, 34.11.


77. See, e.g., the cases cited in supra note 75; see also Ting, 182 F. Supp. 2d 902.

78. See, e.g., Adkins, 185 F. Supp. 2d 628.

Once in a blue moon, an individual litigant may be able to represent himself effectively, but whether in court or in arbitration, ordinary people ordinarily need attorneys to protect their interests. The prospect of limited damage awards, unavailability of the class-action procedure, even the possibility that an unsuccessful plaintiff might be assessed all or part of the defendants' attorney fees—all these may reduce the potential value of the plaintiff's case to a point where it is economically impossible for her to obtain the services of an attorney.

The immediately preceding discussion has focused on the effect that mandatory arbitration can have on the parties to a dispute. This is, however, only one consequence of the choice between arbitration and litigation. From the point of view of one concerned in an institutional way about the development of contract law, wholesale substitution of arbitration for litigation also has other consequences that are perhaps unintended, but nevertheless undesirable. Somewhat paradoxically, these have to do both with the extent to which prior court decisions are binding on courts in future disputes, and also with the extent to which they are not.

In our Anglo-American legal culture, parties to a legal dispute can ordinarily expect any court that hears their case to deal with it in the same way that similar cases have been dealt with in the past either by that court or by higher courts in the same system. This observation would most obviously apply to disputes governed by the "common law" (which is nothing but an aggregate of past court decisions), but it also applies to cases governed by statutes, to the extent that those statutes have been the subject of prior court construction. "Precedent" is considered to be controlling partly because the decisions of higher courts are deemed to be binding on lower courts in the same jurisdiction, but its force also flows from the principle of stare decisis, by which even the high court of a jurisdiction is considered obligated as a general rule to follow its own past decisions in later cases not materially distinguishable. To the extent that a given dispute would otherwise have been decided in a court governed by

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80. See, as an example, Donovan v. RRL Corp., 109 Cal. Rptr. 2d 807 (Cal. Ct. App. 2001), in which lawyer/plaintiff Donovan attempted to hold defendant car dealer to a mistaken price stated in a newspaper ad, based on a combination of common law principles and consumer-protective statute. Donovan lost, but given that he won in two out of three lower courts and persuaded two judges of the California Supreme Court, it must be conceded that he represented himself effectively, even if not successfully. Id. at 834.

81. Plaintiffs in small claims courts may be permitted or even required to appear on their own behalf. Alderman points out that small claims courts may also be less expensive for a plaintiff than arbitration, and yet an arbitration clause may also preclude recourse to that court. Alderman, supra note 7, at 1250.

82. It may be that the costs of litigation, including attorney fees, would generally be lower in arbitration than in litigation. See St. Antoine, supra note 7, at 7-9. But if awards are also seen as likely to be lower, the net effect of lack of access to the courts may be less availability of legal representation. See Schwartz, supra note 7, at 60.
those principles, its diversion to arbitration means that precedent and
stare decisis are no longer controlling in its resolution, as indicated
earlier. It also means, however, that once the case is decided by the
arbitrators, it will furnish no precedent by which future decision-
makers—whether judges or other arbitrators—will be guided. Past
decisions in arbitration furnish no reliable guide to the present and
present decisions serve as no reliable guide to the future. They
neither follow the law, nor contribute to it.

There is another characteristic of litigation in the Anglo-American
system, however, much less frequently manifested but perhaps of
equal importance: the ability to depart from precedent. Although
every court is deemed to be bound by the decisions of a higher court,
y any court is, in principle, free to override its own past decisions in
situations where for whatever reason such departure appears
appropriate. This inherent power in a court to overrule its own prior
decisions is by convention exercised sparingly, but all courts up to and
including the United States Supreme Court can, and on occasion do
change course in this manner, fashioning in the process a new rule to
be applied in similar future cases. This ability to innovate where
necessary saves the system of precedent and stare decisis from being a
straight jacket, allowing room for the law to breathe and develop over
time as knowledge, custom, and mores evolve. Where cases are
decided by courts of law, in reported decisions, a substantial change of
direction by the decision-makers will be a matter of public record.
Since arbitration decisions do not have this public quality, neither a
tendency to follow past decisions nor a resolve to depart from them
would be a matter of public record. So neither kind of law—the
precedent-respecting or the precedent-rejecting—is thereby created.83

This is not to suggest that the widespread use of arbitration by
willing parties has thus far been or indeed is likely to be fatal to the
common law of contract, even though it may have diminished the flow
of contract decisions over the past half-century or so. After all,
disputants who choose to arbitrate might instead have chosen simply
to settle their disputes on their own, without resort to any external
decision-maker. As a practical matter, of course, we all know without
any need for empirical verification that the vast majority of contract
disputes in fact are settled before they reach a court of law, even a
trial court.84 If that were not so, the legal system could not function.

83. If arbitrators were required to prepare written decisions, this would facilitate
judicial review of awards. See Rohlik, supra note 7; Speidel, supra note 7, at 1089-91.
84. To put it a bit more hyperbolically:
On any given day, the number of individual contracts entered into in even
one of the United States must number in the millions. Of that huge total, a
tiny fraction . . . will eventually give rise to a dispute between the parties. Of
these relatively few disputes, the overwhelming majority will be resolved
without even coming to the threshold of a court . . . . The number of written
opinions on which the common law is based . . . is to the commercial life of
But of course there is always the chance that settlement negotiations will not bear fruit, and the parties will, for whatever combination of reasons, litigate to the bitter end, producing a judicial decision that joins its predecessors as part of the aggregate common law of contract. If all contract disputes which the parties could not settle between themselves had to be submitted to arbitration for resolution, rather than to a court of law, the common law of contract would cease to be a living organism. It would become merely an historical relic, a legal King Tut in its elaborately detailed Restatement (Second) sarcophagus, a ruler to be exhumed and displayed—even admired, perhaps—but not obeyed. This might not be altogether a bad thing, but it would mean that our legal system in this respect at least had become vastly different from the one we had (or imagined ourselves to have) for the past century or so.

Until now, I have been depicting what may be seen as the shortcomings of arbitration, either for the parties to a particular dispute or as a component of a larger legal system. Paintings created with a broad brush are often impressionistic, and the scene the artist thinks he has created may not be recognizable to all viewers. Those more intimately familiar than I with the details of arbitration in action might find much to quarrel with in the picture of arbitration sketched by the preceding few paragraphs. They might, for instance, contend that arbitration panels in fact are usually disposed to follow the law as they understand it, whatever their power to do otherwise, and that when they fail to follow the law, it is usually only to reach a fairer outcome than the existing rules of law would permit. Those observers might also claim that attorneys who practice frequently in arbitration proceedings actually are reasonably able to predict the arbitrators' decisions.


86. Of course, even the voluntary settlement of a private lawsuit diverts the resolution of that dispute away from the public process, and there may be social costs to that. See the well-known discussion by Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073 (1984), suggesting that there is a public function even in private dispute resolution that may be lost when cases are shunted out of the public litigation system. And there can be other social costs as well: the pernicious effect of settlement agreements that include secrecy requirements which deny similarly situated plaintiffs access to relevant information (particularly where product safety or potentially criminal conduct such as pedophilia is at issue) has recently become a focus of judicial concern. See Adam Liptak, Judges Seek to Ban Secret Settlements in South Carolina, N.Y. Times, Sept. 2, 2002, at A1. My thesis here is much more modest. When cases are diverted out of the judicial system involuntarily—i.e., by what we have come to call “mandatory arbitration”—rather than by voluntary (post-dispute) submission, we all pay a social cost. For a cogent discussion of the distinction between pre-dispute submission to arbitration and settlement of existing claims, see Schwartz, supra note 7, at 114-20.
TAKING CONTRACTS PRIVATE

reactions to arguments of various types, perhaps as much so as with many judges. And certainly many proponents of mandatory arbitration would argue that I have given far too short a shrift to the degree to which unscrupulous plaintiffs' attorneys—armed with jury access and class-action capability—are able to play the litigation game, extorting (in effect) large settlements where small ones (or none at all) would have been more appropriate. In their eyes, mandatory arbitration may be just another "common sense" means of getting an out-of-control system back under control, so that business can get, well, back to business.

At this point, though, the arguments become inescapably political. Each side rests more on principle than on empirically demonstrable fact, and probably more on faith than on principle. For some, it is an article of faith that contract law has little or nothing to do with morality or fairness or even justice, to the extent that any of those terms means anything other than enforcing the agreements which one of the parties has proposed and the other party has in form agreed to. This faith may stem from adherence to a particular intellectual scheme of economic analysis, from a libertarian cast of mind, or simply from a sort of economic Darwinism: parties with economic power have it because they earned it, and by the same token are entitled to use it to get more. From this point of view, if the drafters of agreements choose for whatever reason to opt out of the public legal arena, and to impose on all who deal with them a private rather than public method of resolving any disputes that might flow from their dealings, that's their privilege. Nobody is hurt by that, and we all benefit from the courts' greater ability to deal with the remaining mass of litigation that is, indisputably, public in nature—criminal prosecutions, other public-law enforcement, and tort litigation between strangers (i.e., parties not already in a contractual relationship). If the price of doing business with Enterprise X is to submit to privatized contract law, then the only issue worth considering is whether the potential gain to be realized from dealing with Enterprise X is worth that price. You either buy that contract or you do not. Either way, it is your choice.

Here, then, is where lines are drawn, and the difference between ordinary voluntary arbitration and "mandatory" arbitration becomes crucial. Parties who jointly and voluntarily agree that arbitration

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87. See, e.g., Alderman, supra note 7, at 1258-59 & nn.93-95.
represents a preferable means of resolving their future disputes may thereby lessen the flow of common-law precedent, but of course they could have done the same thing by simply settling their disputes short of litigation. Moreover, by so agreeing, they do save the rest of us the cost of whatever public resources would have been consumed in resolving their disputes. Good for them.\textsuperscript{89} That, however, is not mandatory arbitration. When a party with the power to do so imposes on all those who deal with it a surrender of access to the public-court system, as a price of doing business, this is truly mandatory arbitration. Why “mandatory”? Because the parties upon whom the arbitration clause is imposed are unwilling or unable to resist. In some cases, this will stem from lack of knowledge of what is happening until it is too late.\textsuperscript{90} But in most cases it will also be a function of the market power of the stronger party, imposing its will on the weaker one: an ordinary employee, a health-care patient, a consumer of goods or services, a small business dealing with a large one.\textsuperscript{91} As a practical

\textsuperscript{89} Or maybe not. See Fiss, supra note 86.

\textsuperscript{90} For example:

The Burches did not receive a copy of the HBW's terms until after Double Diamond had paid the premium to enroll the Burch home in the warranty program and almost four months after they closed escrow on their home. Double Diamond told the Burches that the HBW's issuance was “automatic” and offered extra protection for their home, when in fact the warranty limited their protection under Nevada law. The Burches did not have an opportunity to read the one-page “application” form, or the thirty-one-page HBW booklet, or to view the HBW video before signing the “application.” The arbitration clause was located on page six of the HBW booklet, after five pages of material only relevant to persons residing outside of Nevada. The Burches were not sophisticated consumers, they did not understand the HBW's terms, and the HBW's disclaimers were not conspicuous. Under these circumstances, the Burches did not have a meaningful opportunity to decide if they wanted to agree to the HBW's terms, including its arbitration provision.


\textsuperscript{91} For example:

McCoy [plaintiff file clerk who claimed he had been improperly terminated by defendant law firm] submitted a declaration in opposition to the motion to compel arbitration, stating he signed the agreement . . . because he “was told that if I did not sign the agreement, that I would be fired. I was given no choice but to do it.” He also declared the cost of the arbitration “will be a severe hardship to me.”

. . . . The Firm acknowledges McCoy was required to agree to arbitration or lose his job: “If [McCoy] did not want to sign an arbitration agreement with [the Firm], he could have found employment at another firm.” But the Firm does not see this as a problem . . . [and] argues that making an arbitration agreement a condition of employment does not ipso facto render it procedurally unconscionable. We disagree.

McCoy v. Superior Court, 104 Cal. Rptr. 2d 504, 506-07 (Cal. Ct. App.), rev. denied and ordered to not be officially published (Cal. Sup. Ct. 2001). The California “depublication” process is discussed and defended by then Associate Justice (later Professor) Joseph R. Grodin in The Depublication Practice of the California Supreme Court, 72 Cal. L. Rev. 514 (1984). The process has been attacked as a kind of covert
matter, arbitration clauses in adhesion contracts are not and cannot be
the subject of bargaining. Judges who insist that they should be are
either disingenuous or woefully naive about the ways of the world.  

If permitted to remove all its potential disputes from the public
arena, the party with irresistible contracting power will thus have
deprived the courts of what I and many others would assert is their
natural and appropriate function in cases involving adhesion contract
disputes: to redress that imbalance of power. For decades, one legal
commentator after another has made the point that adhesion
contracts should not be regarded as sacred cows of the law, but rather
as dangerous animals, likely to do harm unless confined and tamed.

Of course, even the public courts do not always systematically protect
those incapable of protecting themselves from egregious overreaching
by the economically powerful. However, the arbitration system as it
presently exists is for all the reasons discussed above unlikely to do so
at all, systematically or otherwise. Acting in tandem, stimulus-and-
response fashion with democratically elected legislatures, vigilant
courts can do much to protect individuals and less powerful
enterprises from corporate overreaching, and to alert the legal
apparatus to systemic abuses of power. But they cannot exercise
that function if access to the courts is denied to those who need it
most.

The mandatory arbitration clause is thus sui generis, unlike any
other boilerplate provision that a stronger party might impose in a
take-it-or-leave-it contract. Every other provision—even a choice-of-
law or forum selection clause—can at least be tested by some court of
law, where the conflicting claims of freedom of contract and freedom
from economic oppression can be publicly weighed and assessed.
Enforcement of the mandatory arbitration clause, however, means
that neither the arbitration clause nor any other portion of that
adhesion contract can be so tested. Left unchecked, mandatory
arbitration will effectively “solve” the adhesion contract problem, to
be sure, but in much the same way as the Austrians in the 1938
Anschluss solved their Nazi problem: by handing over the keys to the
city.

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92. See Rakoff, supra note 33, at 1227-29; White & Mansfield, supra note 33, at
266.

93. See supra note 33.

94. See generally Knapp, Crystal & Prince, supra note 9, at 680-83. On the general
growth of the “equity” side of contract law over the course of the mid-twentieth
century, see Charles L. Knapp, The Promise of the Future—and Vice Versa: Some
Reflections on the Metamorphosis of Contract Law, 82 Mich. L. Rev. 932, 936-38
note 48.
IV. POSSIBLE MEASURES FOR IMPROVEMENT

Readers familiar with Dickens' *A Christmas Carol* will perhaps have noticed that the preceding discussion has faithfully followed the spiritual journey Dickens prescribed for Ebenezer Scrooge: look at where you have been; look at where you are; consider where you will be if nothing changes; in light of all of that, consider whether change is now called for. Awakening to find that the unpleasant future he glimpsed is neither already here nor barreling unavoidably down upon him, Scrooge sighs with relief, celebrates with a turkey dinner, and resolves to take a fundamentally new tack in the future. If we were to follow his example, what should we do—indeed, what could we do—to preserve the values threatened by the privatization of contract law?

One obvious possibility would be to improve arbitration in ways that respond to its critics. If arbitration is prohibitively costly for some litigants who might otherwise have a viable (and affordable) case in court, its costs could be imposed in the first instance on the party who by drafting the contract has elected to impose it on the other party. And indeed, some courts have held that an arbitration scheme must be so structured in order to escape the charge of unconscionability. Some have seen in this intended reform the specter of conflict of interest, fearing that the party who pays the lion's share of the cost may, as a result, wield the lion's share of influence, thus compounding the “repeat player” advantage that they already see inherent in mandatory arbitration. Another type of change from traditional arbitration procedures would be to open up arbitration proceedings to the full range of discovery and other pre-trial procedures ordinarily available in litigation but absent or limited in arbitral proceedings. But this is, of course, another double-edged blade. Such a change would make arbitration more like litigation, but by so doing would remove one of the principal time- and expense-saving features that make consensual arbitration an attractive alternative to many disputants.

Similarly, courts could insist that to be a permissible substitute for litigation, arbitration must hold out the prospect of a panoply of remedies as complete as those which could be obtained from a court.

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95. So I wrote originally. Professor Perillo has reminded me quite correctly, however, that it was a goose, not a turkey. *Shades of Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 119 (S.D.N.Y. 1960) (“Chicken is everything except a goose, a duck, and a turkey.”).


97. In his article discussing the pros and cons of mandatory arbitration, Chief Judge of the D.C. Circuit Harry T. Edwards notes that some have raised the neutrality issue, but dismisses it as “silly,” pointing out that “given the high cost of arbitration, most employees . . . would laugh at the suggestion that they pay half of the arbitrator’s fee in order to ensure neutrality.” Edwards, *supra* note 7, at 502.

98. *See Schwartz, supra* note 7, at 130.
of law. This position could extend to the whole range of damage remedies otherwise available, including punitive damages in actions where those might be awarded. It could also include various types of specific relief, including mandatory and negative injunctions. And to meet the systemic problem of consumer (and other) plaintiffs with real but uneconomically small claims, it would have to include the possibility of class action proceedings where otherwise appropriate. Even more than the possibility of cost-shifting, such an approach would obviously defeat one of the principal aims of many mandatory arbitration schemes, which specifically exclude various types of damages, and prohibit class action proceedings. Of course, limitations of remedy have been common features of standardized contracts for years and it could reasonably be argued that such provisions are no more objectionable when part of an arbitration scheme than when contractually imposed as limitations on judicial action. Such provisions are subject to judicial scrutiny, however, and are to some extent tamed both by statutory circumscription and judicial policing. One does not expect arbitration panels to be similarly adventurous in stepping outside the boundaries apparently laid out for them; indeed, to do so would be to invite judicial second-guessing, since exceeding their authority is one of the few things arbitrators can do that may be susceptible to judicial review.

Another type of fundamental change, more directly responsive to the above critique, would be to require arbitrators to produce written decisions, and then to make those decisions subject to judicial review on the merits. Like the other suggestions just discussed, these would make arbitration less objectionable as a substitute for litigation simply by making it much more like litigation. There would be a record of past decisions, and new decisions could be scrutinized for conformity to the rules of law. Whether this pair of changes would be acceptable to the general run of parties who elect arbitration in

101. E.g., Acorn v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1170 (N.D. Cal. 2002) (finding that the fact that exclusion of class actions operated equally on both parties did not obscure its one-sided nature; difficult to imagine circumstances in which defendant would employ a class action); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002) (finding exclusion of class actions unconscionable and also inefficient); see generally Sternlight, supra note 79.
102. E.g., U.C.C. §§ 2-718, 2-719.
104. Domke, supra note 69, § 34.06.
105. See supra note 83.
commercial cases is open to question, however. To add the possibility of judicial review is, again, to forego some of the comparative advantage that arbitration enjoys by virtue of its relative swiftness. Even more to the point in the context of this discussion, it seems implausible, to say the least, that adhesion-contract-drafters are looking for a litigation-substitute that mirrors litigation in virtually every way that one could imagine except that arbitrators have to be paid substantial fees (particularly if in the first instance such fees had to be borne by the drafter/proponent of the arbitration clause). They are looking for a system for resolving their disputes—more particularly, claims against them—that is fundamentally different from litigation in ways that advantage them and disadvantage their potential adversaries.\(^{106}\) If mandatory arbitration were really party-neutral as well as being faster and cheaper than litigation, plaintiffs would voluntarily accede to it. But they do not. As the case reports demonstrate, plaintiffs are commonly dragged into arbitration kicking and screaming. Whether one considers the fact of repeat-player advantage to be empirically demonstrable or merely anecdotal and intuitive,\(^{107}\) the fact remains that corporate defendants want

106. In Bolier v. Superior Court (Harris Research, Inc., r/p/i), 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001), the court held invalid because unconscionable that part of an arbitration clause that required arbitration in Utah instead of the plaintiffs' home state of California. In the course of its discussion, the court made the following observations:

... [Defendant] Harris is a large international corporation and petitioners are small “Mom and Pop” franchisees located in California. When petitioners first purchased their Chem-Dry franchises in the early 1980's, Harris was headquartered in California, and the franchise agreement did not contain an arbitration provision. ...

Under the circumstances, the ... terms are unduly oppressive: The agreement requires franchisees wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and ... [hire] counsel familiar with Utah law. To rub salt in the wound, the agreement provides franchisees are precluded from consolidating arbitrations to share these increased costs among themselves. And the potential to recoup expenses with a favorable verdict is limited by the restriction against exemplary or punitive damages. ...

Because Dry-Chem franchises are by nature small businesses, it is simply not a reasonable or affordable option for franchisees to abandon their offices for any length of time to litigate a dispute several thousand miles away. ...

Harris's prohibition against consolidation, limitation on damages and forum selection provisions have no justification other than as a means of maximizing an advantage over the petitioners. Arguably, Harris understood those terms would effectively preclude its franchisees from ever raising any claims against it, knowing the increased costs and burden on their small businesses would be prohibitive. As aptly stated in Armendariz v. Found. Health Psychcare Servs., 24 Cal. 4th 83 (Cal. Sup. Ct. 2000), "Arbitration was not intended for this purpose."

Butler, 104 Cal. Rptr. 2d at 894-95 (citation omitted).

107. See generally Bingham, supra note 7 (finding some evidence of existence of "repeat player" advantage).
arbitration, and they want it very much. As Glinda the Good remarks of the Wicked Witch of the West’s lust for the Ruby Slippers, “Their magic must be very powerful, or she wouldn’t want them so badly.”

A different approach to mandatory arbitration would be to attempt to improve the level of consent involved, to ensure that parties who signed onto contracts containing arbitration clauses would understand (a) that they were doing so, and (b) what the possible implications of such a choice could be. And, indeed, some critics of mandatory arbitration have proposed such a course of action. If—as the FAA itself declares—the decision to arbitrate must be a voluntary one, as voluntary as any contractual commitment, then maybe it would be sufficient to take steps to ensure that adherents to adhesion contracts with arbitration clauses will be giving a knowledgeable consent to arbitrate future disputes when they sign on. Sounds good, but there are some problems with this approach. One is that under the FAA as currently construed and applied by the Supreme Court and most lower courts, state and federal, it is virtually impossible for either a court or a state legislature to take the position that an arbitration clause must meet standards of disclosure or conspicuousness any higher than those imposed on any other contractual term. Unless and until there is a change either in the FAA itself or the courts’ application of it, the amount of true “consent” that can be imposed as a condition to the effectiveness of an arbitration clause will remain minimal—a weak “reason to know” standard, met simply by the fact that the adherent did have at least a theoretical opportunity to read and understand the clause, or to seek counsel in order to decide whether to adhere to a contract so providing.

108. Compare Green, supra note 7 (stating that employers are misguided in their insistence on imposing arbitration on employees; it doesn’t actually benefit them), with Schwartz, supra note 7, at 60-63 (stating that behavior of the parties indicates that corporate defendants strongly prefer mandatory arbitration and believe that it lowers their risk of liability).

109. See Harding, supra note 7; Reilly, supra note 7; Silverstein, supra note 7; Speidel, supra note 7.


111. In Green Tree Financial Corp.—Alabama v. Lewis, 813 So. 2d 820 (Ala. 2001), a fraud action by the buyers of a manufactured home, the Supreme Court of Alabama considered the possible unconscionability of an arbitration clause in the sale contract. In the course of its opinion, in which the clause was upheld, the court noted that the plaintiffs “claim to be illiterate.” (emphasis added). In a footnote, the court elaborated this point: Jimmy Lewis testified that his parents could not read or write and that they did not ask anyone to read the installment contract to them because, he says, they trusted [the seller]. He said that he signed documents in connection with the manufactured home purchase, but, he said, he did not know what those documents were. He testified that he had attended school only through the sixth grade, that he cannot read or write, and that he did not know what his parents signed because, he says, he trusted [the seller].

Id. at 825 n.5.
A second reason why a disclosure requirement will have minimal effect is that a truly informed consent to arbitration would necessarily entail some understanding of what the choice between litigation and arbitration might mean to the consenting party. A simple statement such as, “You will be giving up your right to go to court, and will instead be required to take any dispute to arbitration” is hardly an effective disclosure, even if made in 20-point boldface red letters. This is particularly true if that statement is accompanied simply by a few reasons why arbitration might be preferable, but it remains true even if those are balanced with a fuller explanation including some negative statements. Without having a thorough understanding of the pros and cons of arbitration in the context of the sorts of dispute likely to arise in the course of their contractual relationship, or the counsel of someone who does, adhering parties are in no position to make an informed consent to arbitration.

But the real reason why disclosure requirements won’t cure the arbitration/adhesion problem is that adhesion contracts are just what their name implies: contracts of adhesion. They are adhered to—without necessarily being agreed to, in any substantive sense—in most cases without any bargaining, because the factual context in which they are offered and accepted is one which does not lend itself to, indeed is not susceptible to, bargaining over any but the most basic of terms. Certainly there is not going to be bargaining over the remedial provisions in general. Even more certainly than that, there is not going to be bargaining over the presence or absence of an arbitration clause. The rare exception is a case where the agreement being proposed consists of an arbitration clause and virtually nothing else. Otherwise, there is in most cases no practical way for the adhering party to get a better or even a different contract than the one proposed. The only disclosure statement that might actually change the behavior of contracting parties in the adhesion context is one which both discloses the pros and cons of arbitration in a neutral and intelligible fashion, and then gives the adhering party the option of voluntarily expressing consent to arbitrate, if she chooses, with no adverse effect on the drafter’s willingness to contract if she does not.

It does not matter anyway, the court declared (quoting an 1894 case): illiteracy is no defense to enforcement because one who signs an instrument is bound, even if he cannot read, “in the absence of fraud, deceit or misrepresentation.” Id. at 825 (citation omitted). Of course, this was a fraud action. 

113. See Reilly, supra note 7, at 1245-61. Where mandatory pre-dispute arbitration clauses are concerned, “meaningful choice” would require not only that the adhering party have sufficient information to enable her to make a sensible choice between the arbitration scheme being offered and the litigation alternative, but also that she have a true choice in deciding whether to accept or reject. “Giving up one’s right to a judicial forum versus giving up one’s job is hardly a voluntary choice, particularly when such clauses have become boilerplate language in employment contracts. Such a ‘choice’ is naturally
(Even then, knowledgeable drafters can probably engineer consent in many cases if they so desire. How many times, dear reader, have you—prompted by a selling agent—signed or initialed a space or a box on a standard form, just below language which recites "I have read and understood the above provisions . . . ", knowing you have not, and do not?). Any weaker disclosure requirement is likely to have, if anything, an adverse effect on adhering parties, by making it virtually impossible later to challenge an arbitration clause on any basis, without materially reducing the number of adhesion contracts containing arbitration clauses.

All of the above skepticism is not meant to deny the possibility that many of the above measures, if successfully undertaken, could have a beneficial effect on the legal climate for contract litigation, where adhesion contracts are concerned. But conceding the unlikelihood of that happening—and noting that at least some of the steps discussed might have little or no effect, or even a negative one—what possibilities remain? One appears to be already underway, and to be bearing at least some fruit. That is the unconscionability attack. In the recent case of *Circuit City Stores, Inc. v. Adams*, the Supreme Court passed up the opportunity to limit the scope of the FAA by construing its language to exclude employment cases generally, in favor of a much more limited exception only for workers actually engaged in the transportation of goods in interstate commerce. At the same time, however, the Court in that case left open the possibility

Speidel envisions a similar regime, which would provide a choice to take arbitration or leave it without the risk of losing the job or other contract opportunity. In short, the corporation can refuse to negotiate over the terms of the arbitration clause but if the individual rejects arbitration the corporation may not reject the individual for that reason alone. This is true "voluntary" arbitration, where the individual has both adequate information and increased choice.

Speidel, *supra* note 7, at 1087. Professor Samuel Estreicher has argued that for arbitration programs to work, they must be mandatory and uniform, without free "opt-out" alternatives. See Estreicher, *supra* note 7, at 1358. For a case in which the employee apparently had such an option, see *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002). Decided on the heels of *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002), *Ahmed* was distinguished from *Adams* on the ground that employee Ahmed's contract was not one of adhesion, at least so far as the arbitration clause was concerned: The terms of the agreement were "clearly spelled out in written materials and a videotape presentation," he was encouraged to contact company officials or to consult an attorney before "deciding whether to participate in the [arbitration] program," and was given 30 days to decide whether or not to opt out by mailing in a "simple one-page form." *Ahmed*, 283 F.3d at 1199-1200.

The California legislature passed during its 2002 legislative session several measures regulating arbitration in various ways involving potential conflicts of interest on the part of arbitrators and judges, disclosures of various kinds, and fee arrangements. Governor Gray Davis vetoed some, but signed most of the measures into law. See Reynolds Holding, *Consumers Get Arbitration Help*, S.F. Chron., Oct. 2, 2002, at A1.


that a given arbitration scheme could be found to be unconscionable under standards of state law, permitting litigation to proceed. That is just what happened in the **Adams** case on remand to the Ninth Circuit, and the Supreme Court subsequently declined to review that decision.\textsuperscript{116} While the Court has made it clear that here as elsewhere the issue of unconscionability is one for case-by-case decision, and a question of fact (albeit for the court, under the U.C.C. and most decisional law),\textsuperscript{117} many courts both state\textsuperscript{118} and federal\textsuperscript{119} have found

\begin{itemize}
  \item \textsuperscript{116} Adams, 279 F.3d 889, cert. denied, 122 S. Ct. 2329 (2002).
  \item \textsuperscript{118} Thicklin v. Fantasy Mobile Homes, Inc., 824 So. 2d 723 (Ala. Sup. Ct. 2002) (holding that arbitration clause in mobile home dealer’s contract was unconscionable to extent that it negated possibility of punitive damages; that portion of clause was severable and could be stricken by court); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) (finding that arbitration clause must meet minimal standards of fairness; clause limited remedies, imposed costs on employee plaintiffs, and imposed arbitration on employees while leaving employer free to litigate); BellSouth Mobility L.L.C. v. Christopher, 819 So. 2d 171 (Fla. 2002) (holding that defendant’s arbitration clause was facially substantively unconscionable because punitive damages and class action suit denied, and defendant retains option to litigate while plaintiff does not; defendant entitled to hearing on issue of plaintiff’s voluntary and knowing agreement to clause); East Ford, Inc. v. Taylor, No. 2000-IA-01527-SCT, 2002 WL 1584301, at *1 (Miss. July 18, 2002) (finding that truck buyer who claimed fraud not bound by one-sided arbitration clause); Iwen v. U.S. West Direct, 977 P.2d 989 (Mont. 1999) (deciding that telephone directory publisher’s contract with customer was contract of adhesion and substantively unconscionable because it was one-sided in favor of drafter and remedies unduly limited; opinion very carefully worded to avoid repetition of Doctor’s Associates v. Casarotto-type conflict with U.S. Supreme Court (see 517 U.S. 681 (1996)); Burch v. Second Judicial Dist. Ct., 49 P.3d 647 (Nev. 2002) (finding that arbitration clause in home buyers’ contract with developer was unconscionable where it granted developer’s insurer the right to decide the rules for arbitration and select the arbitrators); O’Donoghue v. Smythe, Cramer Co., No. 80453, 2002 WL 1454074 (Ohio Ct. App. July 3, 2002) (holding that arbitration clause not unconscionable per se, but was when taken in conjunction with limitation on amount of available remedy, which effectively foreclosed any remedy for customer of home inspection service); State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002) (deciding that customer who claimed fraudulent scheme by jewelry company was not bound by arbitration clause that prohibited punitive damages and class action relief, although plaintiff had not succeeded in demonstrating unconscionability in imposition of costs on customer; lengthy opinion by Starcher, J., notable for its discussion of bargaining realities in contracts of adhesion cases and various strands of jurisprudence affecting enforceability of arbitration clauses).
  \item \textsuperscript{119} Adams, 279 F.3d 889. On remand from United States Supreme Court, the arbitration clause in the employees’ contract was held unconscionable under the California state law test of Armendariz, 6 P.3d 669, because the clause was one-sided, too restrictive of remedies and provided for a too-short limitations period. See also Ticknor v. Choice Hotels Int’l, Inc., 265 F.3d 931, 939-40 (9th Cir. 2001) (holding clause in hotel chain’s franchise agreement unconscionable under Montana law as established in Iwen, 977 P.2d 989, and other cases because it gave defendant choice of litigating claims against franchisee in state or federal court while remitting franchisee to binding arbitration in Maryland); Acorn v. Household Int’l, Inc., 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (finding allegedly “predatory” lender’s arbitration clause unconscionable under California law because remedies were limited, class action was unavailable, secrecy provisions unduly hampered plaintiffs in obtaining information
contractual arbitration provisions to be unconscionable in whole or in part. This is, of course, just the kind of expensive and time-consuming process that Arthur Leff warned us years ago could not in the long run produce effective and long-lasting social change, 120 but in the absence of legislative help it may be the best that can be done.

In the long run, of course, it will take either a change of heart on the part of the United States Supreme Court (well, at least, of a few of its members) 121 or a willingness on the part of Congress to rein the Court in. The FAA, even in the Frankensteiniian version created by the Court, is after all an Act of Congress, and Congress indubitably can revise it. 122 Congress could also take the lesser step of indicating in other statutory schemes that the rights conferred thereby are not subject to mandatory arbitration under a pre-dispute arbitration clause—that, at most, disputes later arising between the parties might be settled or submitted to voluntary arbitration should the parties then agree to do so. 123 That would be a desirable halfway house, but unfortunately would have the defect of being both piecemeal and partial. The fundamental problem of mandatory arbitration of disputes arising under contracts of adhesion would remain—not only unaddressed, but possibly exacerbated. 124

regarding defendant’s misconduct, and fee provisions were unduly burdensome): Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771 (M.D. Tenn. 2002).

120. Arthur Allen Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, 31 U. Pitt. L. Rev. 349 (1970). If nothing else, the arbitration wars have brought unconscionability back to center stage. See Fitzgibbon, supra note 7.

121. See supra note 62.

122. For one possible form such a revision might take, see Alderman, supra note 7, at 1264.

123. The Supreme Court has declared that Congress is free to take this position if it wishes; it has also made it plain that the Court will not find the intent to do so in any legislation absent the clearest possible statement to that effect, because of the Court-created “strong federal policy” in favor of arbitration wherever humanly possible. E.g., Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 91 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). But see Equal Employment Opportunity Comm’n v. Waffle House, Inc., 534 U.S. 279 (2002).

124. Eventually some (or even most, if Congress were unusually prolific, hardly a likely eventuality) federal statutory rights could be protected against mandatory arbitration clauses. This would have no effect at all, presumably, on such clauses as applied to common-law claims, whether in tort or contract. Nor, for that matter, would it restore the ability of states to regulate arbitration clauses in any meaningful way, or protect state-created statutory rights against federally-imposed mandatory arbitration. A more general change in attitude in this area will have to come either from amendment of the FAA by Congress or from a reconsideration by the Court of its position in Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that the California Franchise Investment Act, which made arbitration agreements unenforceable, violated the supremacy clause).
Conclusion

I suggested above that the ultimate issues raised by mandatory arbitration are not simply legal, but political. Clearly, programs for legislative action raise questions not merely of principle but of politics. Who benefits? Who is hurt? What will be the ultimate effect of a given measure on the various interests that are directly affected by it? On society as a whole? We are all used to the notion that "law" in the legislative sense does not descend from the sky, it comes out of the legislative sausage factory. Indeed, nobody pretends otherwise, probably not even in eighth-grade civics class (if indeed such an animal still exists). On the other hand, there are perhaps still those who believe that judicially-created "law" does in fact descend from some Platonic realm of disinterested abstraction. That view was once the mindset of contract-law students and perhaps even of their teachers, as evidenced by the "classical" contract law of Langdell, Williston and the first Restatement of Contracts. But it's been nearly a hundred years since the Legal Realists pointed out that all law is political, even the judge-made variety, and from there to Bush v. Gore125 is a long distance only chronologically.

So ultimately the choice is a political one, whether made by a legislature (state or federal), or by a court. Can powerful private interests, with the ability to control most of the terms of most of the contracts they make, deprive large segments of American society of their access to the courts for which all of us pay, and to which all of us have historically had access? The answer, until now, is—sadly, to some of us—that apparently they can.

And do.

And will.

125. 531 U.S. 98 (2000); see Larry D. Kramer, The Supreme Court 2000 Term Foreword: We the Court, 115 Harv. L. Rev. 4, 158 et seq. (2001).