

# THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS

*Report of the 2003 Forum  
for State Appellate  
Court Judges*



**POUND  
CIVIL JUSTICE  
INSTITUTE**



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# Foreword

The Roscoe Pound Institute's (presently known as the Pound Civil Justice Institute) eleventh annual Forum for State Appellate Court Judges was held in July 2003, in San Francisco, California. In the tradition of our past Forums, it featured outstanding scholars and panelists who examined the growing trend of mandatory arbitration and its effect on the state courts. During the program, judges engaged with these panelists and each other in a thought-provoking and spirited discussion about the impact that binding arbitration clauses, found in consumer contracts ranging from credit card agreements to car loans, are having on the right to trial by jury in the state courts.

We recognize that the state courts have the principal role in the administration of justice in the United States, and that they carry, by far, the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not the exercise is bound to be very fruitful. Our attendees bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Pound Institute's Fellows. The diversity of viewpoints always emerges in our Forum reports.

Our previous ten Forums for State Appellate Court Judges have examined such important topics as state courts and federal authority, the jury in civil justice, judicial independence, the scientific evidence controversy, secrecy in the courts, and controversies surrounding discovery. We are proud of our Forums and are gratified by the increasing attendance we have experienced since their inception, as well as the very positive feedback from judges who have attended.

The Pound Institute is indebted to many people for the success of the 2003 Forum for State Court Judges:

- Professor Jean R. Sternlight of the University of Nevada Boyd School of Law, and Professor David S. Schwartz of the University of Wisconsin-Madison Law School, who wrote the papers that started our discussions;
- Our panelists: Honorable Terry N. Trieweler, Honorable Larry V. Starcher, F. Paul Bland, Richard T. Boyette, J. Mark Englehart, Reynolds Holding, Eric Mogilnicki; Deborah Zuckerman;
- Our luncheon speaker, Honorable Kathryn M. Werdegar, Associate Justice of the California Supreme Court;
- The moderators of our small-group discussions for helping us to arrive at the essence of the Forum, which is to highlight what experienced state court judges think about the issues we discussed;
- Dr. Richard H. Marshall, Executive Director of the Pound Civil Justice Institute, and his

staff, Marlene Cohen and LaJuan Campbell, for developing and running the Forum, and publishing and distributing this report, and

- James E. Rooks Jr., Esq., for his important assistance in developing the 2003 Forum.

It goes without saying that we appreciated the attendance of the distinguished group of judges, who took time from their busy schedules so that we might all learn from each other.

We hope you enjoy reviewing this Report of the Forum, and that you will find it useful when considering how mandatory arbitration clauses threaten access to justice.

**Mark S. Mandell**

President  
Roscoe Pound Institute  
2001-2003

**Mary E. Alexander**

President  
Pound Civil Justice Institute  
2005-2006

# Introduction

One hundred and twenty judges, representing 31 states, took part in the Roscoe Pound Institute's 2003 Forum for State Appellate Court Judges, held on July 19, 2003, in San Francisco, California. Their deliberations were based on original papers written for the Forum by Professor Jean R. Sternlight of the University of Nevada Boyd School of Law ("The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial") and Professor David S. Schwartz of the University of Wisconsin-Madison Law School ("State Judges as Guardians of Federalism: Resisting the FAA's Encroachment on State Law"). The papers were distributed to participants in advance of the meeting, and the authors delivered oral presentations of their papers to the judges. Each presentation was followed by a panel discussion with distinguished commentators, and a break between the morning and afternoon sessions provided time for lunch and a talk by Honorable Kathryn M. Werdegar, an Associate Justice on the California Supreme Court.

Responding to Professor Sternlight's paper were F. Paul Bland, an appellate lawyer from Washington, D.C.; Eric Mogilnicki, a defense attorney from Washington, D.C.; Reynolds Holding, a journalist from San Francisco, California; and the Honorable Terry N. Trieweler, a former justice on the Montana Supreme Court.

Responding to Professor Schwartz's paper were J. Mark Englehart, a plaintiff attorney from Montgomery, Alabama; Deborah Zuckerman, an attorney with the American Association of Retired Persons (AARP) from Washington, D.C.; Richard T. Boyette, a defense attorney from Raleigh, North Carolina; and the Honorable Larry V. Starcher, Chief Justice of the West Virginia Supreme Court of Appeals.

After each paper presentation and commentary, the judges separated into small groups to discuss the issues raised in the papers, with Fellows of the Roscoe Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters, but, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges' comments appears later in this Report. Judges, when identified, are only identified at the level of specificity of the region of the country they were from, i.e., "a Mid-western state" or a "southern state."

At the concluding plenary session, the moderators summarized the judges' views of the issues under discussion, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Sternlight and Schwartz and on transcripts of the plenary sessions and group discussions.

**Richard H. Marshall, Ph.D.**  
**Editor**  
**Executive Director, Pound Civil Justice Institute**



# Papers, Oral Remarks, and Comments

## THE RISE AND SPREAD OF MANDATORY ARBITRATION AS A SUBSTITUTE FOR THE JURY TRIAL

*Jean R. Sternlight*

**I**n Section I, Professor Sternlight warns that mandatory arbitration clauses are removing the civil jury from our legal system. Critics say that mandatory arbitration eliminates access to courts and juries, utilizes potentially biased decision-makers, carries a high cost, reduces available remedies, eliminates class actions, and restrains discovery. She notes that courts have been unable to address these problems fully because the U.S. Supreme Court has announced a preference to uphold pre-dispute arbitration clauses. Additionally, in many instances state legislatures have not been able to act because of the Court's rulings regarding preemption under the Federal Arbitration Act (FAA). Sternlight asserts that jury trial rights should have a key role in this discussion, but thus far have largely been ignored.

In Section II, Professor Sternlight notes that the Seventh Amendment applies only to common law claims in federal court. This right can be waived, but must be waived knowingly and voluntarily. Sternlight also states that the right to a jury trial has not typically been used to nullify mandatory arbitration clauses for various reasons including: courts using a common contract analysis, the idea that jury waiver arguments are irrelevant regarding arbitration, and a "favoring" of arbitration. She concludes this section by noting that the proper application of the jury waiver standard will not invalidate all mandatory arbitration clauses, but will nullify those clauses that were imposed without knowing and voluntary consent.

In Section III, Professor Sternlight discusses how jury trial arguments have been used in state court, how such arguments should be used, and how the U.S. Supreme Court's FAA preemption doctrine could affect this argument. Regarding how jury trial rights arguments have been used in state courts, Sternlight notes that the Montana Supreme Court has cited this right to invalidate a mandatory arbitration clause. Additionally, the Supreme Courts of New Mexico and Nevada have used identical grounds to nullify state statutes requiring arbitration of certain claims. Sternlight also discusses legitimate reasons for upholding an arbitration clause. One situation occurs when the plaintiff is adjudicating a claim vindicating a public right, as opposed to a private right. Another reason is when no jury trial right exists. Most courts, however, justify upholding arbitration clauses by stating that arbitration can be imposed as a condition of doing business. Regarding how jury trial rights arguments should be handled by state courts in arbitration cases, Sternlight identifies three steps that judges should take. First, determine what kind of claim is presented. Second, ascertain what jury waiver standard is used in the jurisdiction—a knowing standard or a lesser standard. Third, do not alter the normal jury waiver analysis simply because an arbitration clause is involved. The Supreme Court's directive to favor arbitration clauses does not outweigh the constitutional jury trial right.

Regarding how preemption affects the jury trial right argument, Sternlight argues that the FAA does not preempt jury trial right concerns. The jury waiver standard is utilized throughout contract law and does not target arbitration clauses. Allowing the jury trial right to nullify mandatory arbitration clauses would further the FAA's stated goal of elevating arbitration agreements to the level of other contracts by ensuring that the waiver of constitutional rights is handled consistently in all contract cases.

Finally, Sternlight concludes her paper by emphasizing that the jury trial right is in danger because companies impose mandatory arbitration clauses against consumers and employees. Courts that do not apply the usual jury waiver standard in arbitration cases only exacerbate the problem.

## I. Introduction<sup>1</sup>

The civil jury trial is fast disappearing from our legal landscape,<sup>2</sup> and one important reason for its disappearance is the rapid growth of mandatory arbitration.<sup>3</sup> However, few lawyers, courts, and commentators have given adequate consideration to the effect of the constitutional right to a jury trial on the validity of arbitration clauses. This article will show that, if an appropriate analysis were used, including consideration of the right to jury trial, a significant number of mandatory arbitration clauses would be held invalid.

Businesses providing a broad range of products and services are now using small print contracts of adhesion to require their customers, employees, business partners, and others to resolve any future disputes through binding arbitration, rather than through litigation. Buy a house or car, open a bank account, obtain insurance, order a computer or termite extermination services, or secure a credit card, and the odds are high that you will be “agreeing” to resolve all future disputes through arbitration.<sup>4</sup> Arbitration is increasingly being required by medical providers,<sup>5</sup> schools,<sup>6</sup> and was even mandated for a Cheerios box mail-in.<sup>7</sup> One study showed that the “average Joe” in Los Angeles is now required to arbitrate disputes that arise with respect to one-third of the major transactions in his life.<sup>8</sup>

The rapid proliferation of mandatory arbitration has been quite controversial. Numerous articles in the popular press have criticized the practice as unfair,<sup>9</sup> and most legal academics who have written on the subject have been negative toward the mandatory imposition of arbitration.<sup>10</sup> Many state and federal court judges have also voiced disgust with the process of mandatory arbitration.<sup>11</sup> The critics attack mandatory arbitration on a variety of grounds, including not only its elimination of access to courts and juries, but also its actual or potential lack of neutrality, high cost, diminution of claimants’ remedies, prohibition of class actions, and curtailment of discovery.

Yet, mandatory arbitration persists, because, at least thus far, the U.S. Supreme Court has received it quite enthusiastically. Since the mid-80’s, the Supreme Court has issued numerous decisions stating that arbitration should be looked upon with favor and that, with few exceptions, arbitration clauses should be enforced.<sup>12</sup> While recognizing that some contracts imposing arbitration might be unconscionable or impermissible under particular federal laws, the Court has explained that those seeking to attack arbitration on such grounds must present evidence rather than merely speculate about future problems.<sup>13</sup> Thus, while federal and state courts have voided some of the most egregious arbitration clauses on statutory or common law grounds, most arbitration clauses are being upheld.

Nor has legislation significantly reined in mandatory arbitration. At the federal level, although numerous bills have been introduced to proscribe arbitration of particular types of claims, only one statute has been enacted, protecting automobile franchisees from arbitration imposed by automobile franchisers.<sup>14</sup> With respect to state law, the U.S. Supreme Court has interpreted the Federal Arbitration Act (FAA) in such a way as to preempt most legislation that states might think to pass prohibiting the use of mandatory arbitration with respect to certain kinds of claims.<sup>15</sup>

Although one of the most significant aspects of mandatory arbitration is that it denies claimants access to court or to a jury trial, lawyers, courts and policy makers who challenge mandatory arbitration agreements have typically failed to pay sufficient attention to jury trial guarantees.<sup>16</sup> The U.S. Supreme Court and many other courts have repeatedly praised the civil jury

trial, stating, for example, that “The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.”<sup>17</sup> As the Montana Supreme Court put it, “The importance of the right of trial by jury derives from it having ‘developed in harmony with our basic concepts of a democratic society and a representative government.’”<sup>18</sup> To quote William Blackstone, trial by jury is “a privilege of the highest and most beneficial nature.”<sup>19</sup> As Blackstone also observed, in remarks very apt for our situation today, “[Our liberties] cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations which may sap and undermine it.”<sup>20</sup>

Thus, we have traditionally valued the jury trial for providing a fair hearing by one’s peers, for fostering the use of common sense, for limiting the power of judges, and for providing jurors themselves with an important civic educational experience. Yet, the imposition of arbitration eliminates the civil jury, and often the loss of the right to jury trial is not knowing, voluntary, or intelligent on the part of consumers. The remainder of this paper will discuss the implication of jury trial rights for mandatory arbitration under both the federal and state constitutions, focusing primarily on state constitutional rights.

**The fact that the Seventh Amendment has not been deemed sufficiently fundamental to our system of justice to incorporate into the Fourteenth Amendment is troubling to this author.**

## II. The Seventh Amendment Right to a Jury Trial

The constitutional right to a jury trial has long been deemed one of the fundamental elements of our federal system of justice. Ratified in 1791, the Seventh Amendment provides that “[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved.” Of course, the Seventh Amendment only applies to certain kinds of claims. First, it only applies to those cases brought “at common law” for more than twenty dollars.<sup>21</sup> Second, at least to date, the Seventh Amendment has only been held by the Supreme Court to apply in federal, and not state courts. While the Court has not, in any recent cases, held that the Seventh Amendment does *not* apply in state court, the Court’s most recent decision on this point reveals that to date, the Seventh Amendment is one of the very few provisions of the Bill of Rights that has not been “incorporated” into the Fourteenth Amendment Due Process Clause and applied to the states.<sup>22</sup>

The fact that the Seventh Amendment has not been deemed sufficiently fundamental to our system of justice to incorporate into the Fourteenth Amendment is troubling to this author. Indeed, the refusal to incorporate, if maintained, is in some tension with the Court’s statements as to the fundamental nature of the jury trial. Nonetheless, for purposes of this article I do not argue for incorporation, but rather assume that the Seventh Amendment governs only proceedings in federal court, and that state constitutions will govern actions brought in state court.<sup>23</sup>

When the Seventh Amendment does apply, the right to jury trial may be waived, but federal courts typically hold that such waivers must be knowing, voluntary, and intelligent, or words to that same effect.<sup>24</sup> To determine whether a knowing, voluntary, and intelligent waiver has been made, federal courts look at such factors as the negotiability of the waiver, the conspicuousness of the waiver, the degree of bargaining power disparity between the parties, and the degree of professional or business sophistication on the part of the party opposing waiver.<sup>25</sup> Courts often place the burden of proof on those parties who assert that the jury trial right has been waived.<sup>26</sup>

Given this analysis, one might assume that the existence of a Seventh Amendment jury trial right would provide a significant shield against the imposition of mandatory arbitration, but one would be wrong. At least to date, the jury trial right has provided scant protection from mandatory arbitration. How can this be? First, for the most part, federal courts have not even considered jury trial rights when examining the viability of arbitration clauses. Instead, ignoring the special standards used to determine whether a waiver of jury trial is valid, courts have typically employed an ordinary contractual analysis and simply considered whether there was an agreement to arbitrate, whether it

**A few courts have recognized that a party who enters into an agreement to arbitrate waives the jury trial right, but have not then explained their failure to apply the traditional jury trial waiver criteria.**

covered the dispute in question, and whether it was void for contractual reasons such as unconscionability or fraud. Second, to the extent federal courts have considered jury trial waiver arguments in evaluating arbitration clauses, they have usually found they are not relevant to arbitration. For example, a few courts have recognized that a party who enters into an agreement to arbitrate waives the jury trial

right, but have not then explained their failure to apply the traditional jury trial waiver criteria.<sup>27</sup> Some relied on the principle that arbitration is “favored” to reject jury trial arguments, without considering that any favoritism entailed in a federal statute might be trumped by the Seventh Amendment.<sup>28</sup>

One line of federal cases does purport to address the jury trial waiver argument more seriously, ultimately concluding that, because persons who accept arbitration obviously choose a forum in which no jury trial is available, no jury trial waiver analysis need be performed.<sup>29</sup> Yet, this analysis is clearly circular. If the acceptance of an alternative forum entails waiver of jury trial rights, then there is no reason courts should not use appropriate jury trial waiver standards to determine whether in fact that alternative forum has been selected.<sup>30</sup>

The only intellectually honest way to defend many federal courts’ refusal to apply a heightened jury trial waiver standard to arbitration is to argue that reliance on civil jury trial waiver standards should be abandoned—not only in reviewing arbitration clauses, but in all other contexts as well. Professor Stephen Ware has taken precisely this approach.<sup>31</sup> Indeed, some lawyers have now urged businesses to use a plain jury trial waiver, rather than an arbitration clause, to gain the advantages of the waiver without what some companies may perceive as the disadvantages of arbitration (*e.g.*, limited appeal or the possibility of facing an arbitral class action).<sup>32</sup> Fortunately, however, it appears unlikely that most courts will allow persons to waive their jury trial rights involuntarily, non-intelligently, or non-knowingly.<sup>33</sup>

As I have argued elsewhere in greater detail, unless federal courts are generally willing to abandon the “knowing/voluntary/intelligent” civil jury trial waiver standard they have applied in Seventh Amendment cases, they need to significantly revise their approach to mandatory arbitration clauses. Applying the appropriate jury trial waiver standard in arbitration cases will not result in the invalidation of all mandatory arbitration clauses, but where a jury trial right does exist for the type of claim before the court, application of the appropriate standard *should* lead to the invalidation of those clauses that are imposed in the most egregious fashion.<sup>34</sup>

### III. Jury Trial Arguments in State Court

Most state constitutions protect the right to jury trial for certain civil claims.<sup>35</sup> Such clauses typically protect the rights to civil jury trial that existed at the time the state constitution was adopted.<sup>36</sup> State courts, like their federal counterparts, have typically held that the civil jury trial right is waivable. While the specific waiver standards differ from state to state, most state courts follow the federal formulation that the waiver must be knowing, voluntary, and intelligent.<sup>37</sup> Like the federal courts, the state courts typically consider the clarity and conspicuousness of the waiver, the degree to which it was negotiable, and the relative bargaining power and sophistication of the parties.<sup>38</sup> Thus, although civil jury trial waivers are often enforced in commercial contracts,<sup>39</sup> they are often rejected if imposed on a weaker consumer or patient by a stronger party.<sup>40</sup>

#### A. HOW *HAVE* JURY TRIAL ARGUMENTS AFFECTED STATE COURTS’ EXAMINATION OF ARBITRATION CLAUSES?

Although the right to jury trial has been mentioned in a fair number of state court arbitration cases, as in the federal courts it has rarely been examined in a full fashion. Jury trial arguments have arisen in state court cases in two different contexts: (1) state statutes requiring use of arbitration for certain kinds of claims and (2) private contracts requiring the use of arbitration.

##### 1. Cases Relying on Jury Trial Concerns to Reject Mandatory Arbitration

The most extensive recent consideration of whether a contractually imposed arbitration clause violated a state constitutional right to jury trial was given in 2002 by the Montana Supreme Court in *Kloss v. Edward D. Jones & Co.*<sup>41</sup> The case involved a claim brought by an elderly investor against a securities brokerage firm. Justice Nelson’s special concurrence, joined by Justices Trieweler, Leaphart, and Cotter, found that the right to jury trial afforded by the Montana Constitution<sup>42</sup> was “fundamental,”<sup>43</sup> and, therefore, could only be waived “voluntarily, knowingly and intelligently.”<sup>44</sup> Listing a host of factors to be considered in determining whether this test was met, such as the conspicuousness of the waiver and the extent to which the waiver was negotiable,<sup>45</sup> the concurrence went on to conclude that “there is no evidence to support a conclusion that Kloss knowingly and intelligently waived her right [ ] to trial by jury . . . when she executed . . . standard-form contracts containing the arbitration clauses.”<sup>46</sup> As will be discussed in more detail later, the Montana opinion also rejected an argument that the FAA preempted the constitutional jury trial guarantee.<sup>47</sup>

In two other cases, state supreme courts struck down arbitration that was imposed by statute, because of jury trial infringements. In *Lisanti v. Alamo Title Ins. of Tex.*,<sup>48</sup> the New Mexico Supreme Court relied on the state constitutional right to jury trial to invalidate mandatory arbitration of certain insurance claims imposed by statute and state regulation.<sup>49</sup> The insureds argued that they were entitled by the constitution to a jury trial for their *non*-statutory claims, and the Supreme Court agreed. It found that the non-statutory claims were essentially breach of contract allegations to which a right to jury trial should attach.<sup>50</sup> The court then went on to consider whether the jury trial right had been waived by the insureds through their choice to purchase title insurance, and concluded it had not in that the arbitration was mandated by regulation.<sup>51</sup> While the Court did not spell out the standards by which waiver should be determined, it clearly had no problem concluding that arbitration imposed by regulation did not amount to a voluntary relinquishment of the jury trial.<sup>52</sup> Similarly, in *Williams v. Williams*,<sup>53</sup> the Nevada Supreme Court held that a statute requiring arbitration of certain motor vehicle claims infringed on the jury trial right because the arbitration was imposed involuntarily.<sup>54</sup>

As well, in *Badie v. Bank of Am.*,<sup>55</sup> a California appellate court did not conduct a full analysis of the jury trial waiver issues but emphasized that, because a purported agreement to an arbitration clause amounts to a waiver of the constitutionally based right to a jury trial,<sup>56</sup> an arbitration clause is invalid where, due to lack of clarity of the clause, it is unclear that the party agreed to arbitration.<sup>57</sup> The court explained:

In order to be enforceable, a contractual waiver of the right to a jury trial must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties. . . . Although an effective waiver, particularly in a non-adhesive contract, need not expressly state, 'I waive my right to a jury trial' or words to that effect, it must clearly and unambiguously show that the party has agreed to resolve disputes in a forum *other than* the judicial one.<sup>58</sup>

The court found that a provision that merely authorized the bank to make future changes in the agreement was not sufficient to allow the bank to impose arbitration on its customers.<sup>59</sup>

Several other state courts have cited jury trial rights in refusing to enforce arbitration clauses, but have referred to the jury rights more in dictum or rhetorically, than as support for the actual holding. For example, in *Broemmer v. Abortion Servs. of Phoenix, Ltd.*,<sup>60</sup> the Arizona Supreme Court rejected an arbitration clause contained in a contract of adhesion on the ground that it fell outside plaintiff's reasonable expectations, but emphasized in reaching that conclusion that agreeing to arbitrate would waive a jury trial:

Clearly, there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived. The only evidence presented compels a finding that waiver of such fundamental rights was beyond the reasonable expectations of plaintiff.<sup>61</sup>

Similarly, in *Seifert v. U.S. Home Corp.*,<sup>62</sup> the Florida Supreme Court interpreted an arbitration clause narrowly and concluded that it did not cover a wrongful death claim and that public policy supporting jury trials was part of the reason to interpret the clause narrowly.<sup>63</sup>

## 2. Cases Upholding Arbitration after Considering Constitutional Jury Trial Rights

The mere fact that a court upheld the imposition of arbitration does not mean that it found a jury trial waiver analysis irrelevant. Rather, some state courts have recognized that arbitration potentially results in the loss of jury trial rights but found no reason to reject arbitration in a particular case because the claimant never had a jury trial right, or because the claimant properly waived the jury trial right.

For example, in one line of cases, courts have upheld statutorily mandated arbitration on the ground that claimant was seeking to vindicate a public, rather than a private right, and, therefore, could not legitimately complain if the legislature replaced the jury trial with an alternative forum such as arbitration. One such case is *Board of Educ. v. Harrell*,<sup>64</sup> in which the New Mexico Supreme Court found that the state employee was asserting a “public right,” a statutory claim protecting public school employees from discharge, that could be required by the state to be resolved through arbitration.<sup>65</sup> Although another case, *Bethany v. Public Employees Relations Bd.*,<sup>66</sup> does not use this exact analysis, it relies on similar logic in holding that the Oklahoma Constitution’s jury trial provisions did not void a statutory provision requiring public employees to resolve disputes through binding arbitration.<sup>67</sup>

Jury trial arguments will also properly fail in the arbitral context if the claimant had no jury trial right in the first place, or if the state allows civil jury trial rights to be waived without requiring special conditions. Thus, a Colorado statute requiring arbitration of certain insurance disputes did not violate a constitutional right to jury trial, because the Colorado Supreme Court held that there is no constitutional right to a civil jury trial in Colorado.<sup>68</sup>

Similarly, in *Madden v. Kaiser Found. Hosps.*,<sup>69</sup> the California Supreme Court considered whether an employee’s jury trial rights were waived when the group medical plan to which he subscribed mandated that malpractice claims brought against the plan must be arbitrated.<sup>70</sup> The court found no jury trial problem, explaining “It has always been understood without question that parties could eschew jury trial . . . by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum.”<sup>71</sup> The court further explained that, to be valid, the agreement to arbitration need not include an express jury trial waiver.<sup>72</sup> To justify this conclusion, the court compared the standards for waiving a jury trial in the criminal context with those used in civil proceedings and concluded that the criminal standards did not apply in civil cases.<sup>73</sup>

Sometimes it is unclear whether the court is using a jury waiver analysis. In *Buraczynski v. Eyring*,<sup>74</sup> the Tennessee Supreme Court did, in effect, utilize a jury trial waiver analysis but did not state specifically that it did. While recognizing that the arbitration clause imposed by a doctor on his patient would result in the loss of a jury trial right,<sup>75</sup> the court nonetheless upheld the clause, given that: (1) it was contained in a separate one-page document rather than buried with other forms; (2) the patient was encouraged to discuss any questions about arbitration with the doctor; (3) to the extent the clause was retroactive it was separately initialed; and (4) the clause could be revoked for any reason within thirty days.<sup>76</sup> These are among the factors that a court would have considered in doing a full jury trial waiver analysis.

### 3. Cases In Which Courts Did Not Adequately Consider Jury Trial Concerns in Upholding Mandatory Arbitration Provisions

In contrast to the cases discussed above, which give at least some consideration to constitutional jury trial rights in considering whether arbitration clauses are valid, many courts have failed to thoroughly consider jury trial arguments. In some cases, because state legislation mandated the use of arbitration to resolve particular disputes, the courts rejected jury trial challenges brought under the state constitution. Typically, such cases have summarily stated that it was appropriate for states to mandate the substitution of arbitration for litigation as a condition of doing business.<sup>77</sup> If subjected to a proper analysis, at least some of these cases should be reversed, depending on whether a jury trial right would have otherwise existed and on whether the elimination of the right could be justified by special facts and circumstances.<sup>78</sup>

Other cases have failed to adequately consider jury trial arguments in cases in which arbitration was imposed by contractual terms, as opposed to being mandated by statute or regulation.<sup>79</sup> In many of these cases, specifically those in which the party challenging arbitration was a business that entered a contract calling for arbitration, the court would likely have upheld the validity of the arbitration provision even had it applied a waiver test. That is, in those cases the court likely would have found “knowing, voluntary, intelligent” waiver had it employed such a test.<sup>80</sup>

The most troubling cases that fail to properly consider jury trial arguments are those that likely would have come out differently, had a proper waiver analysis been used. These are typically the cases that involve less sophisticated parties such as consumers or lower-level employees, who also were not represented by counsel at the time they purportedly waived their jury trial rights. For example, in *Graham v. State Farm Mut. Auto Ins. Co.*,<sup>81</sup> the Delaware Supreme Court found that the insureds, George and Mary Jane Graham, could be compelled to arbitrate their uninsured motorist claim against State Farm, despite the jury trial guarantee of the Delaware Constitution.<sup>82</sup> The court held this waiver valid even though defendant admitted that the Grahams “were never informed of the arbitration clause and received a copy of the policy only after premiums had been paid and coverage had begun,”<sup>83</sup> and even though the court recognized that any attempt to actually bargain over the clause would have been futile.<sup>84</sup> Had a knowing, voluntary, intelligent waiver standard been applied in this case, it might well have been decided differently. Given the rapid proliferation of mandatory arbitration in the consumer and employment realms, it is clear that, once courts begin to use an appropriate jury trial waiver analysis, they will frequently need to void such clauses that are imposed unknowingly and involuntarily.

#### **B. HOW SHOULD JURY TRIAL ARGUMENTS AFFECT STATE COURTS’ EXAMINATION OF ARBITRATION CLAUSES?**

State courts should recognize, as many have not, that arbitration clauses that eliminate a preexisting constitutional right to jury trial should be scrutinized in the same way that civil jury trial waivers outside the arbitration context are. Thus, to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary, and intelligent, that same standard should be applied to arbitration clauses.

What does this mean, in practice, and what does it not mean? I offer a simple three-part analysis.

**Was a jury trial ever available?** A full jury trial waiver analysis is not required for all arbitration clauses. Instead, the state court must consider whether, absent arbitration, a jury trial would have been required. If the claim is equitable in nature, or based on a new statutory right, a jury trial right may not have existed. To the extent that a particular jurisdiction does not provide a constitutional right to civil jury at all, then obviously no jury trial waiver analysis need be performed.

**How is jury trial waiver analyzed?** Assuming that a jury trial right is at stake, the court must determine what kind of waiver analysis is employed in the particular jurisdiction. If a given state allows the civil jury trial right to be waived through a provision of a contract of

**The mere fact that courts should look upon arbitration clauses with favor and enforce them where appropriate, does not mean that courts should go to the extreme of enforcing an arbitration clause that trammels constitutional rights.**

adhesion, even if the waiver is not knowing, voluntary, or intelligent, then that same standard should be applied to arbitration clauses.<sup>85</sup> At the other extreme, if a given state provides that civil jury trial rights are not waivable at all in pre-dispute contracts, then that same prohibition should be applied to arbitration clauses. To the extent that the particular jurisdiction applies some version of the “knowing, voluntary,

intelligent” test to determine whether the jury trial right has been waived, then that precise test should be applied to the arbitration clause.

**Employ ordinary jury trial waiver analysis, not a “special” analysis.** It is not appropriate for the court to “water down” the normal jury trial waiver analysis simply because it is examining an arbitration clause, rather than an ordinary jury trial waiver. This is where a number of courts have gone astray. Accepting the proposition that arbitration is “favored,” some courts have hesitated or failed to apply the normal jury trial waiver analysis to arbitration clauses. In *Bank South, N.A. v. Howard*,<sup>86</sup> the Georgia Supreme Court held that while both the Georgia Constitution and state statute prohibited pre-litigation jury trial waivers altogether, pre-dispute waiver via arbitration clauses should be allowed.<sup>87</sup> Yet, there is no logical defense for this lapse. The mere fact that courts should look upon arbitration clauses with favor and enforce them where appropriate, does not mean that courts should go to the extreme of enforcing an arbitration clause that trammels constitutional rights. As will be discussed in the next section, the preemptive scope of the FAA does not justify ignoring ordinary state constitutional waiver provisions.

What would it mean, in practice, were state courts to examine arbitration provisions under a traditional jury trial waiver standard? Notwithstanding the apparent fears of some courts,<sup>88</sup> it would *not* mean the total demise of arbitration. Where two companies knowingly and voluntarily agree to substitute arbitration for litigation, presumably any court in the country would accept a jury trial waiver in that commercial context. Similarly, where a sophisticated employee or borrower knowledgeably agrees to resolve future disputes through arbitration, again the clause would pass muster. But, where a company imposes arbitration on unsophisticated consumers or employees and mandates the use of arbitration without giving

them adequate notice, or perhaps a chance to opt out of the clause, some states' jury trial waiver standards would void such a provision. The fate of such a clause would depend upon both the specific law of the jurisdiction and also the precise way in which the clause was imposed. Was it clear and conspicuous? Was the individual knowledgeable, sophisticated, or represented by counsel? To what extent was the individual required to accept the arbitration? Was the individual given a chance to negotiate the clause or to opt out of it altogether? In at least some states, businesses that are interested in introducing arbitration requirements into their contracts with consumers or their employees will still be able to do so, but the companies may have to change their procedures for imposing it, to make them more fair. They may have to draft clearer arbitration clauses, and perhaps even give people a chance to decide whether or not they want arbitration. To my mind, at least, this would not be a bad thing.

### C. THE PREEMPTION QUESTION

It is well established that the FAA preempts certain state laws that are hostile to arbitration. Thus, it is likely that as opponents of mandatory arbitration increasingly attempt to use state constitutional jury trial rights to defeat some of those clauses, defenders of mandatory arbitration will argue that the FAA preempts state constitutional jury trial guarantees. While few court decisions have addressed this question thus far, I argue it would be inappropriate to hold that the FAA preempts general jury trial waiver provisions.<sup>89</sup>

Unfortunately, although the Supreme Court has addressed it in several decisions, the scope of FAA preemption is not entirely clear.<sup>90</sup> In these cases, the Court has made it clear that while the FAA does not occupy the entire field of arbitration, it does preempt those state laws that would undermine the goals of the FAA.<sup>91</sup> In particular, two different kinds of state legislation are preempted. First, the Court has held that states may not legislate that particular categories of claims are exempt from arbitration.<sup>92</sup> Second, in the most recent case in which the Supreme Court reached the merits of the preemption issue, *Doctor's Assocs., Inc., v. Casarotto*,<sup>93</sup> the Court held that the FAA preempted a Montana statute requiring that arbitration clauses in franchise agreements be "typed in underlined capital letters on the first page of the contract."<sup>94</sup> The Justices explained that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."<sup>95</sup> Thus, the Court has consistently contrasted general state laws regarding unconscionability or fraud, which clearly can be used to invalidate arbitration clauses,<sup>96</sup> and those state laws that substantively or procedurally single out arbitration contracts for invalidation. To the extent courts hold that only those state statutes or constitutions that *target* arbitration are preempted, no problem is posed for the use of jury trial waiver standards. Clearly those waiver standards are designed to govern contracts in general, and not specifically to undermine arbitration agreements.

**Unfortunately, although the Supreme Court has addressed it in several decisions, the scope of FAA preemption is not entirely clear.**

However, some will likely seek to attack the use of the state constitutional jury trial waiver standard by arguing that the preemptive scope of the FAA should be interpreted more broadly. In particular, such proponents of mandatory arbitration may argue that jury trial waiver provisions are

not saved from preemption because they do not apply generally to all kinds of contract in a given state. These defenders will cite a series of cases that arise in the franchise area, such as *Bradley v. Harris Research, Inc.*<sup>97</sup> In *Bradley*, the Ninth Circuit upheld an arbitration clause, holding that a franchise law prohibiting the use of out-of-state venues was void to the extent it applied to arbitration clauses, because the franchise law's venue prohibition applied only to franchise agreements and not to contracts in general.<sup>98</sup>

In my view, however, it would be erroneous to interpret FAA preemption so broadly as to exempt arbitration clauses from the standard jury trial waiver analysis. The FAA does not preempt state jury trial provisions because jury trial guarantees do not single out or target arbitration clauses for elimination.<sup>99</sup> This is precisely the interpretation that was given by a majority of justices of the Montana Supreme Court in *Kloss v. Edward D. Jones & Co.*<sup>100</sup> That court explained that, because Montana's law on contractual waiver of constitutional rights applies in a variety of contexts, and not merely to arbitration clauses, it is a general provision of Montana law, and thus not preempted by the FAA.<sup>101</sup> In applying its general constitutional waiver rules to an arbitration contract the court was simply keeping arbitration on the same footing as other contracts, rather than relegating it to an inferior position. This interpretation makes sense, as a matter of policy, in that states are not seeking to invalidate arbitration clauses in general but merely ensuring that waivers of constitutional rights are handled similarly for arbitration clauses as they are for other contractual clauses.

Cases such as *Bradley* are wrongly decided. They would preempt any state statute or constitutional provision that partially or wholly invalidates an arbitration clause if the state provision does not apply to all contracts in the state. As Professor Schwartz has argued, the *Bradley* approach is highly problematic in that it voids virtually all state laws that might invalidate arbitration clauses, in that almost no state law literally applies to all contracts.<sup>102</sup> Although it is true that jury trial waiver provisions do not literally apply to *all* contracts (for example, when the amount of money at stake under the contract is not enough to create a jury trial right), certainly the jury trial waiver standard covers a broad range of contracts and is not targeted to the elimination of arbitration.<sup>103</sup> From a practical standpoint, the vast majority of state statutes and constitutional provisions do not apply to *all* contracts in a given state, but rather apply only to a particular category of situations. It makes no sense to preempt all provisions that are not so general as to apply to every contract in the state.<sup>104</sup>

#### **IV. Conclusion**

Civil jury trial has been part of our legal culture at both the federal and state level for many years. We have long held that while the jury trial may be waived, the waiver must be knowing, voluntary, and intelligent. Businesses' imposition of mandatory arbitration against consumers, employees and others now threatens the jury trial right to the extent that courts fail to apply the traditional jury trial waiver to mandatory arbitration provisions. If our society is to eliminate the civil jury trial right, we should do so in the open, following a full public discussion. It is wrong to allow businesses to use arbitration to surreptitiously eliminate this precious right. State court judges have a critical role to play in preventing businesses from using mandatory arbitration clauses to erode the right to jury trial.

## ENDNOTES

- 1 I commenced this project while I was still a professor at the University of Missouri-Columbia, and I express my gratitude for the support of that institution, as well as for that of my current employer, UNLV. I also thank my research assistants at both schools: Ann Casey, Mark Lyons, and Patti Ross.
- 2 Federal court statistics for 2000 show just 1.21 % of cases terminating in a jury verdict. <http://teddy.law.cornell.edu:8090/cgi-bin/js/betaall8700> (website of Prof. Theodore Eisenberg, Cornell Law School). Apparently the same phenomenon is occurring at the state level. See Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RES. 127, 129 n. 22 (discussing sample of 1992 data showing that approximately 2% of state court cases ended in jury verdict. Meanwhile, jury trials in the nation's 75 largest counties dropped from 12,000 in 1992 to 10,000 in 1996. BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ 173426, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (SEPT. 1999).
- 3 See *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (Ala. 1997) (Cook, J., concurring) (“The reality is that contracts containing [arbitration] provisions appear with increasing frequency in today’s marketplace. As a result, consumers find it increasingly difficult to acquire basic goods and services without forfeiting their rights to try before a jury the common-law claims that may accrue to them.”).
- 4 Many articles have collected examples of these kinds of cases. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV. 1, 7-10 (1997); Elizabeth G. Thornburg, *Contracting with Torfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (2003).
- 5 See, e.g., Michelle Andrews, *For Patients, Unpleasant Surprises in Arbitration*, N.Y. TIMES, Mar. 16, 2003, § 3 at 8.
- 6 See, e.g., Elizabeth F. Farrell, *Signer Beware: For-profit Colleges Increasingly Use Arbitration Agreements to Prevent Lawsuits*, 49 CHRON. OF HIGHER ED., 33 (April 18, 2003).
- 7 Ellie Winninghoff, *Consumers’ Arbitration Risks Debated*, N.Y. TIMES, Oct. 24, 1994, 37.
- 8 Linda Demaine & Deborah Hensler, *Only Another Forum: Substituting Arbitration for the Courthouse in Consumer Disputes*, 67 LAW & CONTEMP. PROBS. 55 (2003).
- 9 See, e.g., Reynolds Holding, *Private Justice; Millions are Losing Their Legal Rights; Supreme Court Forces Disputes from Court to Arbitration—A System with No Laws*, S.F. Chronicle, Oct. 7, 2001, at A1; Margaret Mannix, *No Suits For You—Mad at a Firm? Arbitration Could be your Only Recourse*, U.S. NEWS & WORLD REP., June 7, 1999, at 58; Caroline E. Mayer, *Hidden in Fine Print: “You Can’t Sue Us”*; *Arbitration Clauses Block Consumers from Taking Companies to Court*, Wash. Post, May 22, 1999 at A1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. Times, Mar. 10, 1997, at A1.
- 10 See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); Schwartz, *supra* note 4; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660-74 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017 (1996).
- 11 Often judges use quite colorful language to condemn the process. See, e.g., *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (asserting that the stench of mandatory arbitration “rises as a putrid odor which is overwhelming to the body politic”); *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 658 n.8 (Pa. Super. Ct. 2002) (observing that particular arbitration clause at issue “reveals yet another vignette in the timeless and constant effort by the haves to squeeze from the have nots even the last drop,” and quoting a populist song to illustrate the point) (emphasis in original).

- 12 I recount this history in Sternlight, *supra* note 10.
- 13 See, e.g., *Green-Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (rejecting claim that arbitration was unduly expensive on ground that plaintiff had failed to present sufficient evidence of cost); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991) (rejecting brokerage employee’s claim that arbitration would be biased or unfair on ground that employee failed to present sufficient evidence of problems with arbitration). An example of a case in which plaintiffs successfully presented sufficient evidence to void an arbitration clause on grounds of unconscionability is *Ting v. AT&T*, 182 F. Supp. 2d 902, 929-34 (N.D. Cal. 2002) (holding the arbitration provision illegal and unconscionable given its limitation of remedies, elimination of class actions, and other problems), *aff’d in rel. part*, 319 F.3d 1126 (9th Cir. 2003).
- 14 The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001 was signed into law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (2002).
- 15 See *infra* text accompanying notes 89-104, for further discussion of the preemption issue.
- 16 In addition to the paucity of attention accorded to constitutional and statutory provisions on the right to jury trial, insufficient attention has also been afforded to “access to court” provisions contained in many state constitutions. However, consideration of these arguments is outside the scope of this article. For an example of a decision rejecting the “access to court” argument, see *Rollings v. Thermodyne Indus.*, 910 P.2d 1030 (Okla. 1996) (holding, with respect to private commercial contract, that agreement to arbitrate did not violate Oklahoma constitutional provisions guaranteeing access to court).
- 17 *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.)).
- 18 *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12, (Nelson and majority of court specially concurring) (quoting *State v. LaMere*, 2 P.3d 204, 211-212), *cert. denied sub nom.*, *Edward D. Jones & Co. v. Kloss*, 123 S. Ct. 1633 (2003).
- 19 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND V. 3 at 350 (1765).
- 20 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND V. 4 at 343 (1765).
- 21 To determine if a particular claim is brought “at common law,” courts first perform a historical analysis to decide whether the claim would have entitled parties to a jury in Eighteenth-Century England. Then, if that test is inconclusive, courts look at whether the remedy that is sought is legal as opposed to equitable. *Chauffeurs, Teamsters & Helpers Local No. 391*, 494 U.S. at 565 (finding plaintiff entitled to a jury trial in duty of fair representation action brought against union).
- 22 *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). See generally Richard C. Reuben, *ADR and the Troubling Seventh Amendment: A Modern Case for Incorporation* (2000) (manuscript on file with author). (Prof. Reuben teaches at the University of Missouri-Columbia School of Law.)
- 23 A strong argument for incorporation is presented in Reuben, *supra* note 22.
- 24 For a detailed discussion of this body of case law, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RES. 669, 678-690 (2001). For a recent federal case setting out this standard, see *Med. Air Tech. Corp. v. Marwan Inv. Inc.*, 303 F.3d 11, 18-19 (1st Cir. 2002).
- 25 *Id.*
- 26 Jean R. Sternlight, *supra* note 24, at 691.

27 *E.g.*, *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) (stating “the Seventh Amendment does not preclude ‘waiver’ of the right to jury trial through the signing of a valid arbitration agreement,” but failing to consider standard waiver criteria); *United States v. Am. Soc’y of Composers, Authors & Publishers*, 708 F. Supp. 95, 97 (S.D.N.Y. 1989) (rejecting jury trial claim but failing to consider whether choice of arbitration was voluntary, knowing, or intelligent).

28 *Burlington N. R.R. v. Soo Line R.R.*, 162 B.R. 207, 214 (D. Minn. 1993) (stating that “[I]f the Seventh Amendment presented a serious limitation on the duty to arbitrate, arbitration provisions would have to be narrowly construed,” and rejecting this possibility in light of Supreme Court precedent).

29 The leading case making this point is *Geldermann, Inc. v. Commodity Futures Trading Comm’n*, 836 F.2d 310, 316-321 (7th Cir. 1987). Others include *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001) *aff’d*, 2002 WL 663804 (5th Cir. 2002); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460 (N.D. Ill. 1997).

30 For a discussion and critique of these cases, see *Sternlight*, *supra* note 24 at 719-726.

31 Stephen J. Ware, *Arbitration Clause, Jury Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2003). Ware asserts that there is no valid reason to protect persons against unknowing, unintelligent, involuntary waivers of civil jury trial rights, and that standard contractual analyses should be used that would permit waiver of the jury trial by way of a contract of adhesion.

32 See, Stephen F. Fink, *Insist on Bench Trials*, NAT’L. L.J. J. ed. 2003, at A17; Barry M. Appell, *Bench Trials May Prove Better For Employers Than Arbitration*, S.F. DAILY J., Apr. 24, 2003, at 5.

33 While a few courts appear ready to allow commercial entities to waive their jury trial rights involuntarily, unknowingly or non-intelligently, I have not found any courts willing to apply this standard to most consumers or employees outside the arbitration context.

34 See *Sternlight*, *supra* note 24, at 727-29.

35 See Jay M. Zitter, *Annotation, Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R. 5TH 53 (1996). See also Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1040 n.11 (1999) (stating that all fifty states provide for preservation of the jury trial right, in certain kinds of civil or criminal cases, either by constitution or by statute).

36 See, *e.g.*, *Lisanti v. Alamo Title Ins. of Tex.*, *cert. denied sub nom.* *Alamo Title Ins. of Tex.*, 123 S. Ct. 1288 (2003).

37 For a general discussion of waiver standards in the fifty states see Zitter, *supra* note 35. Examples of state court cases setting out this standard include *L & R Realty v. Conn. Nat’l Bank*, 715 A.2d 748, 751-52 (Conn. 1998) (recognizing that jury trial waiver must be knowing, voluntary, and intelligent but also stating that, in commercial as opposed to consumer context, the written waiver provision is prima facie evidence of knowing, voluntary, intelligent waiver); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. 1997) (per curiam) (stating the “fundamental nature of the due process right to jury trial demands that it be protected from an unknowing and involuntary waiver”); *Gaylord Dep’t Stores of Ala., Inc. v. Stephens*, 404 So.2d 586, 588 (Ala. 1981) (rejecting jury trial waiver imposed on employee on grounds that it was not knowing and intelligent, and also emphasizing bargaining inequity); *Fairfield Leasing Corp. v. Techni-Graphics Inc.*, 607 A.2d 703, 704-5 (N.J. Super. Ct. Law Div. 1992) (finding no proper waiver, in commercial context, because no knowing, voluntary, intelligent waiver was shown); *Trizec Props., Inc. v. Super. Ct. of L.A. County*, 280 Cal. Rptr. 885, 887 (Cal. Ct. App. 1991) (“We do not mean to imply that contractual waivers of trial by jury will be upheld in all instances, or that such rights will be taken away from a party who unknowingly signs a document purporting to exact a waiver. The right to trial by jury in a civil case is a substantial one not lightly to be deemed waived.”). But see *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705, 708-09 (Mass. App. Ct. 1992) (failing to use knowing, voluntary test, and contrasting federal courts’ treatment of jury trial waivers, but nonetheless recognizing importance of bargaining inequities).

38 See, *e.g.* *Gaylord Dep’t. Stores*, 404 So.2d 586, 588 (concluding that a jury trial waiver contained in the

employment agreement between a pharmacist and a department store was not valid because it was buried in paragraph 34 of the agreement and also due to the disparity in bargaining power); *Fairfield Leasing Corp.*, 607 A.2d at 704 (refusing to find proper waiver, in contract between two commercial entities). To the extent that a state imposed tougher waiver standards than those imposed by the Seventh Amendment, the state rule would apply.

39 *See, e.g.*, *Trizec*, 280 Cal. Rptr. 885 at 887 (enforcing jury trial waiver contained in commercial lease given clear unambiguous language and given commercial as opposed to consumer context); *L & R Realty*, 715 A.2d at 751-52 (upholding waiver by commercial borrower and noting that in commercial context, intent can be inferred from the language of the waiver).

40 At the extreme, the Georgia Supreme Court has held that all predispute agreements to waive a jury trial are unenforceable under the Georgia Constitution and statutes. *Bank South, N.A. v. Howard*, 444 S.E. 2d 799, 800 (Ga. 1994). Interestingly and inexplicably, however, this prohibition has not been applied to arbitration clauses. *Id.* at 800 n.5 (citing statute governing enforcement of arbitration provisions).

41 54 P.3d 1 (2002) (Nelson et al specially concurring).

42 Article II, Section 26 of Montana's Constitution provides that "The right of trial by jury is secured to all and shall remain inviolate."

43 *Kloss*, 54 P.3d at 12. The opinion also asserted that the right of access to court is fundamental, while recognizing that not all prior Montana courts had so held. 54 P.3d at 12-14.

44 54 P.3d at 15. The court further stated that "For a fundamental right to be effectively waived, the individual must be informed of the consequences before personally consenting to the waiver," and that "the waiver will be narrowly construed." *Id.*

45 54 P.3d at 15.

46 54 P.3d at 15. The opinion emphasized that there was no evidence that plaintiff actually negotiated the clause, that she had the assistance of counsel, or that she had the same level of knowledge and sophistication as the representative of the brokerage. 54 P.3d at 15.

47 54 P.3d at 15-16. *See infra* text accompanying notes 88-104.

48 55 P.3d 962 (N.M. 2002).

49 The Court found that N.M.S.A. 1978, § 59A-30-4(A) (1985) provided the superintendent of insurance with authority to promulgate rules and regulations, and that the superintendent had used this authority to require arbitration of title insurance claims for under \$1,000,000. 55 P.3d at 964.

50 55 P.3d at 964-65. In so ruling the court rejected the insurance company's argument that "because the specific right to sue under a title insurance policy did not exist in the territorial period, it is not a right for which a jury trial is guaranteed." 55 P.3d at 965. The court explained that what is relevant is the type of cause of action, breach of contract, rather than the specific subject matter of the claim. "It is unreasonable . . . to say that no jury trial right attaches to a breach of contract claim concerning the purchase of a computer simply because computers did not exist when the New Mexico Constitution was adopted." 55 P.3d at 965.

51 "Because the decision to arbitrate the disputes could not be voluntarily accepted or rejected, we think the Court of Appeals was correct to reject Alamo's argument that the Lisantis waived the right to trial by jury." 55 P.3d at 966.

52 55 P.3d at 966. Lisanti also rejected the defendant's argument that the state was entitled to eliminate the jury trial because plaintiffs were pursuing a "public right" as to which the legislature could determine the appropriate remedy. 55 P.3d at 966-68 (discussing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430

- U.S. 442, 450 (1977) and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) but concluding that the Lisantis' claim was private in nature).
- 53 877 P.2d 1081 (Nev. 1994).
- 54 *Id.* at 1083 (finding violation of jury trial right afforded by Nev. Const. art. I, § 3). *See also* *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259 (Nev. 1985) (holding unenforceable arbitration imposed on patient by doctor, where there was no “knowing consent,” but failing to explicitly mention jury trial rights).
- 55 79 Cal. Rptr. 2d 273 (Ct. App. 1998)
- 56 *Id.* at 289.
- 57 *Id.*
- 58 *Id.*
- 59 *Id.* *See also* *Buckner v. Tamerin*, 119 Cal. Rptr. 2d 489, 492 (Ct. App. 2002) (concluding father lacked power to waive adult child's right to jury trial by agreeing to arbitration); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W. 3d 731 (Tenn Ct. App. 2003), *appeal denied* (June 30, 2003) (refusing to enforce clause imposed on nursing home resident where clause was contained on page 10 of 11-page agreement, where font size does not stand out, where arbitration is not fully explained, where agreement was presented on take-it-or-leave-it basis, and where husband who signed clause had obvious educational limits and no real bargaining power).
- 60 840 P.2d 1013 (Ariz. 1992).
- 61 *Id.* at 1017.
- 62 750 So.2d 633 (Fla. 1999).
- 63 *Id.* at 642 (stating that to deprive petitioners of jury trial and other constitutional rights simply because they signed a contract containing an arbitration provision “would clearly be unjust”). The Seifert claim was brought by a home owner's wife against a contractor, after the husband was asphyxiated in the garage allegedly due to a construction defect in the house. It should also be noted that a few decisions have considered jury trial waivers under particular statutes. *See, e.g.,* *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665 (N.J. 2001) (rejecting arbitration clause imposed on employee on ground that employee did not knowingly waive jury trial right provided by the New Jersey Law Against Discrimination).
- 64 882 P.2d 511 (N.M. 1994).
- 65 *Id.* at 523. The New Mexico Court cited two U.S. Supreme Court cases that lay out the “public right” doctrine: *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) and *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989). These cases and their progeny permit Congress to send disputes involving public — as opposed to private — rights to administrative tribunals or other non-Article III judges for resolution. For a discussion of the “public right” doctrine and its limits *see* Sternlight, *supra* note 4, at 72-76.
- 66 904 P.2d 604 (Okla. 1995).
- 67 Analogizing to acts covering administrative procedures, government tort claims and workers' compensation, the court found that specialized adjudicative and quasi-adjudicative regimes may be needed in particular situations. *Id.* at 613. This “logic,” if it is such, should not extend to the private requirement that traditional private claims such as breach of contract be resolved through arbitration rather than a jury trial. Although Bethany mentioned that jury trial rights are waivable, and to some extent relied on this proposition of waivability, *Id.* at 615, it did not use a standard jury trial waiver analysis as this article suggests it should have done.
- 68 *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992).

69 552 P.2d 1178 (Cal. 1976). Note that Madden was subsequently distinguished on another ground in *Blanton v. Womancare Inc.*, 696 P.2d 645, 653 (Cal. 1985) (holding that attorney did not have authority to bind client to arbitration).

70 *Id.* at 1187.

71 *Id.*

72 *Id.* (“But to predicate the legality of a consensual arbitration agreement upon the parties’ express waiver of jury trial would be as artificial as it would be disastrous. . . [T]here are literally thousands of commercial and labor contracts that provide for arbitration but do not contain express waivers of jury trial. Courts have regularly enforced such agreements. . . Before today no one has so much as imagined that such agreements are consequently invalid; to destroy their viability upon an extreme hypothesis that they fail expressly to negative jury trials would be to frustrate the parties’ interests and destroy the sanctity of their mutual promises.”) *See also Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261, 264 (Cal. Ct. App. 1997) (citing Madden to uphold validity of arbitration mandated by attorney’s retainer agreement with client, and stating that the agreement could be valid even if it was not made knowingly).

73 *Id.* at 1187 n.12. *Cf. Trizec Props., Inc. v. Superior Ct.*, 280 Cal. Rptr. 885, 887 (Ct. App. 1991) (upholding jury trial waiver contained in commercial lease but stating that “[w]e do not mean to imply that contractual waivers of trial by jury will be upheld in all instances, or that such rights will be taken away from a party who unknowingly signs a document purporting to exact a waiver” and noting that “the waiver provision must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties”).

74 919 S.W.2d 314 (Tenn. 1996).

75 *Id.* at 320-21.

76 *Id.* at 321.

77 *See, e.g., Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 811 (Iowa 1991) (holding that constitutional jury trial is not compromised where commodities broker is compelled, by federal regulation, to resolve claim through arbitration, where submission to arbitration is a condition of doing business as a commodities broker); *Anderson v. Elliott*, 555 A.2d 1042, 1047-49 (Me. 1989) (holding attorney’s rights to jury trial are not violated where state law requires him to submit to arbitration with respect to his fee); *Lumbermen Mut. Cas. Corp. v. Bay State Truck Lease, Inc.*, 322 N.E.2d 737 (Mass. 1975) (holding statutory imposition of arbitration as forum for inter-insurer subrogation claims does not violate jury trial rights, but failing to explain why not).

78 *E.g.*, as noted earlier, a body of Supreme Court law distinguishes between claims of public right, which can be sent to administrative or other processes, and claims of private right, which cannot. *See supra* note 65.

79 *See, e.g., Bank S., N.A. v. Howard*, 444 S.E.2d 799, 800 n.5 (Ga. 1994) (holding that pre-litigation jury trial waivers are invalid but stating, in dictum, that pre-litigation agreements to arbitrate may nonetheless be enforced); *Graham v. State Farm. Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989) (upholding validity of arbitration clause contained in insurance policy, even though insureds were never specifically informed of arbitration clause and received a copy of the arbitration policy only after they had paid the premium and the policy coverage had begun); *Nordenstrom v. Swedberg*, 143 N.W.2d 848, 857 (ND 1966) (concluding jury trial had been waived, in agreement to arbitration between two businesses, without setting out specific waiver standards); *Miller v. Two State Constr. Co.*, 455 S.E.2d 678, 680 (N.C. Ct. App. 1995) (finding that because arbitration is favored, contract calling for arbitration between contractor and subcontractor does not violate constitutional jury trial provision); *DePalmo v. Schumacher Homes, Inc.*, 2002 WL 253845, \*1 (Ohio Ct. App. Feb. 19, 2002) (finding contractual waiver of jury trial right in home purchaser’s agreement to arbitrate, but without considering whether jury waiver standard was met).

80 Examples of these less troubling cases include *Nordenstrom*, 143 N.W.2d at 857 (concluding jury trial had been waived, in agreement to arbitration between two businesses, without setting out specific waiver standards) and *Miller*, 455 S.E.2d at 680 (finding that because arbitration is favored, contract calling for arbitration between contractor and subcontractor does not violate constitutional jury trial provision).

81 565 A.2d 908 (Del. 1989).

82 The court recognized that Article I § 4 of the Delaware Constitution “preserves the right to trial by jury as it existed at common law.” *Id.* at 911.

83 *Id.* at 912.

84 *Id.* at 913.

85 While I personally believe states should protect the jury trial against involuntary or unknowing waiver in the litigation context, that is the subject for another article. My only point here is that there is no valid reason for applying a different standard to arbitration clauses than to other jury trial waivers.

86 444 S.E.2d 799 (Ga. 1994).

87 *Id.* at 799, 800 n.5 (relying on difference in legislative approach taken to arbitration as compared to other jury trial waivers, but failing to explain why the Georgia Constitution would not protect jury trial access from legislative infringement).

88 *See, e.g., Madden v. Kaiser Found. Hosps.*, 552 P.2d at 1187 (stating it would be “disastrous” to apply a jury trial waiver standard to arbitration clauses).

89 For further discussion of preemption concerns raised by the FAA, see David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law* (published in this volume, page 47).

90 Most recently, in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), defendants argued for an extension of these preemption doctrines, suggesting that the FAA should preempt South Carolina’s willingness to allow an arbitration to proceed as a class action. However, the Court failed to reach the preemption issue, instead simply concluding that the question of whether or not the contract allowed for an arbitral class action should be decided by the arbitrator. *Id.* at 63.

91 *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-78 (1989).

92 *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 294 (1995) (invalidating Alabama statute prohibiting enforcement of predispute arbitration agreements); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding that FAA preempted provision of California Labor Law that had been interpreted to prohibit arbitration of wage collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984) (holding that FAA preempted California Franchise Act to the extent it prohibited arbitration of claims brought under that Act).

93 517 U.S. 681 (1996).

94 *Id.* at 683. The preempted provision was Mont. Code Ann. §27-5-114(4) (1995).

95 *Id.* at 682.

96 As the Court has repeatedly observed, Section 2 of the FAA explicitly allows states to invalidate arbitration clauses “upon such grounds as exist at law or in equity for revocation of any contract.” *See, e.g., Doctor’s Assocs., Inc.*, 517 U.S. at 687; *Allied-Bruce*, 513 U.S. at 281; *Perry*, 482 U.S. at 491; *Southland Corp.*, 465 U.S. at 10-17.

97 275 F.3d 884 (9th Cir. 2001).

98 Several other courts have issued similar decisions. *See, e.g.*, *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (holding preempted, in arbitration context, Louisiana statute invalidating contract provisions requiring litigation or arbitration of any disputes outside of state); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-52 (1st Cir. 1999) (holding preempted, as to arbitration, a Rhode Island statute which renders unenforceable a provision in a franchise agreement restricting jurisdiction or venue to a forum outside Rhode Island).

99 Schwartz, *supra* note 89, spells out this argument in greater detail, criticizing such decisions as Bradley as “incoherent.” *Id.* at 52.

100 54 P.3d 1.

101 *Id.* at 15-16.

102 Schwartz, *supra* note 89, at 52. As Professor Schwartz explains, such an overextension of the preemption doctrine is highly troubling not only because of its impact on arbitration, but more generally because of its undercutting of the appropriate role of state legislatures and state courts.

103 For an example of a decision rejecting the Bradley analysis, *see Mitchell v. American Fair Credit Ass'n*, 122 Cal. Rptr. 2d 193, 201-02 (Ct. App. 2002) (upholding, against preemption attack, signature requirement contained in California Services Act).

104 *See* Schwartz, *supra* note 89, at 52; Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1031 n.210 (1996) (state statute is not preempted merely because it only applies to particular categories of contracts, rather than to every contract in the state).

## **ORAL REMARKS OF PROFESSOR STERNLIGHT**

Thank you. It's a real pleasure to be here with all of you today. I'm honored that the Pound Institute invited me. I'm honored to be present with all of these panelists. I'm honored to be present with all of you. I'm really looking forward to the discussion groups, when we are going to have a chance to speak about these issues not quite one-on-one, but in smaller groups, because I look forward to hearing what all of you are going to say about these things.

The issue that we're talking about today is mandatory arbitration. In my opinion, perhaps colored by the fact that I have been writing about it for eight years, this is one of the most important legal issues of the day. I think that mandatory arbitration is fundamentally changing the nature of our legal system.

I have done a little bit of work and studied what is going on in other countries. I was interested to find out that so far, at least, this is a uniquely U.S. phenomenon. In other countries, companies are not imposing arbitration on consumers and employees the way they are doing it here.

But here in the U.S., it really is a major change to our legal system. One set of professors did a study in Los Angeles as to how many arbitration clauses the average Joe is affected by. And what they found was that about one-third of the major transactions in Joe's life—consumer transactions, like buying a house, buying a car, having a phone, having a bank account, getting insurance, having his house treated for termites—were covered by mandatory arbitration clauses. I think we can all see that that is something that is on the increase, and so this is a major phenomenon in all of our lives.

Now, one can think about mandatory arbitration from many different perspectives. Of course, there are public policy questions to be answered. Is it a good thing? Is it a bad thing? You can think about that from the perspective of the individual consumer or employee. You can think about that from the perspective of the company. You can think about it from the perspective of society as a whole. You can think about the importance of precedent and publicity. And all of those are very important issues, but they are not really the ones that I'm going to focus on today.

There are many ways that plaintiff lawyers can try to attack mandatory arbitration provisions. There are statutory arguments that can be made. There are contractual arguments that can be made. Unconscionability arguments can be made. Due process arguments can be made. All of those are very important. I have written about many of them myself. But they are not what I'm going to focus on today, although we can perhaps talk about those in the discussion groups.

What I'm going to speak about is jury trial issues. I have been shocked at how rarely people talk about mandatory arbitration and jury trial rights in the same sentence, or in the same context, because clearly one of the major implications of this growth of mandatory arbitration has been the further demise of the jury trial.

We all know—you all probably better than I—that there clearly has been a demise of the jury trial. The statistics that I have looked at show that currently in federal court, less than two percent of cases end up being tried as a jury trial. State statistics are harder to come by, because nobody is willing to pay the money to collect all fifty states' information and really figure it out. But as best as

I can figure out from the most recent statistics that I have seen, a similar phenomenon is going on in state courts.

Now, this is not all attributable to mandatory arbitration. There are many reasons why we are seeing the demise of the jury trial other than just mandatory arbitration. But clearly, mandatory arbitration is contributing to the demise of the jury trial, because obviously, if a dispute goes to mandatory arbitration, it is not going to go to a jury trial.

How can the legal arguments that are usually made when a jury trial right is taken away be used to examine mandatory arbitration itself? I have been surprised in my research to see how rarely those legal arguments actually have been examined in the context of mandatory arbitration.

Clearly, when mandatory arbitration is imposed, a jury trial right is eliminated. I would have thought that a lot of court decisions would examine mandatory arbitration provisions under that lens of jury trial rights and jury trial waivers. But surprisingly, in my research I found that that was not the case.

Let's step back for a minute and just look at how the jury trial right ought to be considered, especially in state court. The Seventh Amendment is the U.S. Constitution's guarantee of a jury trial right in civil cases. But you may or may not have learned or remembered from law school that the Seventh Amendment actually doesn't apply in state court, or at least it probably doesn't apply in state court.

**When mandatory arbitration is imposed, a jury trial right is eliminated.**

It's actually kind of curious. It's one of the very few amendments of the U.S. Constitution that has not been imposed on the states through incorporation into the Fourteenth

Amendment. And I'm hedging my words a little bit here. I say it probably doesn't apply in state court, because truthfully, the Supreme Court has not spoken on this issue in about 100 years.

I think good arguments can be made that the Seventh Amendment should be applied in state court. But I'm not going to try to convince you folks to do that. Even though personally I believe that it would make sense to apply the Seventh Amendment in state courts, I'm going to set the Seventh Amendment aside and say that's for those of you who become federal court judges. You can think about the Seventh Amendment. For the rest of you in the state courts, just think about the jury trial rights that are included in your own state constitutions.

Well, it turns out, and I can't quote you every jury trial provision of every state constitution, but most, if not all, states do protect the right to jury trial in their state constitutions. And they use a very similar analysis, by and large, to what has been used by the federal court in examining Seventh Amendment rights.

So, there is a jury trial right in state court under state court constitutions. And yet, I'm surprised at how rarely judges look at arbitration clauses with that kind of standard in mind.

What is the typical jury trial analysis? When a court is looking at a jury trial waiver outside of the arbitration context—let’s say just your typical lease or loan that might include a jury trial waiver—normally what a court will do first is ask if there is a right to bring this claim as a jury trial in the first place?

And there may be variations among the 50 states, but the typical approach in most states is to ask, is this a claim that is brought so-called “at common law?” And mostly what state courts will do is they will look at whether historically—and the particular year may vary—but as a matter of history, would this have been a claim that could have been brought to a jury in 1776 or 1810, or whatever year the particular state constitution deems to be the appropriate year.

Once the court finds that there would have been a jury trial right, then the next thing that courts typically do is look at whether there was an appropriate waiver of that jury trial claim. And again there are some variations state-by-state, and I’m trying to just give you an amalgam, but the typical analysis would be that the court would say jury trial rights are waivable. Most every court has said that jury trial rights are waivable, but that they can only be waived if the waiver is knowing, voluntary, and intelligent. Sometimes the buzzwords differ, but it normally is words to that effect.

And then when they try to spell out what does it mean for the waiver to be knowing, voluntary, and intelligent, the courts will typically look at an array of factors, such as how conspicuous the waiver was and how clearly it was written. Was it bold print or not? What was the degree of knowledge of the person on whom it was imposed? Was it negotiable? Was it actually negotiated?

And looking at that whole set of factors, courts will uphold waivers that were sufficiently conspicuous and clear, where the party upon whom it was imposed was sufficiently knowledgeable, and had some ability to negotiate. And courts will not uphold waivers in situations where there are too many of the factors going the other way. But again, the interesting phenomenon to me is that this test is not typically used to examine mandatory arbitration provisions.

What I have done in this table (Table One) is just try to show you the contrast between the way that courts typically approach jury trial waivers, and the way that they typically approach arbitration agreements. And the contrast is really stark. For example, typically courts will say waivers of jury trial rights may not be lightly implied. In contrast, when they look at arbitration agreements, courts typically say arbitration is favored.

Courts, when they look at jury trial waivers, use the test that I just outlined, the knowing-voluntary-intelligent test, and they look at all the factors about conspicuousness and so on. That’s the test they use for jury trial waivers. But when courts look at arbitration clauses, they very often uphold them, even in circumstances where that particular arbitration clause would flunk the knowing-voluntary-intelligent test.

So, arbitration clauses are being upheld where they are not knowing, they are not voluntary, they are not intelligent, they are not conspicuous, they weren’t negotiated, they weren’t negotiable. The person upon whom they were imposed had no power to say No. So, you really see a stark contrast between the analyses that are used.

In terms of burden of proof, there is quite a bit of variation around the country. From what I have seen, mostly in the jury trial waiver context, the party that is trying to defend the waiver, i.e., the company that imposed the waiver, bears the burden of proof of showing it was knowing, voluntary, and intelligent.

In contrast, when you look at arbitration clauses, courts almost never put the burden of proof on the company that wrote the mandatory arbitration clause. Instead, the burden of proof is typically put on the plaintiff, who is trying to get that mandatory arbitration clause struck down.

Jury Trial Waivers	Arbtration Agreements
1. Waivers of jury trial rights may not be lightly implied.	1. Arbitration is favored.
2. Jury trial waivers are acceptable only when they are knowing, voluntary and intelligent, after considering such factors as the negotiability of the waiver and whether it was actually negotiated, the conspicuousness of the waiver, any disparity in bargaining power between the parties, and the business or professional experience of the party opposing the waiver.	2. Most courts have held arbitration clauses are valid even when they are not knowing, voluntary, or intelligent. To be valid, most courts state arbitration clauses need not be negotiable, actually negotiated, nor conspicuous. Nor is a substantial disparity of bargaining power or expertise usually sufficient to void an arbitration clause.
3. Many courts have held that the party seeking to enforce a jury trial waiver bears the burden of proof.	3. Courts have generally held that the party opposing an arbitration clause bears the burden of proof.
4. Unsigned and uninitialled waivers are highly suspect.	4. Courts have frequently upheld arbitration clauses contained in unsigned, uninitialled envelope stuffers, employment manuals, or other documents.
5. Courts hold that jury trial waivers must be narrowly construed, in light of the presumption against waiver of constitutional rights.	5. Courts have often held that ambiguous arbitration clauses must be interpreted broadly, to favor arbitration.

How does this play out in real life? Well, it's hard to find jury trial waiver cases outside the arbitration context that are upheld if they are unsigned, or not even initialed. Those kinds of things would be highly suspect outside of the arbitration context. But with arbitration clauses, we frequently see stuffers that are included by banks, insurance companies, and lenders in their mailings. Those are not signed. They are not initialed. They are just imposed, and yet, courts uphold those very frequently as valid arbitration clauses.

When courts look at jury trial waivers, they typically say they are to be narrowly construed. Construe them in light of the presumption against waiving constitutional rights. Make it as narrow as it can be. Whereas, you see a number of courts ruling on arbitration clauses saying as long as something is plausibly subject to this arbitration clause, we'll send it to arbitration. So, there is a stark contrast in the way that courts are typically handling these two sets of jury trial waivers.

Now, why is this going on? Obviously, I'm not here to blame all of you. A lot of the fault of this, if there is any fault to be handed out, is because attorneys are not bringing the arguments to you. It's too rare, in my view, that plaintiffs' attorneys are even trying to present these jury trial waiver arguments. I think in a lot of cases, it just hasn't occurred to the plaintiffs' attorneys that they ought to be asking a court to set aside a mandatory arbitration clause on the grounds that it wasn't a knowing, voluntary, and intelligent waiver of the jury trial right.

But what happens in those cases where the arguments are presented? From the cases that I have looked at, from the published opinions that I have looked at, there are three typical reasons that courts don't tend to view mandatory arbitration as jury trial waivers.

Sometimes it's just that the court doesn't even mention it. And I don't know if it is because the attorneys didn't raise it, or it is because they did raise it, but the court just didn't think it was a good argument, or not worth discussing, or who really knows? But most of the mandatory arbitration cases that are out there don't mention jury trial arguments at all.

In the ones that do mention jury trial arguments, more often than you might think, you simply see a statement by the court saying, "The plaintiff has argued that this ought to be treated like a jury trial waiver. But obviously, the plaintiff is wrong, because arbitration is favored. The U.S. Supreme Court has told us it's favored, so therefore, we can't look at a jury trial argument." Now, that doesn't really make any sense to me. I mean the mere fact that arbitration is so-called "favored," doesn't mean that state constitutional arguments go out the window. There has to be a better legal justification for that than simply to say that arbitration is favored.

Now, sometimes courts do actually purport to consider the jury trial waiver analysis. And there are some decisions where they use it to void mandatory arbitration clauses. But in those cases where they don't void the mandatory arbitration clause, often it is because even though courts say that they are looking at a waiver analysis, they don't apply the real jury trial waiver analysis.

So, there are many decisions out there where a court will say, "Plaintiff has argued they have a jury trial right, but the plaintiff waived his or her right to jury trial by agreeing to arbitration." Now, that's not the proper jury trial waiver analysis, because the court has not examined whether that waiver was knowing, voluntary, and intelligent. The court is just coming to the conclusion, without stating any of the reasons, that there really was an appropriate waiver.

Now, how should you do it, assuming the argument is raised? What I suggest is a pretty straightforward analysis for a court to use. First of all, you ought to look at whether this is a claim for which there would have been a jury trial right in the first place. Not all claims give rise to a jury trial right. And if this person never would have had a jury trial right absent the arbitration clause, obviously, they don't get a jury trial. If it's a claim that is not brought at common law, or if it's not brought for enough money, then they don't have a right to jury trial. And you have to look at your own state law to determine when people do or do not get a jury trial for a particular kind of a claim.

Once you have concluded that there is a jury trial right, or that there would have been a jury trial right, then you need to do the appropriate waiver analysis. And what is that appropriate waiver analysis? Well, it is the same waiver analysis that you would have done outside of the arbitration context. So, if it's an arbitration clause that was imposed by contract, you should be doing the same analysis that you would have used in a non-arbitration contract, which typically is

the knowing-voluntary-intelligent test. But if your state has a different test, then you need to impose your own state's analysis.

Some of the cases that are out there have to do with situations where the mandatory arbitration was not imposed by contract, but was imposed by statute. For example, a state legislature says all insurance claims need to go to mandatory arbitration. In that event, it is a slightly different analysis outside of the arbitration context, and it should be the same analysis that is applied in arbitration.

Typically, if a statute takes away what would have been a jury trial right, the courts look at whether the state legislature can do that. Is it the kind of public right, a newly created right that we can simply send to an administrative law judge, let's say, rather than to a jury trial?

**All I'm suggesting is that whatever analysis you would have done outside of the arbitration context, that's what you should do inside of the arbitration context.**

Or is it the kind of right that is a private right, that has been long sent to juries, and that we're not going to let the state legislature take away?

All I'm suggesting is that whatever analysis you would have done outside of the arbitration context, that's what you should do inside of the arbitration context. In

my paper, I give you examples of some of the court decisions that in my opinion are good decisions—well reasoned decisions—that do employ this kind of analysis.

The Montana Supreme Court in the *Kloss* decision, and Justice Triewiler was one of the concurring justices in that opinion, is one I would commend. And there are some good decisions from New Mexico and Nevada. So, there are decisions out there that employ this kind of analysis.

Now, one of the arguments that will be made against me, perhaps even by a panelist today, is to say that these state constitutional rights, such as the jury trial right, should go out the window, because they are preempted by the FAA. And I fully recognize that the FAA does have preemptive power. We have four major Supreme Court cases that all talk about preemption. So, it is clear that certain kinds of state laws and state constitutional provisions are preempted by the FAA. That is true.

But, my point is I don't believe that the jury trial provision is one of those that is preempted. The kinds of provisions that have been held preempted in prior decisions fall into one of two categories. Some of those are decisions that explicitly target arbitration. For example, in California there was a statute that was interpreted by the California Supreme Court to say no claims brought under this employment law can be sent to arbitration. The U.S. Supreme Court said that's preempted by the FAA.

An Alabama statute said no claims can be sent to mandatory pre-dispute arbitration. That was preempted. Also preempted were laws like the Montana law that said all arbitration provisions have to be in a certain font, or on page one of the contract. It was a special rule just for arbitration.

But the jury trial provision is not like that. The jury trial provision is not targeted to arbitration. The jury trial provision covers all waivers of jury trial, whether brought in litigation or in arbitration. And again, all that I'm suggesting is that the same analysis that is used outside of the arbitration context, the knowing-voluntary-intelligent test, needs to be used within arbitration as well.

What are the implications of this analysis? Some judges in opinions have essentially said, "Well, gosh, I can't accept an argument such as the one that a Professor Sternlight might make, that I ought to be doing the jury trial analysis. Because if I do, arbitration is out the window. And gee, if arbitration is out the window, my caseload docket might increase too much, or the world will stop turning."

I don't think you have to worry about that, because the argument that I'm presenting here would not lead to the wholesale elimination of arbitration. For starters, it is not going to lead to the elimination of arbitration in claims—and there are many such claims out there—where there wouldn't have been a jury trial right in the first place. But even more important, it is not going to lead to an elimination of arbitration in those cases where there was a proper waiver of the right to arbitration. Now, I have repeatedly used the phrase "mandatory arbitration" without defining it, and I won't really take the time to define it now.

But for all of those arbitration clauses out there that are entered into between two businesses, these are all the arbitration clauses that we used to have before the 1980s, when the Supreme Court kind of fell in love with arbitration. Arbitration existed business-to-business. Those clauses are all going to be upheld. If you do a standard jury trial waiver analysis, and the clause is between Gateway and CitiBank, of course it's going to be held to be a knowing, voluntary, and intelligent waiver.

Even in the consumer setting and even in the employment setting, as long as the clause is sufficiently conspicuous, as long as it is sufficiently clear, and as long as the consumer or employee is really given a chance to opt in or opt out, it is going to be upheld. All that what I'm suggesting today would do is to require companies who want to impose arbitration to do it in a more fair way.

The clauses that are going to be voided, if this jury right argument is used, are those clauses that I think many of us, at a gut level, would think are the most unfair clauses. The clauses that are going to be in trouble are those that are imposed in small print, hidden in a stuffer mixed in with your mail from the bank. And you didn't even know it was there, and you really can't get out of it anyway. Those are the clauses that are going to be in some jeopardy, and myself, I don't find that very problematic.

## COMMENTS BY PANELISTS

**F. Paul Bland, Esq.**

**Reynolds Holding, Esq.**

**Eric Mogilnicki, Esq.**

**Honorable Terry N. Triewiler**

### **F. Paul Bland**

I think they wanted me to sit and speak before one of these microphones, but I was afraid that if I spoke to even one judge, much less 100, sitting down, that I would be hit by lightning, or an anvil would drop on me or something.

And I'm afraid I don't have any visual presentation. I was going to get one of the arbitration clauses that we regularly see, but there was no magnification, even on that screen, that would make it big enough for any of you to be able to read.

I think that Professor Sternlight has made some very important and interesting points. But because of some developments in just the last few months at the U.S. Supreme Court, I think you will see arguments that everything that she has said is essentially none of your business.

In monitoring a lot of litigation, and I'm involved in a lot of different cases involving challenges to arbitration clauses, I've found that an issue that is being raised by many defendants around the country is the idea that any kind of challenge to the formation of a contract, or to whether a contract is unconscionable or whatever, cannot be resolved by a court. It is only a question for the arbitrator.

It's a striking thing. Just a few years ago, this argument had almost no traction. There were only a few courts in the country, just a few judges, notably Judge Manion and Judge Easterbrook in the Seventh Circuit, who had sort of endorsed it. But most courts were saying that questions about whether you had a valid contract in the first place were questions for courts.

But because of some recent decisions, that is being questioned now. And I think that the implications of this are unbelievable. I was involved in a case where we successfully challenged an arbitration clause in a lending contract using the argument that the National Arbitration Forum, the arbitration provider, was favoring banks in so many cases, that it was essentially not trustworthy nor neutral. We had a lot of evidence and some state law arguments that we presented and we won in this argument in the West Virginia Supreme Court of Appeals.

Under the argument that you are now seeing, the challenge to the arbitration form as being biased would not have been allowed to be raised in court, but instead could only have

been raised with the National Arbitration Forum. So, I'm sort of picturing them addressing this argument: "Are we biased and untrustworthy? No." And that would be the end of it.

Certainly, there were a lot of challenges to the expense of arbitration. I had a case that we just prevailed on in the Ninth Circuit where we produced evidence that AT&T had an arbitration clause that would require the arbitrators, unlike judges who are paid by the state, to charge by the hour. And we came up with proof that AT&T's arbitration clause would impose costs on consumers, even for very small claims in many instances, of about \$1,900 a day for a hearing of arbitration. This was found to be unconscionable by the Ninth Circuit. And the idea that only the AAA (the American Arbitration Association) would be the ones to decide whether or not their own fees were so great as to be unfair, and would be something that could be decided by the arbitrator and not the courts is sort of problematic.

But where does this idea come from? There are three cases that have just come up in the last few months. I think if you look at them closely, you will see that what the Supreme Court is talking about are very different types of issues from the ones that are most commonly brought up in terms of unconscionability cases, and in terms of contract formation arguments, like the ones that Professor Sternlight is talking about.

The first case was *Howsam v. Dean Witter*. What this case was about essentially was that the arbitration provider had a set of rules that said you had to bring a case within a certain number of years. And it was the arbitrator's own rule. So, Dean Witter wanted a court, because they were concerned that the arbitrator was going to want to go ahead and take the case and bill. Dean Witter wanted the

**I think the questions "Is there a valid contract in the first place?" and "Is there a contract that is not unconscionable under state law?" are the types of gateway questions Justice Breyer is talking about there.**

court to come in and say, "No, these people missed the statute of limitations under the arbitrator's rules." So, a unanimous Supreme Court said "No, these are the arbitrator's rules. The arbitrator gets to decide what those are." Which made sense.

But Justice Breyer's opinion for the majority—he has written most of the Supreme Court's opinions in this area recently—said this is a different kind of question than the question of gateway questions. And he didn't really spell out what those were, but I think the questions "Is there a valid contract in the first place?" and "Is there a contract that is not unconscionable under state law?" are the types of gateway questions Justice Breyer is talking about there.

The second case was called *Pacificare v. Book*. In that case, it was unclear what the arbitration clause said. The arbitration clause banned punitive damages. And the plaintiffs were bringing a claim under RICO, which allows treble damages. So, the Supreme Court said it's not really clear whether a ban on punitive damages is also a ban on treble damages. There was an ambiguous term in the arbitration clause. And under a long tradition, particularly coming from labor arbitration cases, the arbitrator gets to say in the first instance what the clause says. Now, if the arbitrator finds that this clause prevents him from awarding damages that would be authorized by the statute such that the contract essentially violates RICO, then the arbitrator should say so, and the court will come in and strike it down.

So, again, it's not talking about a question about whether the contract exists in the first place, or whether or not it is unconscionable. One of the things that was particularly noteworthy in that case is that the HMO throughout their brief stressed that the challenge that the plaintiffs had brought to the arbitration clause was not brought under Section 2 of the Federal Arbitration Act. Section 2 is the big provision of the arbitration act. It's the one that says the contracts are going to be enforceable. And it's also the one that says that generally applicable state common law defenses, which the Supreme Court has repeatedly said included unconscionability challenges, are not covered.

So, that was one of Pacificare's big points, that it's all right for the arbitrator to decide this. It's not a Section 2 case. And now what you are seeing is of course all the HMOs are grabbing hold of that case now that they have won it, and they are going in as Section 2 cases, and saying this means that we win.

The last case is the *Bazzle* case. It was just decided a few weeks ago. It's the very end of the term. Basically, what happened was there were two connected cases that were brought as consumer class actions. They were compelled into arbitration. The arbitrator was selected by the defendant Greentree, a subprime lender. And then the arbitrator allowed the cases to go forward, with state trial judge's approval, on a class action basis in arbitration, and then hit the defendant with a very, very large award.

And it went up to the Supreme Court. In this case, no one disputed that there were valid legal contracts between every single one of the consumers and the defendant. And the question was, what was the procedure to be used in arbitration? The Supreme Court said well, once you have a valid contract in place, the procedure to be used in arbitration is something the arbitrator gets to decide. That is very different from the kind of unconscionability challenge we are looking at.

The bottom line I think comes from the EEOC case, the *Waffle House* case. This is a case where a guy is fired because he has an epileptic seizure. The EEOC wants to get involved on his behalf. He has an arbitration clause with the company. And what happened was that the Fourth Circuit had held that the EEOC was barred from going forward on behalf of this guy, because there was an arbitration clause between the man and the company.

And what the Supreme Court said was—the Fourth Circuit went through this analysis as well—on the one hand, the Americans with Disabilities Act is really important, and the EEOC's rights are important. On the other hand, the Federal Arbitration Act is really important, and we think that arbitration is more important than the disabilities act, so arbitration wins.

What Justice Stevens said was, you've got it all wrong. All the arbitration act says is these things are enforceable as other contracts. Since there is no contract between the EEOC and Waffle House, then the EEOC is not bound by the Waffle House arbitration clause.

The same thing applies to most of these sorts of challenges. If it's a type of issue that a court would normally hear, is it unconscionable? Is there a contract at all? You don't take it away from the court. You don't change the normal approach from how you would deal with any type of contract or challenge to a contract just because it's an arbitration clause. You can't sort of launder something that would otherwise be illegal by sticking it under the word arbitration in a contract, and make it okay.

## Reynolds Holding

I would like to steer the discussion back towards, if not public policy, at least public sensibilities, since I am a journalist, and not practicing law, and this is how I have come to approach the subject of mandatory arbitration.

From the point of view of the people that I speak with every day for stories, the employees and the credit card holders—the individuals that are often calling me to ask what is this arbitration issue—Professor Sternlight has really hit the nail on the head. Because I think what they find so offensive is that they are being deprived of a basic right to use the public courts as protection. Protection against the power of their employer, the power of their bank, and the power of other institutions with which they must do battle from time to time. And they often do not know exactly what this right is, or where it comes from, or its dimensions, or how to enforce it. But they have a strong sense of entitlement, and certainly of outrage, when it is taken away without their consent, or even their knowledge.

And so I think the issue that Professor Sternlight has addressed, the proper and legal way to gain waiver of the right to a jury trial, is perhaps the most vital for gaining public acceptance of arbitration as a means of settling disputes. So long as people believe that something is being stolen from them, that they are being ripped off in some way, arbitration will continue to provoke suspicion and remain, I think, controversial at best.

Which brings me to the second point that I wanted to address. And that is the failure of the courts generally to deal with the issue of what is proper consent for the waiver of what is often a constitutional right. And it seems to me, and it seems to other people that I have spoken with on this issue, that over the past 20 years, particularly from the U.S. Supreme Court, there has been sort of a certain intellectual dishonesty to the discussion and in the jurisprudence of arbitration. A dishonesty beginning in 1983 with this notion, that many people would argue is taken and developed from whole cloth, that the FAA established a liberal federal policy favoring arbitration.

And I get the sense that the same sort of intellectual dishonesty has caused the courts generally to avoid the issue that Professor Sternlight addresses in her paper. Maybe it's the failure of lawyers to bring the issue up often enough in cases. But I wonder why we have gotten such thin guidance from the courts on what is certainly an important issue to the people that are bound by arbitration clauses.

And of course, Professor Sternlight makes a compelling case for the knowing, voluntary, and intelligent standard. And I'm fully aware that there are some also fairly compelling and persuasive arguments on the other side. But what we really need to know now, to have happen now, is for the judiciary to tell us who is right.

So, why aren't we being told? Is it because the benefits of arbitration are so obvious that we don't have to deal with the issue? Is there an agenda by at least some judges to favor arbitration at all costs because they want to clear their dockets? Is there an agenda by some judges to promote a private adjudication industry that will provide lucrative jobs when they get off the bench?

And that may sound harsh, but most of you are not from California, and in California we see on a regular basis, judges negotiating with JAMS, with AAA, and with other arbitration providers

for jobs while they are on the bench. And there is an eagerness to leave the bench for what is often a more lucrative job in a private arbitration or mediation firm. Last year the California state legislature restricted the ability of judges to talk with arbitration and mediation firms while they are on the bench, but still, there is almost an outflow off the bench by judges in California—where really private adjudication was born in many ways back in the seventies. So, it may not be an issue in your states, and it may be sort of shocking to your minds, but out here it is an issue important enough for the California legislature to have addressed.

And I think the absence of any real clarity from the bench on this issue of the proper form of consent raises the public's suspicion. And at least for that reason, I think it's a subject that I would like to see, and I think deserves further study and discussion.

## **Eric Mogilnicki**

Hello. My name is Eric Mogilnicki. I thank the Roscoe Pound Institute for having me here, and Professor Sternlight for her excellent paper. I was asked here though to provide a different perspective, and so I'm going to differ with Professor Sternlight.

There are two points I would like to make in the short time we have together. The first is to disagree with the notion that arbitration is a culprit in the disappearance of civil jury trials. And the second is to disagree with Professor Sternlight on the appropriateness of state courts applying a knowing, voluntary, and intelligent test—i.e., a higher standard—to arbitration agreements than it does to contracts generally.

With regard to the disappearance of civil jury trials, there are two reasons why we have fewer jury trials as a percentage of cases filed. The first is the explosion in civil litigation. And the second is the failure of state governments to create sufficient resources so that the judiciary can handle the higher number of cases filed.

**I suspect that the more common experience is that the system is clogged, badly clogged.**

Now, it may be that some of you will tell us during the discussion groups that you have dusty courtrooms and eager jurors just waiting for someone to make a civil jury trial demand. But I suspect that the more common experience is that the system is clogged, badly clogged. And it is that clog in the system that makes it difficult for people to get all the way through from filing of the complaint to a civil jury trial.

So the problem is one of supply, not of demand. And so the solution proposed by Professor Sternlight, which is to increase the demand for civil trials by making it very difficult for people to agree to arbitration to resolve their disputes, is exactly backwards. Arbitration is not the culprit to the disappearance of the civil jury trial. It may be a solution, because if we can get some cases into alternative dispute resolution, there might be room in the system so that you can schedule trials in a prompt and efficient manner.

Second, I disagree with Professor Sternlight on the role that state courts can play in striking down arbitration clauses. The reason for this is simple—the Federal Arbitration Act. The Federal Arbitration Act says that arbitration agreements are enforceable, and I’m quoting, “save upon such grounds as exist for the revocation of any contract.” The Supreme Court has made clear that “any” means “any.” In *Doctor’s Associates v. Casarotto*, the Supreme Court explained that only generally applicable contract offenses such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements.

These three defenses—fraud, unconscionability, and duress—apply to every contract. You can imagine every contract being challenged on those grounds. That is not true of the “knowing, intelligent, and voluntary standard” that Professor Sternlight would apply to arbitration clauses. Indeed, the Supreme Court in *Southland v. Keating*, a decision you will hear vilified this afternoon, decided that California could not prohibit a waiver of certain rights when that interfered with the right of parties to agree to arbitration by contract. The court said that allowing state law to prohibit such waivers would eviscerate the Federal Arbitration Act.

And so, the question for I think those who propose, as Professor Sternlight does, a higher standard for arbitration agreements, is to ask this: Must “any” contract provision be entered into knowingly, intelligently, and voluntarily? And the answer to that, as you learn on the first day of law school, is No. Indeed, I think Professor Sternlight’s chart indicates that her complaint here is that arbitration agreements are being treated like all other agreements. Well, that’s precisely what the FAA requires. The Supreme Court in *Perry v. Thomas* said a state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not conform to Section 2 of the FAA. Professor Sternlight’s proposal for the higher standard to be applied to arbitration agreements would apply only to contracts that have alternative dispute resolution mechanisms in them. That is precisely the kind of singling out that the FAA prohibits.

Now, to be very clear, I want to agree with something Paul Bland said: that FAA preemption can be taken too far. I believe it is inappropriate for a company that dislikes punitive damages, for example, to put a punitive damages waiver in its arbitration provision, and to insist that the FAA does not allow state court judges to look at that waiver of punitive damages.

But the jury trial waiver issue is a different and easy issue when it comes to analyzing whether the FAA preempts a higher standard being applied to an arbitration provision. With regard to the jury trial issue, the state law involved is *about* dispute resolution, and therefore, implicates issues at the very heart of the concerns that led Congress to pass the FAA. Punitive damages, in contrast, aren’t at the heart of any alternative dispute resolution mechanism. There is also no way for an arbitration clause to avoid the higher standard that Professor Sternlight proposes, because arbitration clauses inevitably involve a jury trial waiver. And that is why the FAA protects that aspect of the arbitration clause.

Finally, I would note that the power to raise the standard for an arbitration agreement is really like the power to tax, in that it includes the power to destroy arbitration clauses. If a state may impose upon arbitration clauses the requirement that they be intelligently given, then a state can require that the agreement be signed in triplicate, or that it be only post-dispute, or that it not be made at all. I can’t figure out any principle that would allow a state to intrude upon the level of consent required, and not be capable of expansion to a level where it was essentially impossible for a

consumer to agree to an arbitration clause. I think giving states that power that would be a mistake for policy reasons that time doesn't allow me to go into.

But I'm also sure the FAA simply does not allow state courts to intrude on decisions to grant arbitration. The FAA requires that those decisions be treated like every contract term.

## Honorable Terry N. Trieweiler

Let me first, in defense of the state judiciary, which I was a member of for twelve-and-a-half years, say that I strongly disagree with Paul Bland that there is a diminishing role for the state judiciary in the application or enforcement of binding arbitration clauses. I think the state

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judiciary will continue to play the most important role, which is to determine whether this is an enforceable agreement to arbitrate in the first place, or in other words, apply the gateway decisions, whether or not there is a binding arbitration agreement to begin with.

I should tell you, however, from the outset, that I have the unique distinction, or maybe indistinction, of having had my opinion regarding the arbitration clauses in our state set aside and reversed by the U.S. Supreme Court twice in the same case, *Doctor's Associates, Inc. v. Casarotto*. So, I don't have a good track record of interpreting the U.S. Supreme Court's interpretations of the Federal Arbitration Act. I should also tell you that in Montana, we frequently set aside binding arbitration agreements for a variety of reasons, and could probably be characterized in those patronizing terms, often applied by federal courts, as those "state courts who cling to outdated notions, and hostilities toward arbitration founded in the English Commonwealth."

Like many of you, we come from a very busy court. In Montana, we don't have an intermediate appellate court, so unlike the U.S. Supreme Court, we issue 400-450 full opinions a year, compared to the U.S. Supreme Court's 75. We are anything but protective of our jurisdiction and would be glad to have any kind of help that we can get in eliminating some of our docket.

But what we do cling to in Montana are traditional notions of fairness. And we also cling to the notion that if those traditional forms of protection aren't provided by the courts, they are simply not going to be provided. And included in traditional notions of fairness are access to the courts, the right to trial by jury, and the right to reasonable discovery, so that you can develop your factual record. We consider the rules of evidence important to fairness. We consider rules of venue important to fairness. We consider the right to appeal, so that one can be sure that the decision was based on the law and the facts, important to principles of fairness. And we believe that public courts, where you don't pay for the judge, are important to the enforcement of principles of fairness.

We have also taken the Supreme Court at face value. We have taken it to mean what it says when it always points out to us that those grounds that exist at law and equity for the revocation of any contract can be applied to binding, pre-dispute arbitration agreements.

So, recently in *Kloss*, we held, as we have always held, that all contracts of adhesion have to be scrutinized for fairness, and they have to be scrutinized for whether they measure up to the reasonable expectations of the party who has the least bargaining power. And even if they do, they have to be scrutinized as to whether they are unconscionable. We set forth in *Kloss* what kind of facts are essential in developing a record of unconscionability. We also said, in the concurring opinion in *Kloss*, that we will consider whether there has been a valid waiver of the constitutional right—the fundamental right in Montana—to trial by jury. I disagree with Professor Sternlight to some extent, when she says that that can be considered in every state with equal force. I think the reason we are able to apply jury trial waiver standards in Montana is because we have done it in other contexts.

We have previously held in Montana that a contract, in which the person in the inferior bargaining position waives the right to personal jurisdiction, violates due process, and has to be scrutinized for voluntariness, whether it was knowing, and whether it was intelligently done in other contexts. So, we have no problem in Montana applying the same constitutional scrutiny to waiver of the constitutional right to jury trial in the arbitration context. And I think we come fully within the Savings Clause that the U.S. Supreme Court has said would apply to judicial enforcement of arbitration clauses.

In conclusion, the important thing, or the interesting thing, to me is that at one time or another, five members of the nine member U.S. Supreme Court have held that its notions regarding the Federal Arbitration Act are misguided and unfounded. Justice Stevens, Justice O'Connor, Justice Rehnquist, Justice Scalia, and Justice Thomas have all at one time written or concurred in strong opinions concluding that the Federal Arbitration Act was never intended to apply to state courts, or at least not to the extent that it preempts state laws that protect consumers from unfair arbitration clauses. And yet, here we have this series of cases from the U.S. Supreme Court that have continually expanded federal preemption in that area and left consumers unprotected to the point where Justice O'Connor says that over the past decade the Court has abandoned all pretense of ascertaining congressional intent, building instead, case-by-case, an edifice of its own creation.

**The important thing to me is that at one time or another, five members of the nine member U.S. Supreme Court have held that its notions regarding the Federal Arbitration Act are misguided and unfounded.**

Our case in *Kloss v. Edward D. Jones and Company* was recently denied certiorari by the Supreme Court. I don't know if that means that they mean what they say when states are still free to consider whether arbitration contracts are contracts of adhesion, and whether traditional legal exceptions will apply to arbitration. I don't know if that's a crack in the edifice that they have constructed, or whether the facts in *Kloss* were simply so gross that it didn't make a good case for the Supreme Court to continue building its edifice. But I do think that state courts play an important

role as gatekeepers in determining whether there is a binding arbitration agreement in the first place. And I think the justices should continue to perform that important role.

## Response by Professor Sternlight

I've been given a few minutes rebuttal time, but I don't need to rebut too much of what my fellow panelists have said. Still, I will go through and give you some of my comments on each of their presentations.

I completely agree with Paul Bland that one of the critical issues that you folks are going to need to face is the role of a judge in interpreting an arbitration clause, versus what is the role of an arbitrator. And I didn't hear him to say that he agreed with the argument that would be made to you, which was to say that you guys need to punt these cases to the arbitrators.

But I think he was just putting you on notice that you are going to see a lot of arguments to that effect. A lot of defense counsel are going to take some of these recent Supreme Court decisions and use them to try to craft an argument that you need to allow arbitrators, rather than yourselves, to make a lot of the decisions about what is contained in an arbitration clause.

And I think that even though the Supreme Court has created a muddle with those decisions, and even though I would have written those decisions differently had I been on the Court, you can discern a fairly clear line as to which decisions are for the arbitrator, and which decisions are for yourselves.

There was an earlier Supreme Court decision that Paul didn't get a chance to mention, the *First Options of Chicago v. Kaplan* decision decided five or more years ago, which was a decision in which the Supreme Court said the issue of whether there actually was an arbitration agreement in the first place is for a court to decide. The facts had to do with basically who had signed the arbitration agreement, and did it bind the individual as well as the company? And this Supreme Court said in that decision, and continued to say in the later decisions, that fundamental questions as to whether there is an arbitration agreement in the first place go to the court.

And in my view at least, it's quite clear that an argument that an arbitration clause is unconscionable is one that needs to be decided by a court. And an argument that an arbitration clause is void, because it doesn't comport with jury trial waiver standards, that too, would need to be decided by a court.

And what the Supreme Court is doing is distinguishing those kinds of fundamental arguments about the validity of the arbitration clause from procedural issues that can be decided by the arbitrator. These may be issues such as: Once it goes to arbitration, what's the statute of limitations? If it goes to arbitration, what are the remedies? Is there a class action?

It's not an ideal line. It is a bit fuzzy. But I would be shocked if the Supreme Court would ever affirm a decision that said the arbitrator gets to decide the whole ball of wax, because then we really will have created a completely privatized system of justice, where arbitrators would be

deciding for themselves if the arbitration clause is valid. And I don't think that even this Supreme Court, as enthralled as they have been with arbitration, is going to go that far down the line.

So, to the extent you are presented with arguments that suggest you need to punt those kinds of decisions to the arbitrators or to the arbitration providers, I would urge you to stand firm, and

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make it clear that no, there are certain decisions on the fundamental validity of the arbitration clause that do need to be made by the court itself.

I completely agree with the comments of Ren Holding, who didn't bother to advertise himself, but Ren has written some incredibly influential columns on arbitration here in California, laying out what have been some of the

excesses of mandatory arbitration here in California. And in my opinion, those columns have been very influential in some of the legislation that has now been passed in California, trying to reform what the legislature deems to be a real mess, including some of the problems that Ren identified, including judges apparently making decisions in order to curry favor with arbitration providers who might become their employer in the future.

Now, the commentator with whom I do disagree somewhat, and you won't be surprised to hear this, is Eric Mogilnicki. Actually, I really don't strongly disagree with his first point. His first point is that it is wrong to say that arbitration is the culprit for the demise of the jury trial, and I think I admitted that myself in the very beginning of my talk. There are many factors that have gone into the demise of the jury trial, and it's something that has been happening gradually over time. If you look at statistics of how many jury trials there were one hundred years ago, versus how many are there now, it was a much higher percentage one hundred years ago.

And that also goes along with just the fact that we handled our litigation system differently 100 years ago. We didn't have as much discovery as we do today. We didn't have as much motion practice as we do now. One hundred years ago we had a litigation system where it really was pretty much you took a case as a trial lawyer. It was more the Perry Mason kind of thing, where you did it quickly. You investigated. You went to trial. Boom, boom, it was over, and you either won or you lost.

And for better or worse, for a variety of reasons, we have ended up today with a much more motion-intensive litigation practice, with many more settlements. A contributing factor clearly is this rise of arbitration, which is contributing to, although not solely responsible for, the demise of the jury trial.

Now, Eric says arbitration is not the culprit. It may be the solution. I like arbitration. I teach all kinds of procedural courses. I teach alternative dispute resolution courses. I think arbitration is terrific. Mediation is terrific. I'm fully in favor of those forms of alternative dispute resolution, and so I do agree that arbitration can be a solution for some of the problems with our legal system, and that arbitration is something policy makers ought to be thinking about. But I have problems with the mandatory form of arbitration. And that is mostly a discussion for another day or for the

small group settings. But I myself would not say that mandatory arbitration is a solution for the clogged-up legal system we have. We ought to be fostering other opportunities, other ways to resolve cases, and putting more money into the court system to have more judges, if that's what we need, so that we can have jury trials, if that is what we decide we want.

Eric spent most of his time on the preemption argument, which I spent some time on in my presentation, and more in my paper. Clearly, he is giving you the argument that you will hear when lawyers try to make the jury trial argument that I have set out. I don't buy his argument, and you folks will have to decide for yourselves whether you do. But here is what I would suggest you think about.

Eric is correct when he points to Section 2 of the FAA and argues that it says that courts shall enforce arbitration clauses, save upon such grounds as any contract. That is what the FAA says. He tries to draw from that the idea that therefore, jury trial waiver analyses are irrelevant, because they don't apply to every and all contracts in the state. That's where I think there is a gap missing in his logic. The jury trial provisions that are in your state constitutions, if you do have them, are not provisions that were written to target arbitration clauses. Those jury trial provisions do not merely apply to arbitration, nor do they merely apply, as he threw in, to alternative dispute resolution. Jury trial waiver provisions apply to any contract that purports to take away the constitutional right to a jury trial. That, in my view, is a general provision. It is not targeted to arbitration. And if you do want to look to legislative history, clearly, those jury trial provisions were put into the vast majority of state constitutions, if not every single one, long before there was such a thing as mandatory arbitration.

Mandatory arbitration did not exist until the 1980s and 1990s. State jury trial provisions have been around for one-hundred-plus years. So, these are general provisions. They apply to any contract that would take away a constitutional right to a jury trial. They apply to litigation where a company might try to say, "Yes, you can go to litigation, but not before a jury." In that context, you ought to be applying the jury trial waiver analysis. All that I'm saying is that if the company says not only can't you go to a jury, but you can't go to court at all, the same analysis ought to be used, and that is really my simple point.

Now, Eric says well, that's problematic, because then you are treating arbitration contracts differently from all other contracts. With most contractual provisions, we don't care if somebody agreed to it knowingly, voluntarily, and intelligently. You can in a contract agree to buy your car. And even if you didn't knowingly, intelligently, or whatever, agree to buy a car, you are going to be bound to that contract.

And it's true that, form contracts—contracts of adhesion—are rampant in our society, and we enforce them. And we don't have a knowing, voluntary, and intelligent standard. Well, that's fine, because the vast majority of contracts do not impose a jury trial waiver. If they did, a court would do a jury trial waiver analysis. But if a contract does not impose a jury trial waiver, of course you don't apply the knowing-voluntary-intelligent test.

So, all that I'm suggesting is that it's the same analysis. As Justice Trieweler pointed out, in some states they use the knowing-voluntary-intelligent test not only for jury trial waivers, but for other waivers of constitution rights as well. Maybe you have that in your state as well. All that I'm saying is that's the same test.

Now, I agreed with virtually everything that Justice Trieweiler said, so I don't need to spend a lot of time on that. But he said he disagreed with me that every state has the same jury trial waiver analysis. I didn't mean to say that. If I said that, I'll take it back. You need to look at your own state constitution, and your own case law, and apply the same jury trial waiver analysis to arbitration as you do in other contexts.

## Questions and Comments

**Participant:** My question is to Professor Sternlight, the speaker. In reading your fine paper yesterday, I tried to distill it into a proposition, so this was my shot. You tell me if I'm wrong. This is just the beginning. Mandatory arbitration is an unfair threat to the rights of have nots, read that consumers, injured persons, parties in the inferior bargaining position, which can be neutralized through the invocation of the right jury trial in civil cases, and the application of orthodox waiver doctrine. Professor Schwartz's paper suggests that *Southland* tramples upon traditional notions of federalism, and that state courts can limit the effect of *Southland* by assiduously adhering to the doctrine of constitutional avoidance.

I'm wondering whether his premise, if I have it correct, is antithetical to yours? Just by way of clarification, I don't see engaging in orthodox jury waiver analysis as an example of the doctrine of constitutional avoidance, at least as he defines it.

**Professor Sternlight:** I guess the way I see our papers fit together is that they are consistent, but you don't have to buy both of them. I think you could say, well, I'm going to do the jury trial waiver analysis that Sternlight suggests, even if you don't buy Professor Schwartz's argument, or you might buy his, but not mine. But I don't think that either of the two papers is dependent upon the other.

**Participant:** I just had a question, and it's in reference to the Federal Arbitration Act, which I assume was passed in the 1920s at some point. In Section 2, there is that reference to, "such grounds as may exist at law or inequity for the revocation of any contract." And there is an assumption here that that's a reference to state law.

And I'm wondering, since the statute itself refers to a transaction involving commerce, meaning interstate commerce, whether the Congress somehow intended, or did in fact federalize those law and equity provisions about the interpretation of contracts? And keep in mind that this was in the twenties, before *Erie v. Tompkins*, which said there is no general federal common law. Well, when this statute was passed, there was a notion that there were principles of law and equity that were enforceable by the federal courts. And I wonder if that is bleeding over into this, and we are coming back to pre-*Erie* law, and having federal interpretation, rather than state interpretation prevailing on these contract questions.

**Professor Sternlight:** I do think that the FAA, when written, was intended only to apply in federal courts. And I do think that you may be right, that Congress had in mind at that point, some kind of federalized contract law. But the Supreme Court in numerous decisions issued in the 1980s and since, has stated that the kind of contract law that should be applied in interpreting Section 2 is state contract law. So, regardless of whether you are right or wrong about the real

legislative history, the Supreme Court has essentially given state court judges, their marching orders to apply state law in that situation.

**Participant:** But if state law is used to invalidate an arbitration agreement, and it is based specifically by a state court on state law, it seems to me that then the question is whether that is reviewable by the U.S. Supreme Court. It seems to me that under your interpretation, it is not. But if you read the statute the way I was asking about whether it should be read, that would present a federal issue as far as certiorari review.

**Paul Bland:** That was a significant point of contention in the *Bazzle* case. Essentially, the South Carolina Supreme Court looked at this arbitration clause and said, the arbitration clause doesn't say anything about class actions. And we interpret any contract against the drafter. And so, therefore, we are going to find that this contract permits class actions, because the consumers want it and Green Tree doesn't. And essentially, what the banks argued was the South Carolina Supreme Court either intentionally got it wrong, or they just were so confused they got it wrong, but that the contract clearly doesn't allow class actions. And so, South Carolina Supreme Court's interpretation of South Carolina contract law is just bogus and has to be thrown out.

And what you will see in the opinions in the *Bazzle* case is a mishmash of opinions, but only three justices were willing to have a federal second guessing of the state court's decision on contract issues, Chief Justice Rehnquist, and Justices O'Connor and Kennedy. It was a four member majority that Justice Stevens signed onto, because he thinks it should be important that there be five justices. But then he wrote separately to say that even though I signed onto it, I have a different

**I do think that the FAA, when written, was intended only to apply in federal courts.**

view. But the four member majority said this is a question to be decided by state law. And it's very clear, it's in the first paragraph, it is extremely important. Then they say, but the arbitrator gets the first cut at what the state law is on this.

Then Justices Stevens and Thomas wrote separately to say if it is up to us, it's just a question of state law, and no federal court has any business getting involved in that, because state courts get to say what state contract law is. So, I think this was the central issue in the case, and six members of the Supreme Court said state contract law governs these things, to be decided under regular state principles, except in the limited circumstances where it is undermining the statute.

**Mark Mandell:** This is from a practitioner's standpoint. I tried a medical malpractice case here in San Francisco 10 years ago. And because it was a case against Kaiser Permanente, it had to be arbitrated. There was a labor union agreement that all disputes had to be arbitrated. And it was in front of JAMS, the Judicial Arbitration Mediation Service. There was a plaintiff's arbitrator, a defense arbitrator, and a retired judge who was on the panel. All throughout the arbitration—we eventually settled the case—my perception was, and backed up by the plaintiff's arbitrators comments back to me, that there was a very significant amount of pressure on us to settle the case—for a lot less than what I felt the case was worth. It struck me

that there was potentially a repetitive bias that existed, because if the arbitrator was to enter a huge award against Kaiser, those arbitration cases might go to a different company. And I don't know if there has been literature on that, or if there is a way to solve that problem. But it was, from a practitioner's standpoint, a very significant issue that we dealt with in that case.

**Paul Bland:** There is a huge amount of literature on that issue. In some states, there is a body of state law that applies to all decision makers. For example, in West Virginia they used to have a system where a bank would be able to pick whichever justice of the peace they wanted to enforce a debt. And the justices would only get paid based on how many cases were brought to them. So, what happened was banks were going around shopping around, and whichever justice of the peace was giving them the debt fastest and in the full amount was who they gave all their business. In 1973, the West Virginia Supreme Court struck that down in a case called *Shrewsberry v. Poteet* and said that is unconstitutional.

We got involved in a case where we had extremely strong evidence of an arbitration provider having a very strong repeat player bias, and was very much finding in favor of the banks. And we came in and argued to the West Virginia Supreme Court, look, if it's unconstitutional for a governmental decision maker to do it, it should be unconscionable under state contract law for someone else to do it. And we were successful. We got a good ruling in a case called *Toppings v. Meritech*, finding that that was unconscionable. And what has happened in the majority of banks' arbitration clauses that I have seen, and I've seen several dozen of them, have been rewritten in such a way that now they will say you can choose between one of the following three arbitration providers: JAMS, the AAA, or the National Arbitration Forum. And I believe a number of Eric's clients have written it in such a way.

It basically takes away the argument that we made in the *Toppings* case, but it has changed somewhat the way the providers have been working. In the last year or so, several of the providers have changed their rules in various ways to make them easier and more helpful to consumers. Now, there is a big debate about whether these changes are meaningful, whether they have really fixed it, or it's just for appearance's sake to get the things enforced. But I think it is very interesting that you have already seen better practices by a lot of the more sophisticated companies to write their arbitration clauses with a goal of giving the consumer a choice, which gives the arbitration provider a little less incentive to, if you will, suck up to one side.

**Reynolds Holding:** I wanted to add if you were dealing with Kaiser 10 years ago, you were dealing with an arbitration system that in 1997 or 1998 was struck down in its entirety as unconscionable—just for the control that Kaiser exerted over the arbitration, over the timing of arbitrations, over the selection of arbitrators—and that was struck down by the state Supreme Court. Now, there is an independent administrator for that system.

**Paul Bland:** That case, by the way, is the *Engalla* case, and it's one of the worst fact patterns you will ever see. Essentially, the allegation was that Kaiser and the arbitrator supposedly got together and intentionally delayed the hearing, and wouldn't hold a hearing in the arbitration until the plaintiff died. And under California state law, once he died, the damages were dramatically lower. So, right after he died, they were suddenly able to hold the hearing. The case went up to the California Supreme Court. It is a very sharply worded, telling opinion.

**Eric Mogilnicki:** Do we have time for two quick comments? One is with regard to the *Engalla* case. I propose that we treat anecdotes about unfair arbitration agreements the same way we treat anecdotes about why tort reform is necessary. If we apply that same standard, I think we will find that sometimes the anecdotes are meaningful, and sometimes not so much. And I think the *Engalla* case is an example of a not-so-helpful anecdote for the very reason that Paul identified, which is that arbitration clauses by and large, with exceptions, are improving over time. The clauses you will see in your courtrooms, I predict, will be better, and more consumer-friendly than the clauses in the cases that you are reviewing in order to decide the relevant law.

One example is the proliferation of forums, so that people have choices. Another is an improvement in the disclosures. Another is improvement in the disclosures not just of the rules, but of the background of the arbitrators. Another is in the way arbitration is paid for, which is now more often shared by the defendants. One thing that I think businesses, or at least smart businesses, are doing are making these clauses better for consumers, so that they are easier to enforce. And I think that you will find that there is often a mismatch between the case law like *Engalla*, and other terrible cases from past and present cases. There was a case involving a Hooters employment contract that was just as egregious.

You will find that those cases are cited, but that the clauses you are seeing are different from the clauses in those cases. The clauses you are seeing are really quite fair—they bend over backwards to make sure that the arbitration system is as fair to the consumers as is possible.

**Sharon Arkin (Discussion Group Moderator):** Briefly, a comment on the *Engalla* case. It wasn't simply anecdotal. If you read the Supreme Court's decision, there was extensive evidence about the problems with the system, and the decision was based on the evidentiary record, not merely finger pointing or storytelling. My question also goes to Eric's contention that under basic contract law, you don't have to actually agree to anything. And the law school I went to taught me in basic contract law that there has to be a meeting of the minds, at least on the material terms of the agreement. And although adhesive contracts have become very prevalent, especially in consumer contexts, and that the adhesive terms of the contract will be enforced in large measure, those are not "the material terms" of the contract.

You can't enforce a material term of a contract that wasn't knowingly agreed to on basic contract principles. Isn't the determination of whether you are being required to engage in that contract, and are forced to waive a substantial constitutional right, shouldn't that be considered a material term? And if it is, then doesn't the knowing waiver argument apply to that term, just as it does to every other contract term?

**Eric Mogilnicki:** Let me respond. First, I meant to cast no aspersions on the record in a particular case. I just note that when I speak on these subjects, I often hear anecdotes, and I know that my fellow panelists also hear anecdotes in other contexts. I want to make sure the same rules applied for how seriously we take a particular example as proving a case.

Second, on the point about meeting of the minds, I would say this. All of us have credit cards. Who here knows the interest rate on their credit card? Who here knows the interest rate on their credit card if they are late with a payment? Who knows what the fee will be if you are

late? Who knows how many times you can be late before your card is canceled? Those are all material terms of that contract. You have agreed to those contract terms. I don't think you would hesitate to enforce those terms if they came to you in your courtroom. And yet, those material terms in our modern economy are agreed to without knowing, intelligent, voluntary, "meeting-of-the-minds" type consent.

All I'm saying is don't pluck out the arbitration clause and decide that it is going to be subject to a high contract that you would not for a minute apply to any of the other basics of the agreement in a credit card agreement, in a loan agreement, or in any other kind of consumer contract. Use the same standard. If the standard requires a meeting of the minds, I think we are all going to find that we are no longer required to pay interest on our credit card, since virtually none of us actually agreed to pay the rate that is set forth in the fine type of the agreement that governs our account.

**Paul Bland:** There is a rule of general contract law that applies to all constitutional rights relating to voluntary and knowing waiver. It's not just the jury trial right. For example, anybody can waive their right to free speech. My office fires me tomorrow, and they say we have too many men here, and we need more women. So I bring a general discrimination case. We settle the case. They give me \$100,000. That's probably way too much, but anyhow, they give me money, and I have to sign a release saying I promise never to say something bad about you. I have given up my free speech right. But it's knowing. It is voluntary. That's the kind of thing that we allow every day.

**All I'm saying is don't pluck out the arbitration clause and decide it is going to be subject to a high standard that you would not for a minute apply to any of the other basics of the agreement in a credit card agreement. Use the same standard.**

Imagine if one of Eric's clients puts in the credit card agreement, you agree to never criticize any candidate or legislation supported by the American Bankers Association. And it's one of the things in the fine print. It's crazy. It would never be enforced. If that went into any courtroom where they tried to enforce that, and said, oh, you promised never to speak against our candidate and you did. Therefore, you owe us \$1 million. Everyone would say

that's unenforceable, because it's a waiver of a constitutional right that wasn't voluntary, knowing, and intelligent. What they are saying is that out of all the constitutional rights that have to be waived this way, we are going to pluck this one and say it doesn't matter, and we can throw it out on a totally different standard than is applied for any other constitutional right. That is getting it exactly backwards from what the Supreme Court said.

You look at these things the same way you look at other contracts. You don't treat them better than other contracts. So, you can't have a contract term that takes away your right to free speech because of the generally applicable rule of voluntary, knowing, and intelligent waiver. Why would you be able to have a different rule just for this one type of contract? That's exactly the opposite of the way the Supreme Court is trying to say that you have to treat these things like other deals.

## ISSUES STATE COURTS FACE WHEN CONSIDERING FEDERAL PREEMPTION OF STATE COURT PROCEDURES: AN ANALYSIS FOR STATE JUDGES

*David S. Schwartz*

**I**n his introduction, Professor Schwartz asserts that the U.S. Supreme Court's decision in *Southland Corp. v. Keating* is inconsistent with federalism because it restructures dispute resolution processes for state law claims. He also notes that *Southland* interferes with state contract law despite the Supreme Court's previous acknowledgment of that topic as one that is traditionally governed by the states. Professor Schwartz suggests that state judges should correct these federalism problems by adhering to the doctrines of constitutional avoidance and the presumption against preemption of state laws. In sum, state judges should give preference to state law until Congress explicitly states that state law is preempted by embracing federalist principles.

In Section II, Professor Schwartz examines the decision's current effects, attempted extensions of *Southland*, and how the case could have been decided in accordance with the constitutional avoidance doctrine and the presumption against preemption. He also identifies the use of the "enforce as written" rule and the general/specific differentiation as attempts to extend *Southland*'s reach that could potentially preempt all general state contract laws when an arbitration clause is at issue. Finally, Professor Schwartz states that, *Southland* should have heeded the guidance of the doctrine of constitutional avoidance and not preempted state law, nor bound the state courts to adhere to the FAA.

In Section III, Schwartz addresses federalism concerns from the unique perspective of state judges. He suggests that judges concerned with judicial restraint and issuing rulings comporting with legislative intent should narrowly apply the Supreme Court's FAA preemption precedents.

In Section IV, Schwartz explains why contract defenses, issues of arbitrability, and regulation of arbitrators are topics to be governed by state law. Contract defenses to arbitration agreements are examined in the context of remedy-stripping provisions, unfair arbitration procedures, imposition of burdensome arbitration fees, venue provisions, and mutuality in contract formation. Several of these issues could be addressed via unconscionability, a state law contract defense. Regarding arbitrability claims, Schwartz argues that state judges can permissibly resist the undue expansion of FAA preemption on two grounds. First, states have the same power and authority as Congress to make certain claims non-arbitrable. Second, the U.S. Supreme Court has not decided whether arbitrators can issue injunctive relief that affects either third parties or the public; therefore, state courts are free to conclude that arbitrators cannot issue such injunctions.

The issue of whether arbitration clauses can prohibit class actions was debated in *Green Tree Fin. Corp. v. Bazzle*, which was decided in June 2003 by the U.S. Supreme Court. Schwartz contends that pre-dispute waivers of class action should be void as against public policy or unconscionable; therefore, the claimant should be able to pursue her claim in litigation. Professor Schwartz further explains that states are not preempted from regulating arbitrators because the FAA does not occupy this field. Such regulation would also fall within the state's power to regulate its judicial system.

Schwartz concludes his paper by emphasizing that an often-cited justification for supporting *Southland*'s preemption holding, the "national policy favoring arbitration," was not congressionally created but is a make-weight argument constructed by the Supreme Court. Another argument, that state courts should follow the lower federal courts' examples of ignoring federalism in favor of clearing crowded court dockets via FAA preemption rulings, he argues, is not required by the Supremacy Clause.

## I. Introduction

Despite reputedly leading a “federalism revival,”<sup>1</sup> the U.S. Supreme Court has ignored the federalism problem inherent in its decisions nullifying state laws by holding them preempted. The most glaring example is the Court’s continuing adherence to its badly reasoned 1984 decision in *Southland Corp. v. Keating*,<sup>2</sup> which holds that the FAA<sup>3</sup> binds state courts and preempts state law. Although the Court has itself expressed its fundamental “belief in the importance of state control of state judicial procedure,”<sup>4</sup> the *Southland* doctrine of FAA preemption restructures state dispute resolution processes for *state law claims*. And while the Court has stated that contracts are an area of traditional state regulation that federal courts should be “reluctant to federalize,”<sup>5</sup> the *Southland* doctrine threatens to take state courts and legislatures out of the business of making contract law entirely.

Federalism often comes down to a battle waged in the courts. State judges have a special role in this battle, because, unlike their federal counterparts, they are sworn to uphold not one, but two constitutional systems. In this paper I argue that two principled tools of statutory interpretation designed to safeguard state autonomy in the name of federalism—the doctrine of constitutional avoidance and the presumption against preemption—have been ignored, and indeed violated, by the federal courts in FAA preemption cases. I argue further that it is incumbent on state court judges to use these tools pursuant to their dual constitutional duties, which authorize and *require* them to (1) interpret federal statutes independently in the absence of a controlling Supreme Court precedent and (2) give due regard to the interests of their states in the enforcement of state laws in the absence of a clear congressional mandate to preempt those state laws. This requires state courts to construe both the FAA itself and the U.S. Supreme Court’s FAA preemption precedents as narrowly as good faith permits.

## II. *Southland* as a Disaster for Federalism

The values of federalism, articulated in *Gregory v. Ashcroft*,<sup>6</sup> provide a basis for evaluating *Southland*’s federalism error:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>7</sup>

Each of these values of federalism assumes a substantial degree of state lawmaking autonomy; none would have much meaning if the states were merely “regional offices [ ] or administrative agencies of the federal government.”<sup>8</sup>

Preemption doctrine represents the most significant and frequently applied limitation on substantive state autonomy in our constitutional scheme.<sup>9</sup> While federal commerce power still potentially reaches most subjects of legislation even after *United States v. Lopez*<sup>10</sup> and *United States*

*v. Morrison*,<sup>11</sup> preemption doctrine holds that Congress may nullify state law on any subject within federal legislative jurisdiction. Therefore,

the true test of federalist principle may lie, not in the occasional effort to trim Congress's commerce power at its edges . . . or to protect a state treasury from a private damage action . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law

—namely, preemption cases.<sup>12</sup> FAA preemption under *Southland* tramples on these federalism values by nullifying and federalizing the dispute resolution processes and contract law of the states.

### A. *SOUTHLAND*'S CURRENT EFFECTS ON STATE LAW

Under *Southland*, the FAA has been construed to bind state courts and preempt state laws that single out arbitration agreements for special barriers to enforcement, whereas “generally applicable contract defenses” and rules that “arose to govern . . . contracts generally” may be applied to arbitration agreements “without contravening [FAA] § 2.”<sup>13</sup> The FAA thus preempts those state laws—but only those—that regulate arbitration agreements per se,<sup>14</sup> or that declare certain types of substantive claims non-arbitrable.<sup>15</sup>

Even with these limitations, scores of state laws have been held preempted or become subject to FAA preemption under *Southland*. In 2002 alone, state laws were held preempted under *Southland* in at least 16 cases. At least 30 states have one or more statutes containing antiwaiver provisions of the kind held preempted in *Southland*. Many states have tried to regulate arbitration agreements by creating specific exceptions to a general state rule requiring specific enforcement of arbitration agreements, but *Southland* preempts these laws.<sup>16</sup>

**FAA preemption under *Southland* tramples on federalism values by nullifying and federalizing the dispute resolution processes and contract law of the states.**

A key, and frequently celebrated, value of federalism, is that it enables states to serve as “laboratories for experimentation” in social policy.<sup>17</sup> But preemption stifles state law “experimentation” not only by nullifying state laws on the books, but also by discouraging proposals to change the law. For example, the National Conference of Commissioners on Uniform State Laws (NCCUSL) was considering addressing issues relating to adhesive arbitration agreements in its Revised Uniform Arbitration Act (RUAA), but its drafting committee determined that “the preemptive effect of the Federal Arbitration Act . . . dramatically limits meaningful choices for drafters addressing adhesion contracts....”<sup>18</sup>

## B. SOUTHLAND'S NEW DIRECTION: THE END OF STATE CONTRACT LAW?

In recent cases, drafters of arbitration clauses have sought to move beyond these “correct” applications of FAA preemption doctrine, attempting to convert the FAA into a massive federal deregulation program that nullifies potentially all state contract laws designed to counteract unfairness, overreaching, and grossly disparate bargaining power. Two related arguments, either of which would have this effect, have made doctrinal inroads by persuading at least some lower courts.

### 1. *Bazzle-Dazzle*: The “Enforce As Written” Rule

A number of litigants have begun to press the argument that the FAA creates a substantive federal rule of contract law that arbitration agreements must be enforced *as written*, notwithstanding any state law which may vary the effect or meaning of specified terms. The basis for this argument is not § 2 of the FAA, which provides that arbitration agreements are enforceable, save upon grounds for the revocation of any contract, i.e., that they are subject to state contract law. Section 2, which *Southland* identified as the FAA’s “substantive” provision, says nothing about enforcing arbitration agreements “as written.” Rather, the argument seems to arise from § 4, a procedural provisions directed to federal district courts, which provides that a district court, in granting a petition to compel arbitration, may issue an order “directing that such arbitration proceed *in the manner provided for in such agreement*” or, further on in § 4, an order “directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*”<sup>19</sup> But § 4’s focus on federal district court procedures belies the notion that it binds the states to a federal substantive rule of enforcing arbitration agreements exactly as written in all cases. While the “according to their terms” language is echoed in *Volt Info. Sciences v. Stanford Univ.*,<sup>20</sup> and *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>21</sup> neither of those cases can be read to hold that federal law prevents any reliance on state law to determine the enforceability of arbitration agreements. On the contrary, both cases *applied* state law to resolve the issue presented: *Volt* holding that the FAA allowed state law arbitration procedures to be chosen by the parties, and *Mastrobuono* applying the state contract principle that ambiguities will be construed against the drafter.<sup>22</sup>

The “enforce as written” rule has been urged upon the U.S. Supreme in *Green Tree Fin. Corp. v. Bazzle*.<sup>23</sup> In *Bazzle*, a case arising under state law in South Carolina, two class actions were certified in consumer arbitrations against Green Tree—a nationwide consumer loan company which is a frequent litigant in challenges to arbitration agreements. The arbitrator found for the claimants in both class actions and awarded a total of approximately \$27 million in damages and attorney fees against Green Tree. The South Carolina Supreme Court rejected Green Tree’s challenge to the class-wide arbitration procedure, on the ground that class arbitration was permissible as a matter of state procedural law. In its argument to the U.S. Supreme Court, Green Tree asserted the existence of a special “enforce as written” rule under the FAA, contending that an arbitration agreement purportedly written to exclude class actions must, as a matter of judge-made FAA law, be enforced in exactly those terms: as an agreement that (1) requires arbitration and (2) bars the arbitrator from considering claims filed on behalf of a class. This in itself would be an extraordinary exemption from state consumer contract regulation, since “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”<sup>24</sup>

But the “enforce as written” argument goes beyond the class action issue. It has become commonplace for corporate contract drafters to attempt to load various self-serving terms into their arbitration agreements that go beyond the basic forum choice of arbitration over litigation. Most challenges to arbitration agreements now involve such things as remedy-stripping provisions, provisions requiring arbitration in distant venues, one-sided arbitration procedures and prohibitive costs just to name a few examples. Parties defending such arbitration agreements have taken to arguing that the FAA requires that such agreements be enforced “according to their terms” or “as written” as a matter of preemptive federal law, and that any state law doctrine which would deny full enforcement to all the terms grafted onto the arbitration agreement is preempted.<sup>25</sup>

With this rule, FAA preemption becomes a gaping maw that threatens to swallow all state contract law. A rule requiring enforcement of an agreement literally “according to its terms” does indeed conflict with a rule holding that, for instance, unconscionable terms will not be enforced, and such a federal enforcement rule would trump the state unconscionability rule. Because only a federal common law of contract defenses would withstand this preemption doctrine, the “enforce as

**The law of contract guarantees no one an absolute right to have a private written agreement enforced exactly “as written.”**

written” rule would effectively immunize arbitration agreements from any review whatsoever for fairness under state law.

The “enforce as written” rule misconstrues the FAA. The FAA permits drafting parties to control only one particular aspect of dispute resolution—the choice of arbitration or court. The Act expresses no “federal policy” against state laws which protect consumers (or employees or other adhering parties) from having unfavorable dispute rules imposed on them distinct from the simple choice of arbitration over litigation. There is no “national policy” favoring oppressive venue clauses, waiver of class action remedies, waiver of damages remedies, one-sided arbitration procedures or other unconscionable terms, even if such terms can be grafted onto an arbitration agreement. The Supreme Court has never adopted a blanket federal rule of contract law that arbitration agreements are to be enforced “according to their terms” *irrespective of general state contract law*. On the contrary, the Supreme Court has been careful to point out that “commercial arbitration agreements, *like other contracts*, are enforced according to their terms and according to the intentions of the parties.”<sup>26</sup> This means that, like other contracts, arbitration agreements are subject to a state’s “generally applicable contract defenses” and rules that “arose to govern . . . contracts generally[.]”<sup>27</sup>

The law of contract guarantees no one an absolute right to have a private written agreement enforced exactly “as written.” All contracts are subject to background state contract law, which will provide, as a matter of public policy, that certain terms cannot be enforced as written. The sole recognized purpose of the FAA is to place arbitration agreements “upon the same footing as other contracts,”<sup>28</sup> and “make arbitration agreements as enforceable as other contracts but not more so.”<sup>29</sup> This limitation precludes any notion that the FAA can serve as special national exemption from state contract law that applies to arbitration agreements but no other contracts.

## 2. *Bradley* and the “General Contract Law” Conundrum

As the U.S. Supreme Court explained in *Perry v. Thomas*,<sup>30</sup> “state law, whether of legislative or judicial origin” is saved from preemption if it “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally[.]”<sup>31</sup> Unfortunately, the concept of “generally applicable contract law” lends itself to misapplication. For example, in *Bradley v. Harris Research*,<sup>32</sup> the Ninth Circuit misapplied the concept to hold that a California statute barring unfair venue provisions in franchise agreements was preempted by the FAA. The court acknowledged that the state venue statute did not “single out” arbitration and would have applied irrespective of the presence of an arbitration agreement. But the court nevertheless concluded that “general” contract law under *Doctor’s Assoc.* means a law that applies to *every* contract, whereas the California statute “applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to ‘any contract.’”<sup>33</sup> Accordingly the court held the venue statute preempted by the FAA.

A growing number of cases make the same error made by the *Bradley* court, and thereby threaten to undermine broad swaths of state contract regulation.<sup>34</sup> Like the purported federal “enforce as written” rule, *Bradley’s* application of the “general/specific” distinction would have the effect of turning arbitration agreements into blanket exemptions from consumer protection and other statutes aimed at preventing contractual overreaching. An arbitration agreement could be written to mandate a waiver of injunctive relief, compensatory damages, or attorney fees guaranteed by a state consumer or antidiscrimination statute. Because those statutes are not “general contract law” they would be preempted, and the arbitration agreement “enforced as written” under the *Bradley* analysis.

But the *Bradley* definition of “general law” is incoherent. The suggestion that there are general contract defenses that are wholly distinct from statutes creating public policies as to specific categories of contracts makes no sense. Legislatures deal with specific problems, not abstractions, and therefore the vast majority of state contract legislation targets specified categories of contracts rather than “all contracts.” Longstanding “general” contract law holds that “[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable.”<sup>35</sup> Likewise, seemingly “general” judge-made contract defenses take their meaning from application to specific factual settings. A court is no more likely than is a legislature to find the need to apply protective doctrines like unconscionability to agreements freely negotiated between, say, Bank of America and Citibank, yet both the court and the legislature might well seek to apply unconscionability protection to an individual consumer doing business with either of those firms.<sup>36</sup> *Bradley’s* erroneous reasoning would apply *Southland’s* “general/specific” distinction to preempt virtually all state contract law where an arbitration agreement is involved.

### C. THE FAA AND FEDERALISM-BASED STATUTORY INTERPRETATION PRINCIPLES

#### 1. *Southland’s* Dubious Constitutionality and the Constitutional Avoidance Doctrine

A long-established principle of judicial restraint, the doctrine of constitutional avoidance, holds that “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”<sup>37</sup> As a corollary principle, “where an otherwise acceptable construction of a statute

would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>38</sup> The U.S. Supreme Court has failed to apply this principle in the *Southland* line of cases.

The FAA is a statute that, at bottom, governs *procedure*. The choice of arbitration over litigation does nothing more—or less—than “trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition” of arbitral procedures.<sup>39</sup> The Supreme Court has repeatedly emphasized the fundamentally “procedural”<sup>40</sup> nature of arbitration agreements: arbitration agreements are “in effect, a specialized kind of forum selection clause,”<sup>41</sup> in which a party compelled to arbitrate “does not forgo . . . substantive rights,” but “only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>42</sup> Thus, by holding that the FAA binds state courts, the *Southland* doctrine permits a federal restructuring of state dispute resolution procedures by supplanting such processes as a jury trial, discovery, and plenary appellate review. That the mechanism for this restructuring under the FAA relies on the mediating device of a private contract term does not in any way lessen the federal intrusion on state dispute resolution processes. The effect of *Southland* in cases involving no federal question, therefore, is to restructure state dispute resolution processes for state law claims.<sup>43</sup> Large numbers of cases in which a state would ordinarily open its courts to litigants are compelled into arbitration under *Southland*, irrespective of the presence of a substantive federal interest—that is, a federal interest other than an interest in the dispute resolution process itself.

The traditional means for Congress to guarantee certain procedures for federal claims is not to dictate procedure to state courts, but to create federal question jurisdiction to open the doors of the federal courthouse to the claim.<sup>44</sup> The authority of Congress to restructure state dispute resolution procedures has been found to exist only in a handful of exceptional cases where a state procedure directly impairs a substantive federal claim or defense.<sup>45</sup> Does the commerce power authorize Congress to restructure state dispute resolution processes for *state law* claims, even under the guise of “substantive” regulation of interstate contracts?

The constitutionality of such an asserted power is doubtful at best.<sup>46</sup> In *Johnson v. Fankell*, the Supreme Court “made it quite clear that it is a matter for each State to decide how to structure its judicial system.”<sup>47</sup> The *Johnson* Court was unanimous in observing that “respect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts.”<sup>48</sup>

When Congress displaces state dispute resolution procedures, in whole or in part, by creating exclusive jurisdiction in federal district courts or federal administrative tribunals,<sup>49</sup> it does so by asserting plenary *substantive* authority over a particular subject matter, and at least implicitly identifying a strong federal interest in that subject matter.<sup>50</sup> Thus, for example, collective bargaining agreements, although private contracts in form, have long been regarded as contracts carrying national public policy implications, due to the history of labor strife.<sup>51</sup>

What exactly is the federal interest in restructuring state dispute resolution procedures for state law claims? The FAA, in contrast to federal labor law, evinces a Congressional intent to bring private contractual arbitration agreements into general contract law, not to lift them out of it into a category of special federal concern. Not only has Congress failed, in the FAA or

otherwise, to identify alternative dispute resolution as a matter of pressing national concern that must be imposed on all levels of government, but one searches the FAA in vain for any substantive federal policy that might be at stake in such matters as whether a state will keep its courthouse doors open to state law wage and hour claims. Although the FAA identifies a federal nexus—contracts involving interstate commerce or admiralty—the Supreme Court has never found in the FAA an intent to assert plenary substantive authority over all such contracts, even those interstate commerce contracts containing arbitration agreements. The absence of substantive federal policy

**One searches the FAA in vain for any substantive federal policy that might be at stake in such matters as whether a state will keep its courthouse doors open to state law wage and hour claims.**

underlying the FAA explains why the FAA *does not even create federal question jurisdiction*. It has become commonplace to answer the “federal interest” question by waving the flag of the so-called “national policy favoring arbitration,”<sup>52</sup> but that is nothing more than a circular argument that fails to explain why Congress would, or constitutionally could, impose such a policy on the states.

*Southland* thus violates the principle of constitutional avoidance by adopting a construction of the FAA that raises serious constitutional doubts when an alternative construction—holding that the FAA does not bind state courts or preempt state law—is highly plausible, and is consistent with the Congress’s intent.

## 2. The Clear Statement Rule and the Presumption Against Preemption

In a closely related doctrinal development, in *Gregory v. Ashcroft*, the Supreme Court established a rule of statutory interpretation designed to protect state autonomy against federal encroachment: “If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute.”<sup>53</sup> A subset of this federalism-based “clear statement” rule is the long-established presumption against preemption: “where . . . the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States,’ congressional intent to supersede state laws must be ‘clear and manifest.’”<sup>54</sup>

One of the major failings of the *Southland* preemption doctrine is its total disregard for these principles. The FAA includes no “clear statement” of Congressional intent to preempt state law, or to intrude heavily on the states’ traditional control over general contract law. It is widely recognized that the “national policy favoring arbitration” was not the creation of the FAA as written by Congress, but was instead a judicial creation—federal common law—that took the FAA as a point of departure.<sup>55</sup> As has been clearly demonstrated in two scholarly dissenting opinions from the Supreme Court, the *Southland* opinion flouted the FAA’s historical record, which showed that Congress intended the FAA to be a procedural statute that neither applied in state court nor preempted state law.<sup>56</sup> Even the *Southland* majority opinion conceded the absence of anything that would meet the “clear statement” test, by going outside the FAA’s text to rely on a legislative history that was “not without ambiguities.”<sup>57</sup>

### III. The Role of State Judges in FAA Preemption Cases

State judges have a unique role in our constitutional system. They alone are assigned the delicate task of applying the law of multiple sovereigns (the law of their own states, of their sister states, and of the federal government) *while bound by oath to uphold not one, but two constitutions*—federal and state. At the same time, the U.S. constitutional system of checks and balances—both in its “horizontal” separation of powers, and its “vertical” structure of federal and state sovereignty—is designed so that a proper systemwide balance will emerge if each constitutional participant acts attentively toward its own institutional interests.<sup>58</sup> In this system, it is incumbent on state judges to remain particularly attentive to the balance between state autonomy and federal supremacy.

Under the Supremacy Clause, state judges are obligated to apply federal law.<sup>59</sup> But this obligation carries a concomitant power to interpret federal law independently. “[S]tate courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.”<sup>60</sup> While bound to follow an authoritative construction of a federal statute by the U.S. Supreme Court, state courts are not bound by lower federal court decisions.<sup>61</sup>

Preemption cases bring the sometimes competing duties of state judges to the forefront. Viewing preemption cases merely as issues of statutory interpretation overlooks the crucial constitutional dimension to preemption. A state (or federal) judge who rules that a state law is preempted by a federal statute strikes down that state law on constitutional grounds, to the same degree as if holding a state law unconstitutional as a violation of free speech under the first amendment. Preempting a state law is not merely “applying” an act of Congress, but involves two analytical steps: concluding (1) that the federal statute is intended to displace the state law or conflicts with it and (2) that the Supremacy Clause requires that the state law must give way to the federal statute. *Southland* was correct on this one point: a preempted state law “violates the Supremacy Clause” and is in that sense unconstitutional.

Preemption cases are highly significant for judges concerned about the issues of “judicial activism” and “judicial restraint.” Where the state law is statutory, to preempt it is to override the will of the democratically elected state legislature. If Congress has expressed a clear statement to the effect that contrary state law is preempted, the preemption decision represents the decision of the national legislature to exercise its supremacy over the state legislature. But what if Congress has not made such a clear statement? Where preemption results from a freewheeling judicial gloss on a silent statute, the override of state law is no less an instance of “judicial activism” than the creation of a new constitutional right under the due process clause. But more than that, it is judicial activism in disregard for federalism values.

Preemption under the FAA, because of its intrusion into state court procedures, should be viewed with particular caution by state judges.

When pre-emption [sic] of state law is at issue, we must respect the principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law. This respect is at its apex when we confront a claim that federal law requires a state to undertake something as fundamental as restructuring the operation of its courts.<sup>62</sup>

The statutory language of the FAA says nothing about preemption, and even the *Southland* majority admitted that the legislative history was at best ambiguous on the intent to preempt. To be sure, the U.S. Supreme Court has decided that the FAA preempts certain state laws, and those rulings bind state judges under the Supremacy Clause. But in many specific cases, the answer to the preemption question is unclear; litigants may be pressing to expand FAA preemption into new applications. State judges who believe in “judicial restraint” and deference to the will of their state legislatures should be extremely hesitant to *expand* FAA preemption, and hesitant even to *apply* FAA preemption in close cases. Supreme Court decisions asserting FAA preemption can be applied faithfully by state judges, yet narrowly. The state judge’s role under the state constitution is consistent with a rigorous application of the presumption against preemption and the doctrine of constitutional avoidance.

#### **IV. A Federalism-Based, “Strict Constructionist” Approach to FAA Preemption**

Questions of preemption under the FAA are all fundamentally about whether state law can control the enforceability of an arbitration agreement. Although these enforceability questions take a variety of forms, they all fall into one of two broad categories: contract defenses and arbitrability questions. First, contract defenses involve either “formation questions”—whether a contractual agreement to arbitrate was made at all—or “validity” questions, which consider whether the arbitration agreement can be held unenforceable because unfair terms make it either unconscionable or void as against public policy. Second, “arbitrability” issues concern legal rules holding that a particular type of claim or remedy is unsuitable for arbitration. Some recurring issues raise both contract defense and arbitrability questions, but do so in a way that is analytically separable. For example, an arbitration agreement written by a company to prevent any consumer from bringing a class action against it may be held invalid on unconscionability grounds. But the issue of whether an arbitrator can issue classwide relief is an arbitrability question.

In this section, I argue that the federalism principles of constitutional avoidance and the presumption against preemption should guide courts—particularly state courts—in the resolution of both contract defense and arbitrability questions.

##### **A. CONTRACT DEFENSES: FORMATION, UNCONSCIONABILITY AND PUBLIC POLICY**

Properly understood, contract defense questions can—and should—always be analyzed as matters of state law, and should never be preempted by the FAA, so long as the state contract law in question does not expressly single out arbitration agreements. This is made clear by FAA § 2 which “saves” all “grounds for the revocation of any contract,” as subsequently explained by the Supreme Court in *Perry*, *Allied Bruce*, and *Casarotto*. Unconscionability doctrine and the doctrine of voidness as against public policy are two doctrines of general contract law that FAA § 2 permits to be applied to arbitration agreements. The argument that such doctrines are preempted by an “enforce as written” rule or the *Bradley* misconception of “general law” are two examples of aggressive, strained readings of the FAA that push it toward ever greater preemption—such interpretations would override even the application of general state contract law to arbitration agreements, federalizing the field completely. They should be rejected under the federalism principles described above.

The following are specific recurring examples of issues that should routinely be resolved as validity questions controlled by state law.

### **1. Remedy-Stripping Provisions**

Many arbitration agreements join the arbitration requirement with the limitation that the arbitrator cannot award certain remedies, such as non-economic damages, attorney fees, and, particularly, punitive damages. Such “remedy-stripping” clauses should never be “enforced as written.” The Supreme Court has itself made clear that a decision to enforce an adhesive predispute arbitration agreement presumes that “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute.”<sup>63</sup> For present purposes, the key point is that the grounds for invalidating such agreements are purely state law principles. Courts properly consider damages remedies—including punitive damages—to be “important substantive right[s].”<sup>64</sup> Contractual attempts to force an adhering party (usually a consumer or employee) to waive such rights in advance have routinely been held invalid under the general state law principle of unconscionability.<sup>65</sup> Alternatively, such prospective waivers should be deemed void as against public policy.<sup>66</sup>

### **2. Unfair Arbitration Procedures**

The specific arbitration procedure spelled out in the contract may, if it is sufficiently unfair, provide another basis to question the validity of an arbitration agreement. While “generalized attacks” on the adequacy of arbitration procedures are not a basis to invalidate a pre-dispute arbitration clause, claims of procedural inadequacy of arbitration under the terms of a specific arbitration agreement may be “resolv[ed] in specific cases.”<sup>67</sup> Procedural overreaching has been held in some cases to create “a sham system unworthy even of the name of arbitration.”<sup>68</sup> Again, the key point is that such contractual unfairness is simply an instance of unconscionability, and, therefore, a matter of state law controlled by the state’s unconscionability doctrine.<sup>69</sup>

### **3. Imposition of Burdensome Arbitration Fees**

The question of who will bear the forum fees of arbitration pursuant to predispute adhesion contracts has emerged as an important issue in the last few years. Whereas access fees to a judicial forum are limited to the initial filing fee and possibly jury fees, these pale in comparison to the filing and administrative charges for an arbitration, plus the arbitrator’s fees, which can amount to thousands, or even tens of thousands of dollars.<sup>70</sup> Moreover, if the plaintiff lost, he or she could be assessed that entire amount by the arbitrator. In the absence of a contractual allocation of costs and fees, traditional arbitration practice supplies a “default rule” under which each party pays half the arbitrators’ fees unless the arbitrators, in their discretion, order the losing party to pay all the fees. Thus, where the arbitration agreement does not mention the allocation of arbitrator fees, it is assumed they will be assessed, at least in part, against the adhering party—the consumer or employee.<sup>71</sup>

A number of courts have taken exception to the idea that a plaintiff could be forced, in essence, to pay thousands of dollars to the adjudicator to resolve important rights against the drafter of an adhesive employment or consumer contract, and have imposed a blanket rule against enforcing such agreements.<sup>72</sup> The U.S. Supreme Court, in *Green Tree Fin. Corp. v.*

*Randolph*,<sup>73</sup> recognized that prohibitive arbitration fees might run afoul of the principle that arbitration agreements cannot force an employee to “forego the substantive rights afforded by the statute,” but nevertheless rejected a blanket prohibition against express or implied “fee-sharing” arbitration agreements. Instead, the *Green Tree* Court held that the plaintiff had failed to make an individualized showing that the fees were prohibitive or deterred *her* from pursuing her statutory claims under the federal Truth in Lending Act.<sup>74</sup>

*Green Tree* is best understood as a limited decision about arbitrability of Truth in Lending Act claims in particular, or possibly federal statutory claims more broadly. But it is not a decision that binds state courts on determinations of state unconscionability principles, under which the arbitration forum-fee issue should normally be decided. To construe *Green Tree* as binding on state courts would be to treat it as creating a federal common law of unconscionability—that a finding of unconscionability will not be made on the basis of a cost claim without specific proof—that arguably preempts state law on the subject. Such a construction of *Green Tree* would fly in the face of the presumption against preemption, and should therefore be rejected.

#### **4. Venue Provisions**

Many arbitration agreements now appear bundled with venue clauses, requiring that the arbitration take place in a distant state that maximizes convenience of the drafting party while discouraging the plaintiff from pursuing her claims.<sup>75</sup> To the extent that the FAA protects a contractual forum choice, it is the choice of arbitration over litigation; the FAA expresses no preference about *where* the arbitration should take place. The enforceability of a venue provision in an arbitration agreement is thus a separate question not governed by the FAA. Many states have statutes prohibiting out-of-state venue provisions in certain kinds of contracts, as well as statutory or common law policies disfavoring oppressive venue clauses in contracts.<sup>76</sup> These state policies are analytically separate from the question of arbitration *per se*, and are therefore not preempted by the FAA.

#### **5. Mutuality and Contract Formation**

Numerous courts have applied state contract principles to deny enforcement of arbitration agreements on a variety of contract formation issues. Where the agreement requires the adhering party, but not the drafter, to arbitrate claims, courts have analyzed these kinds of agreements as reflecting an absence of mutuality of obligation, and therefore conclude either that there is no agreement at all or that the term is one-sided and unconscionable.<sup>77</sup> The FAA requires a “written agreement” to arbitrate as a prerequisite to an order compelling arbitration.<sup>78</sup> Courts have divided on the issue of whether notices or other unexecuted writings purporting to make unilateral contract modifications—such as employee handbooks or “bill stuffers”—can create a binding arbitration agreement.<sup>79</sup> However a court resolves the issue, it is plainly a question of the state law of contract formation, and not purported “federal common law” under the FAA.<sup>80</sup>

#### **B. ARBITRABILITY: IS THE CLAIM OR REMEDY SUITED FOR ARBITRATION?**

One would expect arbitrability questions to be matters of state contract law under the principle that “arbitration is a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”<sup>81</sup> Arbitrability questions may have been needlessly complicated by overheated dicta in an early

arbitration decision that spoke of the creation of “a federal [judge-made] substantive law of arbitrability,” under which “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>82</sup> The U.S. Supreme Court has properly retreated from the implication that state law would be entirely displaced in construing arbitration agreements—an extreme position that flies in the face of the FAA’s § 2 savings clause. In *First Options of Chicago v. Kaplan*, the Supreme Court held that courts “generally” should apply the state law of contract formation to determine what the parties agreed to arbitrate.<sup>83</sup> The presumption in favor of applying state law to arbitrability questions is strengthened by the presumption against preemption.

The following two arbitrability issues are prominent in recent cases.

### **1. Individual Claims and Remedies**

In two recent cases, the California Supreme Court decided that statutory “public policy” claims could not be compelled into arbitration. In *Broughton v. Cigna Healthplans*,<sup>84</sup> the court held that claims for injunctive relief under the state Consumer Legal Remedies Act designed to protect the public from deceptive business practices were not subject to arbitration. In *Cruz v. Pacificare Health Sys.*,<sup>85</sup> the court extended that holding to preserve claims to enjoin unfair competition and misleading advertizing under the state Business and Professions Code. According to the *Broughton* and *Cruz* courts, such claims were unsuitable for arbitration because (1) these statutory injunction claims were “for the benefit of the general public rather than the party bringing the action” and (2) courts have “significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators.”<sup>86</sup> For these reasons, the court concluded there was an inherent conflict between arbitration and the statutory remedies, which gave rise to the inference that the state legislature intended to withhold such public injunction claims from arbitration.

*Cruz* and *Broughton* raise the question of how a state legislature can decide to withhold a public injunction claim from arbitration when *Southland* and *Perry* hold that the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>87</sup> The California court’s answer to that question is to assert that state legislatures have the same power that Congress does, to make certain kinds of claims non-arbitrable, either expressly or by implication by creating a right or remedy having an “inherent conflict” with arbitration.<sup>88</sup>

At first blush, the California court’s reasoning raises eyebrows. After all, the Supremacy Clause makes clear that Congress and state legislatures are not on equal footing when it comes to creating exceptions to a federal statute. But on closer inspection, *Cruz* and *Broughton* are absolutely right. To begin with, as the court is quite correct in pointing out, the U.S. Supreme Court “has never directly decided whether a legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests.”<sup>89</sup> All of the FAA preemption cases decided by the U.S. Supreme Court, to date, have involved private damages claims, not public injunctions, so the Court has never had occasion to determine whether broad injunctive relief affecting third parties or the public can be issued by arbitrators. What the Court has said, however, is that compelled arbitration of statutory claims is appropriate insofar as the claimant “does not forgo . . . substantive rights.”<sup>90</sup> Absent an

express guarantee by the Supreme Court that arbitrators can issue and administer public injunctions, a state court is free to reach the common-sense, highly practical conclusion that arbitrators cannot do so. In such a case, compelling public injunction claims into arbitration would indeed “forgo substantive rights.”

*Broughton* and *Cruz* exemplify, moreover, the best approach of a state court to the federalism issues surrounding FAA preemption. The California court’s correct conclusion that the FAA has not authoritatively been held to encompass public injunction claims is significant, because under the Tenth Amendment to the U.S. Constitution, states retain *by default* all powers not removed from them—either by constitutional provisions or by statutory preemption under the Supremacy Clause.<sup>91</sup> By refusing to extend the FAA to a new area—public injunction rather than private damages claims—the California Supreme Court (albeit without explicitly acknowledging this) properly applied the federalism-based presumption against preemption and the doctrine of constitutional avoidance. The presumption against preemption should work against *any* extension

**The presumption against preemption should work against *any* extension of the FAA into a new area, in the absence of a clear statement from Congress of an intent to upset the normal federal-state balance.**

of the FAA into a new area, in the absence of a clear statement from Congress of an intent to upset the normal federal-state balance. Here, a state’s power to administer its own dispute resolution system, and allocate certain substantive state claims to specific state remedial and procedural structures, would be undermined by extension of FAA preemption. Similarly, this aspect of *Southland*—dictating intrastate dispute resolution mechanisms

for state law claims—is the most constitutionally dubious application of FAA preemption, and by upholding the authority of the state in this case, the California Supreme Court avoided the constitutional issue—an issue that has never expressly been decided by the U.S. Supreme Court.

## 2. Class Actions

The question of whether a state law preserving a plaintiff’s right to pursue classwide relief is preempted by the FAA is within the scope of the issues presented to the U.S. Supreme Court in *Green Tree Fin. Corp. v. Bazzle*, which was decided on June 23, 2003.<sup>92</sup> In *Bazzle* itself, South Carolina procedural law permitted an arbitrator to certify a class and issue classwide relief; many other states do not allow class-wide arbitrations.<sup>93</sup> Either way, the issue is essentially whether the drafting party can use an arbitration agreement to prevent class actions being brought against it. The best answer to this question should be “No.” The right to proceed in the form of a class action, aside from promoting state judicial policies in favor of the expeditious resolution of large numbers of disputes, is also a substantial right for the litigant. “The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”<sup>94</sup> Adhesive, predispute waivers of class action remedies should be void as against public policy, or unconscionable, just like any substantive waiver of a damages remedy.<sup>95</sup> Thus, if class actions are not “arbitrable” under state law, a plaintiff should have the right to proceed in court on a class claim.

### C. Regulation of Arbitrators

California has recently enacted ethics rules governing arbitrators and companies that provide arbitration services.<sup>96</sup> Other states could follow suit. Litigation is already beginning to percolate over whether such state regulation of arbitrators is preempted by the FAA. Clearly, the FAA should not be held to preempt the California law or any reasonable state regulation of arbitrators or arbitration providers.

The FAA does not occupy the field of regulating arbitration. Therefore, state arbitrator regulation is not preempted unless it “stands as an obstacle”<sup>97</sup> to the congressional purpose of the FAA, of making arbitration agreements “as enforceable as other contracts, but not more so.”<sup>98</sup> Moreover, arbitrators are, in important ways, adjuncts to the state courts, since they displace the state courts as the venue for resolution of disputes in most of those cases where arbitration is compelled.<sup>99</sup> Therefore, arbitrator regulation comes within the states’ sovereign interest in controlling its own judicial processes. Finally, since contemporary arbitrators are almost invariably lawyers, the states’ power to regulate arbitrators is closely related to their historically sovereign power to regulate the practicing bar.<sup>100</sup> For these reasons, and in light of the presumption against preemption, most state regulation of arbitrators should not be deemed preempted.<sup>101</sup>

### V. Conclusion

It is an open secret that the “national policy favoring arbitration” was not the creation of Congress in enacting the FAA in 1925, but is rather an “edifice of [the U.S. Supreme Court’s] own creation” starting in the 1980s. Various policies *might* motivate the judicial creation of a pro-arbitration doctrine, primary among them being (1) the desire to remove cases from crowded court dockets and (2) a belief that allowing companies to use private contracts to control disputes with their customers and employees creates a socially beneficial form of economic deregulation. Whatever might be said for these policies, it is noteworthy that they are never mentioned as justifications in judicial decisions.<sup>102</sup> We all know that docket control and deregulation are there as motivations, but we also know that the consistent unwillingness of any court to admit those justifications stems from a sense of judicial propriety. Unlike the judge’s duty to sustain the Constitution’s federal structure, they are not proper policies for courts to impose.

Even if federal courts overindulge an impulse to pursue such pro-arbitration policies at the expense of the proper, judicially cognizable value of promoting federalism, the Supremacy Clause does not require state courts to follow suit. Once the conflict between state and federal laws leaves the legislative sphere and enters the courts, the most natural spokespersons for the autonomy and integrity of state contract law are state judges. If they do not serve as the guardians of federalism against excessive inroads into state contract law, who will?

## ENDNOTES

- 1 The leading federalism decisions, which have limited congressional commerce power, strengthened state “sovereign immunity” and revived the Tenth Amendment, are well known. *See, e.g.*, Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002).
- 2 465 U.S. 1 (1984).
- 3 9 U.S.C. §§ 1-16 (1994) [hereinafter “FAA”].
- 4 *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)); *Johnson v. Fankell*, 520 U.S. 911, 919 (1997); *see also* *Felder v. Casey*, 487 U.S. 131, 150 (1988).
- 5 *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977)).
- 6 501 U.S. 452 (1991).
- 7 *Gregory*, 501 U.S. at 458; *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *Gregory* as setting forth the “first principles” of federalism); *Id.* at 581 (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states can serve as “laboratories for experimentation” in social policy)).
- 8 *New York v. United States*, 505 U.S. 144, 188 (1992).
- 9 *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORN. L. REV. 767-68 (1994).
- 10 514 U.S. 549 (1995).
- 11 529 U.S. 598 (2000).
- 12 *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).
- 13 *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)); *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).
- 14 *See* *Doctor’s Assoc.*, *id.* at 687 (nullifying Montana law requiring certain formalities for all arbitration agreements); *Allied-Bruce*, 513 U.S. at 281 (nullifying Alabama law making predispute arbitration agreements per se invalid).
- 15 *See* *Southland*, 465 U.S. at 12 (nullifying California law making arbitration agreements invalid for claims under franchise statute); *Perry*, 482 U.S. 483 (same for statutory wage claims).
- 16 *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2003) at 12-13, and App. A, B.
- 17 *See* *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
- 18 NCCUSL, Drafting Committee for RUAA, Adhesion Arbitration Agreements and the RUAA, (last modified Aug. 23, 2000) <<http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm>>.
- 19 FAA § 4 (emphasis added).

- 20 489 U.S. 468, 477-78 (1989).
- 21 514 U.S. 52, 59 (1995).
- 22 *See* Volt, 489 U.S. at 476-77; Mastrobuono, 514 U.S. at 62.
- 23 539 U.S. 444 (2003).
- 24 *Amchem Prod. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotations omitted); *see* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28-33 (2000).
- 25 *See, e.g., West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-80 (W. Va.), *cert. denied*, 123 S. Ct. 695 (2002) (drafting party argued that FAA preempts application of state unconscionability doctrine to arbitration agreement purporting to waive punitive damages); *Discover Bank v. Superior Ct.*, 105 Cal. App. 4th 326, 129 Cal. Rptr. 2d 393, 408 (Ct. App. 2003) (suggesting that FAA preempts any departure from enforcing arbitration agreements as written).
- 26 *First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995) (emphasis added, internal quotations omitted); *Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (“[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”) (emphasis added).
- 27 *Supra* note 13 at 681, 687.
- 28 H.R. No. 96, 68th Cong., § 1 (1924); *Volt Info. Sci. v. Stanford Univ.*, 489 U.S. 468, 479 (1989).
- 29 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).
- 30 482 U.S. 483 (1987).
- 31 *Id.*; *Doctor’s Assoc.*, 517 U.S. at 687; *Allied-Bruce*, 513 U.S. at 281.
- 32 275 F.3d 884 (9th Cir. 2001).
- 33 275 F.3d at 890.
- 34 *See* *Ting v. AT & T*, 319 F.3d 1126 (9th Cir., 2003) (provision of California consumer protection statute prohibiting contractual waiver of class action remedy is preempted because consumer protection statute is not “general contract law”); *KKW Enter. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1999) (holding FAA preempts venue provision in state franchise law); *Doctor’s Assoc., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same); *see also* Brief of Appellant in *Eastman v. Conesco Fin. Servs. Corp.*, Wis. Sup. Ct. No. 01-1743, bankruptcy stay entered (2003) (arguing that a class action right bestowed on consumers by a consumer protection law is preempted by the FAA because *Southland* “saves” from preemption only “general” contract law, whereas a consumer protection statute is not “general”).
- 35 Restatement (Second) of Contracts § 178(1) (1981).
- 36 The Uniform Commercial Code, which has been adopted in some form in 49 states, is about as “general” as contract law gets. *See* 1 STEWART MACAULAY, ET AL., *CONTRACTS: LAW IN ACTION* 37 (1995). Yet even the U.C.C. would fail the “test” for generality adopted in *Bradley* and similar cases: the U.C.C. does not apply to “all contracts”—even taking all nine of its articles together—but rather is limited to “certain” commercial transactions. *See* U.C.C. preamble, reprinted in *CONTRACT LAW: SELECTED COURSE MATERIALS* 7 (Burton & Eisenberg eds., 2002). The limited scope of the U.C.C. is even more apparent when viewing its various articles separately: Article II of the U.C.C., of course, limits its scope to transactions in goods. *See* U.C.C. § 2-102.

- 37 Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).
- 38 Solid Waste Agency of N. Cook County v. Army Corps of Eng., 531 U.S. 159, 173 (2001) (internal quotations omitted). In SWANCC, a federal agency interpreted the Clean Water Act in a manner which raised a federalism-based constitutional question by “invok[ing] the outer limits of Congress’ power[.]” *Id.* at 172. The Court gave a narrowing construction to the statute to avoid the constitutional issue. *Id.* at 173-74.
- 39 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (internal quotations omitted).
- 40 Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 481-82 (1989) (overruling determination in Wilko v. Swan, 346 U.S. 427 (1953), that arbitration affects substantive rights).
- 41 Rodriguez, 490 U.S. at 482-83 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)); EEOC v. Waffle House, 534 U.S. 279, 122 S. Ct. 754, 765 (2002) (arbitration agreement is “effectively a forum selection clause”); Circuit City Stores v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 1313 (2001) (“by agreeing to arbitrate. . . a party does not forgo . . . substantive rights”); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (same); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630 (1985) (same).
- 42 *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)), quoted in Circuit City Stores v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 1313 (2001).
- 43 *See* Allied-Bruce, 513 U.S. at 285 (Scalia, J., dissenting) (*Southland* causes “a permanent, unauthorized eviction of state court power to adjudicate a potentially large class of disputes”).
- 44 To the extent there is a federal interest in protecting arbitration for federal claims filed initially in state court, that interest is adequately protected, even without *Southland* preemption, by removal jurisdiction. *See* 28 U.S.C. § 1441.
- 45 Just as state courts may not discriminate against federal rights in exercising jurisdiction, *see* Testa v. Katt, 330 U.S. 386 (1947), so they may not uniquely disadvantage or discriminate against federal “rights of recovery” by imposing particular procedural obstacles. *See* Howlett v. Rose, 496 U.S. 356 (1990) (state municipal immunity doctrine against § 1983 claims in state court held preempted); Felder v. Casey, 487 U.S. 131 (1988) (application of state notice-of-claim statute for § 1983 claims in state court held preempted). However, in the absence of such discrimination, “federal law takes the state courts as it finds them.” Howlett, 496 U.S. at 372. Thus, it is doubtful whether any federal power to control neutral state procedures in federal question cases exists at all. *See* Johnson v. Fankell, 520 U.S. 911, 919 (1997) (neutral state rule denying interlocutory appeals not preempted by federal rule allowing such appeals for § 1983 defendants).
- 46 *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 42-52 (1999) (arguing that Congress lacks constitutional authority to regulate state procedures for state law claims); Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L. J. 947 (2001) (same); A Review of the Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary, 105th Cong. 160 (1997) (statement of Laurence H. Tribe) (“For Congress directly to regulate the procedures used by state courts in adjudicating state law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism.”).
- 47 520 U.S. 911, 922 n. 13 (1997).
- 48 *Id.* at 922.
- 49 *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78aa (original jurisdiction placed exclusively in federal district courts); National Labor Relations Act §§ 3, 10, 29 U.S.C. §§ 153, 160, (original jurisdiction placed exclusively in federal administrative agency).
- 50 *See* NLRA § 1, 29 U.S.C. §151 (identifying federal interests).

- 51 See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 577-78 (1960).
- 52 *Southland*, 465 U.S. at 10
- 53 501 U.S. at 460 (internal quotations omitted).
- 54 *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)). "To the extent that federal statutes are ambiguous, we do not read them to displace state law." *Allied-Bruce*, 513 U.S. at 292 (Thomas, J., dissenting); *Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted [sic] by a federal statute unless that was the clear and manifest purpose of Congress").
- 55 See *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) ("[T]he 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.").
- 56 See *Southland*, 465 U.S. at 23-31 (O'Connor, J., dissenting); *Allied-Bruce*, 513 U.S. at 285-95 (Thomas, J., dissenting). For additional historical evidence supporting the arguments in the O'Connor and Thomas dissents, see Schwartz, *supra* note 16, at 19-31.
- 57 465 U.S. at 12.
- 58 See, e.g., *The Federalist No. 28* (Hamilton) at 180-181 (C. Rossiter ed. 1961) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); *Id. No. 51* (Madison) at 323 ("The [federal and state] governments will control each other, at the same time that each will be controlled by itself.").
- 59 U.S. Const. art. VI, cl. 2 ("The judges in every state shall be bound" by federal law "made in pursuance" of the Constitution); *Printz v. United States*, 521 U.S. 898, 908 (1997); *Testa v. Katt*, 330 U.S. 386 (1947).
- 60 *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).
- 61 "This court is in any event under no obligation to follow federal lower court precedents interpreting acts of Congress when we find those precedents unpersuasive." *Graham v. Scissor Tail, Inc.*, 28 Cal. 3d 807, 830, 623 P.2d 165, 179 (1981); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *Bodzai v. Arctic Fjord, Inc.*, 990 P.2d 616, 619 (Alaska 2000); *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 894 (Colo. 2000); *State v. Dwyer*, 332 So. 2d 333 (Fla. 1976); *Flanagan v. Prudential-Bache Sec., Inc.*, 67 N.Y.2d 500, 506, 495 N.E.2d 345, 348 (1986); *Janette M. v. Blue Cross/Blue Shield*, 662 So. 2d 498, 501 (La. Ct. App. 1995); *Northpointe Plaza v. City of Rochester*, 457 N.W.2d 398, 403 (Minn. Ct. App. 1990), *aff'd*, 465 N.W.2d 686 (Minn. 1991); *Kiefer v. Continental Airlines*, 882 S.W.2d 496, 502 (Tex. App. 1994).
- 62 *Johnson v. Fankell*, 520 U.S. at 922 (internal quotations and citations omitted); accord *Howlett v. Rose*, 496 U.S. 356, 373-74 (1990) (the states' "great latitude to establish the structure and jurisdiction of their own courts" is "fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.").
- 63 *Mitsubishi*, 473 U.S. at 628; *Gilmer*, 500 U.S. at 31.
- 64 *Mastrobuono v. Shearson-Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 (1995) (the right to punitive damages "is an important substantive right").
- 65 See, e.g., *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138 (Ct. App. 1997); *Armendariz v. Foundation Health Psychare Serv.*, 99 Cal. Rptr. 2d 745 (2000).

- 66 See Cal. Civ. Code § 1668; Restatement (Second) of Contracts § 195 (1981).
- 67 Gilmer, 500 U.S. at 33.
- 68 Hooters of Amer., Inc. v. Phillips., 173 F.3d 933, 940 (4th Cir. 1999).
- 69 See, e.g., Graham v. Scissor Tail, Inc., 28 Cal.3d 807, 171 Cal. Rptr. 604, 615-17 (1981).
- 70 For example, a four-day arbitration of a small-to-moderate employment discrimination case before the American Arbitration Association claiming compensatory and punitive damages of, for example, \$200,000, would cost about \$12,000. See Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 44 n. 30 (1997) (assuming an arbitrator's hourly rate of \$350 per hour). AAA, National Rules for the Resolution of Employment Disputes (Nov. 2002), <[http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules\\_Procedures\National\\_International\..\focusArea\employment\employment\\_rules3.html](http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\focusArea\employment\employment_rules3.html)>.
- 71 See, e.g., IAN MACNEIL, ET AL., FEDERAL ARBITRATION LAW § 31.2.4, at pp. 31.12-13 (1999 ed.).
- 72 See Armendariz v. Foundation Health Psychare Serv., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745 (2000); see also Shankle v. B-G Maintenance Mgmt. of Colo., 163 F.3d 1230, 1234-35 (10th Cir. 1999); Paladino v. Avnet Computer Tech., 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., joined by Tjoflat, J., concurring); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1468, 1484 (D.C. Cir. 1997).
- 73 531 U.S. 79 (2000).
- 74 *Id.* at 91.
- 75 See, e.g., Bradley v. Harris Research, 275 F.3d 884 (9th Cir. 2001) (contract requiring California franchisee to arbitrate in Utah); In re Management Recruiters Int'l, Inc. v. Nebel, 765 F. Supp. 419 (N. D. Ohio 1991) (contract requiring California employee to arbitrate in Ohio).
- 76 See, e.g., Cal. Bus. & Prof. Code § 20040.5 (prohibiting out-of-state forum selection clause in franchise agreements); Conn. Gen. Stat. 42-133g (a), 42-133f (f) (same); 1 Restatement (Second), Conflict of Laws § 187(2) (1971).
- 77 See, e.g., Showmethemoney Check Cashers, v. Williams, 27 S.W.3d 361 (Ark. 2000) (refusing to enforce arbitration clause in “payday loan” contract that required the borrower to submit her claims to arbitration but allowed the lender to pursue a collection action in court, due to “lack of mutuality”); Armendariz v. Foundation Health Psychare Servs., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 769 (2000); Arnold v. United Co. Lending Corp., 204 W.Va. 29, 511 S.E.2d 854, 861 (1998); Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997) (applying state contract principles to hold non-mutual arbitration agreement unenforceable because unsupported by consideration); see also Floss v. Ryan's Family Steak Houses, 211 F.3d 306 (6th Cir. 2000) (applying state contract principles of “illusory” promises to deny enforcement to arbitration agreement requiring the employee to arbitrate his claims before a private arbitration company that specifically reserved the right to modify the rules and procedures of the arbitration without notice to or consent from the employee).
- 78 FAA § 1.
- 79 Compare Heurtebise v. Reliable Bus. Computers, 550 N.W.2d 243 (Mich. 1996) (provision in employee handbook disclaiming the creation of contractual rights vitiated the “agreement” element of the handbook's arbitration provision); Badie v. Bank of Amer., 67 Cal. App. 4th, 79 Cal. Rptr. 2d 779 (1998) (credit card “bill-stuffer” containing arbitration agreement failed to demonstrate that “the parties intended to contract” about ADR); and Patterson v. Tenet Healthcare, 113 F.3d 832 (8th Cir. 1997) (employee handbook did establish binding arbitration agreement).
- 80 See First Options of Chicago v. Kaplan, 514 U.S. 938, 943 (1995) (contract formation questions pertaining to

arbitration agreements are “generally” resolved under state law); *see also* Casarotto, 517 U.S. at 686-87 (“state law may be applied if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”) (emphasis in original, internal quotations omitted).

81 First Options of Chicago v. Kaplan, 514 U.S. 938, 943 (1995).

82 Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 & n. 32 (1983).

83 514 U.S. at 944-45. To be sure, a certain contradictory quality remains. The Court went on to qualify that general rule by establishing two specific federal common law presumptions: ambiguity over whether the parties agreed to arbitrate a dispute on the merits would be resolved in favor of arbitration, whereas ambiguity over whether the parties agreed to arbitrate “arbitrability”—whether a court or the arbitrator gets to decide who decides the merits—should be resolved in favor of leaving that issue to the court. *Id.* How a court should resolve the dispute over whether a court or arbitrator decides, however, is presumably left to state law.

84 21 Cal. 4th 1066, 988 P.2d 67 (1999).

85 30 Cal. 4th 303, 66 P.3d 1157 (2003).

86 Cruz, 66 P. 2d at 1162-63 (quoting Broughton, 988 P.2d at 77-78).

87 Southland, 465 U.S. at 10.

88 *See* Cruz, at 1162-63; Broughton, 988 P.2d at 72 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)).

89 Cruz, 66 P. 2d at 1163 (quoting Broughton, 21 Cal. 4th at 1083-84).

90 *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)), quoted in Circuit City Stores v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 1313 (2001).

91 U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

92 539 U.S. 444 (2003).

93 *See* Sternlight, *supra*, 42 WM. & MARY L. REV. at 38-42, 55-62.

94 Amchem Prod. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotations omitted).

95 *See, e.g.*, West Virginia ex rel. Dunlap v. Berger, 567 S.E.2d 265, 279-80 (W. Va.), *cert. denied*, 123 S. Ct. 695 (2002) (predispute waiver of class action unconscionable); *see also* Cruz v. Pacificare Health Systems, *supra* (arbitration agreement not enforceable against claim involving remedy designed to protect the public).

96 *See* Cal. Code Civ. Proc. §§ 1281.92, 96 (2003); *see also* Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2004).

97 *See, e.g.*, Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000).

98 Prima Paint, 388 U.S. at 404 n.12; H.R. No. 96, 68th Cong., § 1 (1924) (FAA places arbitration agreements on “same footing as other contracts”); Volt, 489 U.S. at 479 (same).

99 Arbitration is often adjunct to federal litigation as well, but the vast majority of litigation takes place in state courts. *See* Parmet, *supra* note 46, at 58 n. 351.

100 *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (“the regulation of the activities of the bar is at the core of the State’s power to protect the public.”).

101 Such regulation should be preempted, if at all, only if it has the purpose or effect of restricting the supply of arbitrators to the point where it is impracticable or impossible for parties to have their claims arbitrated.

102 Well, almost never. *See Securities Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989) (“[T]he hope has long been that the [FAA] could serve as a therapy for the ailment of the crowded docket.”).

## ORAL REMARKS OF PROFESSOR SCHWARTZ

Well, I would like to begin by thanking the Roscoe Pound Institute. It's a real honor for me to be speaking here, particularly given the eminence of the audience. I should tell you the only time I have ever spoken to groups of judges, I was actually down there, and the judges were up here. By the time I had gotten about this far into what I had to say, I was interrupted. In fact, wouldn't you all be more comfortable if we just switched places?

I want to start with something very old, and that is federalism. That is the great principle that seems to get lost in the shuffle in FAA preemption cases. Let me start by quoting *Gregory v. Ashcroft*, because supposedly the U.S. Supreme Court cares about federalism, and they have been leading us through what many people say is a federalism revival.

And it begins with *Gregory v. Ashcroft* in 1991, and it is an excellent, fascinating opinion, where Justice O'Connor writes quite eloquently, I think, in describing the values of federalism, "This federalist structure of joint sovereigns preserves for the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the states in competition for a mobile citizenry."

So, we really have the idea of what federalism is all about there. The thing that we have to bear in mind is that preemption is about nullifying state law. It is a direct attack on state autonomy. Although our federal system assumes that that will happen sometimes, preemption issues are always federalism issues. And therefore, I think, as state judges you have a special responsibility, a special public trust that is unique in our federal system. I do say this in my paper, but it's worth repeating. Of course all public officials—state, federal, and local—are sworn to uphold the Constitution of the United States in discharging their duties. But state judges alone are sworn to uphold not one, but two constitutions, and that makes you unique. You have the unique balancing act that you have to do. That balancing act really comes up in a prominent way in these preemption cases.

In preempting state law, a state judge may well be treading on state constitutional prerogatives and state sovereignty, and therefore I think it is incumbent on state judges in particular to be especially careful. You should be, I would say, as careful and circumspect in preempting a state law as you would be in a case asking you to create a new constitutional right in order to strike down a state statute, because you are really doing the same thing. In holding a state law preempted, you are saying that because of a conflict between a state and a federal law, the state law is unconstitutional in effect, under the Supremacy Clause. So, a freewheeling interpretation, an overall broad interpretation of a federal statute that holds a state statute preempted, is a form of judicial activism really, and I think that is worth pointing out.

Now, the other point I want to make about federalism goes back to the great historical principles, the institutional arrangements of federalism built into our Constitution. This goes back to high school civics, and it goes back to constitutional law in law school. It assumes that the institutional actors in our federal system will promote the interests of their respective institutions. The system was designed to work that way. You get it in *The Federalist Papers*. For

example, Alexander Hamilton, in Federalist number 28, says, “Power being almost always the rival of power, the general government will at all times stand ready to check the use or patience of the state governments, and these, the state governments, will have the same disposition towards the general government.” Or as Madison says in Federalist number fifty-one, “The federal and state governments will control each other at the same time that each will be controlled by itself.” What that suggests is that in order to be doing your job to make the constitutional system of federalism work, I think it is incumbent on you state judges to be thinking about the interests of your states, of your state law, of your state constitution to be protecting the prerogatives of your legislatures.

So with that as a backdrop, what is going on then with FAA cases? Well, I should say one other backdrop, because two principles have emerged in the federalism revival in the Supreme Court. One of course is that the case of *Gregory v. Ashcroft* itself creates a clear statement rule. The idea is this, that

**I think it is incumbent on you state judges to be thinking about the interests of your states, of your state law, of your state constitution.**

when a federal statute is argued to change the traditional balance between the state and federal governments, the courts will presume that Congress did not intend to do that unless it spoke clearly. Congress has to come out very clearly and say, “Yes, we do want to preempt state law. Yes, we do want to kind of expand into this area that has traditionally been the realm of the

states.” A subspecies of that doctrine in *Gregory v. Ashcroft* is the presumption against preemption, which says that courts interpreting federal statutes are supposed to apply a presumption against preemption.

As I point out in my paper, and of course you all know this very well, as state judges, it is not only your duty, but also your power to interpret state statutes independently. Unless the U.S. Supreme Court has given you an authoritative interpretation of the state statute, you have the same latitude to interpret a federal statute as does the federal court.

Okay, so one of the tools of statutory interpretation is this presumption against preemption. The other is the doctrine of constitutional avoidance. That is the notion that says that courts, in construing statutes, will avoid constitutional issues.

If I can quote from the recent 2001 Supreme Court case that happens in the height of this recent federalism revival, in an opinion by Chief Justice Rehnquist in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, “Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the court will construe the statute to avoid such constitutional problems unless such a construction is plainly contrary to the intent of Congress.” So statutes should be construed to avoid raising potential constitutional problems, unless Congress has clearly said “No, you have to interpret it that way.”

When you look at the Federal Arbitration Act, you see that the *Southland* opinion, which holds that the FAA preempts state law, violates both of those principles. It has been well established in scholarly dissenting opinions by Justices Thomas and O’Connor. I have written about this myself, and I allude to it in my paper. Congress did not intend to preempt state law when it passed the FAA in 1925. There is nothing in that statute that expresses a clear intent on the part of Congress to upset the traditional state control over contract law, or to preempt state law;

yet it has been interpreted that way. So, *Southland* is an oddball. It doesn't fit in the current thinking of the court on federalism. I suggest to you that if it was decided today, it would be decided differently. Justice Trieweiler pointed out, five present justices on the Supreme Court have all dissented from *Southland* at one time or another.

But another point that I don't think has been made in the cases, and it hasn't really been raised by litigants, and certainly doesn't appear in the legal scholarship on this issue, is that *Southland's* interpretation of the FAA is probably unconstitutional. The reason I say that it's probably unconstitutional is because the FAA, as construed by *Southland* to apply in state courts, to bind state courts and preempt state law, restructures state dispute resolution processes.

It tells states you must close your courthouse doors to these kinds of claims, even though under your state law you would hold them open. A lot of procedural implications follow from that argument. The rights to appeal are lost. The rights to discovery are lost. Various kinds of

**Various kinds of protective procedures go out the window when arbitration is enforced under the Federal Arbitration Act.**

protective procedures go out the window when arbitration is enforced under the Federal Arbitration Act. So, when enforcing an arbitration agreement under the FAA, in effect Congress is telling the states you are going to restructure your state

dispute resolution processes even for state law claims, even for cases where there is no federal question. Does Congress have that power?

Well, when the question is put that way, it is very dubious about whether Congress has that power. I make the argument in somewhat more detail in my paper, but I think for now it would suffice to quote a recent Supreme Court decision, *Johnson v. Fankell*, unanimously decided in 1997: "It is quite clear that it is a matter for each state to decide how to structure its judicial system." That was a case where the Court said that even where there is a federal claim in state court, the federal law has to take the state courts as they find them. Congress, in creating federal causes of action, can't tell states "Do this with your state procedural systems and don't do that."

Well, if that limit is imposed on Congress's power where there is a substantive federal question, wouldn't you think that Congress had even less power where there is no federal question and simply the Federal Arbitration Act? Because remember, the Federal Arbitration Act has been held to apply under *Southland* in cases where you simply have state law claims in state court.

This was the situation in *Bazzle*. State law claim in state court, no federal question, no federal jurisdiction, and no right to remove the case to federal court. Yet somehow Congress is telling the states, "You can or you can't have class actions. You can or you can't open your courthouse doors." It seems to me that it is very dubious whether Congress has that power. I think that if it were looked at clearly, the FAA is probably unconstitutional in that sense.

Well, all right, what does this mean? What are the implications of this? Because the *Southland* opinion by the Supreme Court is binding on the states. What I would suggest to you is this: The presumption against preemption and the doctrine of constitutional avoidance, which both come into play here, can and should be applied by state court judges.

Under the old *Southland* rules, there are still going to be close cases. But one thing that is interesting, and that came up in some of the discussions this morning, is that *Southland* is actually being argued now to be applied in new directions. There are many arguments to extend *Southland* far beyond what that original holding held.

And my basic argument is that these federalism-based doctrines—the presumption against preemption and the doctrine of constitutional avoidance—should be applied. You can still be faithful to the existing Supreme Court precedents, and yet use these doctrines to refuse to extend *Southland* even further, which courts are being asked more and more to do.

How are they being asked to extend *Southland* even further? One example is in the *Bazzle* case. I call it the “enforce-as-written rule.” When you have an arbitration agreement, as Paul Bland said this morning, the draft of the contract puts in a lot of extra goodies for the contract writer into something that is labeled an arbitration agreement. These goodies might include: a waiver of damages; remedy stripping provisions; provisions that would deprive a plaintiff of statutory attorney fees; a class action ban; or, perhaps a forum selection clause that would be oppressive to the consumer.

Those things aren’t really about arbitration, even though they might appear in the arbitration clause. But what you have now is the argument, and this is pressed on the court, and accepted by the three dissenting justices in the *Bazzle* opinion, that an arbitration agreement has to be enforced as written, no matter how it is written, and no matter what extra bells and whistles are put into it. That argument should be rejected. It has never been accepted by the Supreme Court, though again, the three dissenting justices in the *Bazzle* opinion hint at maybe accepting it. But applying the presumption against preemption and the adoption of constitutional avoidance would weigh heavily against accepting it, because that represents a massive intrusion into state law.

**The FAA, to the extent that there is a national policy in there at all, is only about the pure choice of arbitration over litigation.**

If a drafter could, simply by using the expedient of an arbitration agreement, say we don’t have to pay you punitive damages, or we don’t have to submit to a class action, if that were enforceable, that would turn the Federal Arbitration Act, and the power to write arbitration clauses, into basically a deregulation program. It would give the drafter of a contract the power to exempt itself from a whole variety of state contract law designed to protect parties to adhesive contracts.

So, I’m suggesting that the enforce-as-written rule, when you see it, it should be rejected. Even giving face value to cases like *Southland*, and accepting there is a national policy favoring arbitration, it is not a national policy banning class actions. It is not a national policy favoring oppressive venue clauses, requiring arbitration in distant locations. It is not a national policy favoring waivers of punitive damages. It is not a national policy favoring expensive forum fees.

The FAA, to the extent that there is a national policy in there at all, is only about the pure choice of arbitration over litigation. Other aspects of how the dispute will be resolved, such as class actions, are logically independent.

The other argument that would expand the FAA preemption into a brave, new world of deregulation, of basically eliminating consumer protection law, is the argument that was made by Eric Mogilnicki, who I should point out is a former debate partner of mine. We were on the college debate team together. I haven't seen him in 20 years. The idea that Section 2 of the FAA, which preserves state contract law—the phrase is that arbitration agreements will be enforced, “save upon such grounds as exists for the revocation of any contract.” Eric argues that any contract means every contract, and that the savings clause in Section 2 will only protect some kind of general state law that applies to all contracts, and not to subsections of contract law.

And that argument has been accepted by some federal courts. *Bradley v. Harris Research*, which I cite in my paper, is a leading case of that. That position, I say with all due respect, is dead wrong. Because when you think about it, there is no such thing as general to contract law. There is no contract law principle that applies to each and every contract. Even the doctrine of unconscionability is not going to apply in the same way in a contract between the Bazzles and Green Tree, a nationwide lender, as it would in a contract between Green Tree and CitiBank. The doctrine of unconscionability is very case-specific. It doesn't apply to each and every contract.

So, the notion that only doctrines that apply to every contract are safe from preemption would basically render that savings clause a nullity. Then when you think about how legislatures work, legislatures don't pass sweeping, general principles of unconscionability. They look at specific categories of contracts. They will regulate consumer loan contracts with one statute. They will regulate employment contracts with another statute. Do you think that the Section 2 savings clause is supposed to preempt all of those legislative actions which target specific agreements?

In the paper, I suggest to you that the *Cruz* and *Broughton* cases from California are good examples of what a court can do to be faithful to the U.S. Supreme Court cases, while construing them narrowly, and at the same time being faithful to their obligations to preserve state autonomy in the federal system.

I would like to conclude by giving you a reading recommendation, if you haven't already read it. This is Justice Trieweler's special concurrence in the infamous case of *Doctor's Associates v. Casarotto*. I would like to just read a couple of excerpts from it, because I think it makes my point rather nicely:

In Montana, we are reasonably civilized, and have a sophisticated system of justice which has evolved over time, and which we continue to develop for the primary purpose of assuring fairness to those people who are subject to its authority. Our courts have developed rules of evidence for the purpose of insuring disputes are resolved on the most reliable basis possible. We have developed standards for appellate review which protect litigants from human error, or the potential arbitrariness of any one individual. We have contract laws and tort laws. We have laws to protect our citizens from bad faith, fraud, and unfair business practices. The procedures we have established and the laws we have enacted are either inapplicable or unenforceable in the process we refer to as arbitration.... The insidious erosion of state authority and judicial process threatens to undermine the rule of law as we know it.

What I find so compelling about that opinion is that it really highlights what I'm talking about as the role of the state court judge. There is this state system of procedures that each of your states has evolved. There is a state substantive law of contract that each of your states has evolved. And if state judges are not going to be the guardians of federalism, the spokespersons for the integrity of that system, against really excessive and undue expansion of the preemption doctrine, then I think nobody else will take that role.

## COMMENTS BY PANELISTS

**J. Mark Englehart, Esq.**

**Deborah Zuckerman, Esq.**

**Richard T. Boyette, Esq.**

**Honorable Larry V. Starcher**

### **J. Mark Englehart**

What I would just like to touch on briefly with you today are a couple of themes that Justice Werdegar and Professor Schwartz have touched on, which is there is a role for state courts, and there is a role for state law in addressing the enforceability of arbitration agreements under the FAA.

The perspective that I come from is that this has very practical effects for me as a plaintiff lawyer, and I think for plaintiff lawyers generally. The Supreme Court has made clear that it views arbitration provisions as a specialized choice of forum, a specialized forum selection provision. And the FAA does not create a body of federal common law of arbitration, and that state law does apply.

Even though it's just the choice of forum though, under that perspective, it has very practical effects. Even a neutral arbitration provision alters outcomes in individual cases. It alters the way that I and my partners and other plaintiff lawyers look at a case. In Alabama in particular, we are seeing arbitration provisions cropping up in all types of transactions—consumer credit, mobile home financing, and insurance disputes. We are even seeing them now in the context of personal injury disputes, including products liability cases and nursing home admission agreements.

The presence of even a “neutral” provision in these agreements causes us to take a second look. It prevents us or stops us from investigating certain cases that otherwise would have merit. It colors the way in which we evaluate the cases. It colors whether we decide to file suit on a case. Because other plaintiff lawyers that we deal with have similar viewpoints, decisions based on the presence of an arbitration provision affect, in very practical ways, whether a claimant will end up being able to get counsel and vindicate his rights.

Where an arbitration provision does apply, it also affects the settlement value of a case. And in our experience, that has been recognized on both sides of the docket. That argument is regularly made to us by defense lawyers that with an arbitration forum, the case just isn't worth as much. As lawyers we seek compensation for clients, obviously that is a paramount concern.

That is all with respect to neutral arbitration provisions. Obviously, some of what we have heard about here today, and what you read about in the papers, are provisions that seek to alter the rules for resolving disputes once they arise. That can be, as Professor Schwartz had mentioned, where drafters of arbitration provisions try to take advantage of superior

bargaining power to limit the relief that can be obtained. Or provisions that are inserted to attempt to make the process procedurally more oppressive, whether it be requiring the arbitration brief be brought in an inconvenient venue, whether it be oppressive cost provisions, or any of a series of ways that just make it more difficult procedurally for the claimant to vindicate his or her rights. That would address as well provisions prohibiting class actions.

Because these are imposed in the context of gross disparities of bargaining power, these types of extreme provisions are inflicted on the people least able to defend themselves, the least able to stand up, and the least able to negotiate to obtain alternate means of getting these types of services. It is precisely that area of regulating unfair contract terms, and remedying gross disparities in bargaining power as reflected in contracts, that is a traditional area of regulation for state courts and for state judges.

One thing that I would urge you to do, and one thing which the Supreme Court precedent and the FAA expressly allows, is to use that authority that you have to apply your generally applicable state law to areas in which states have traditionally regulated. Courts have the ability both to address arbitrability issues, and substantive issues of contract law. And as I run out of time, it's my plea that you, as David Schwartz has mentioned, please take seriously your role of protecting state interests, of applying traditional state contract law to arbitration agreements, because they are to be no more enforceable than other contracts, and the FAA expressly allows that.

### **Deborah Zuckerman**

In listening to both key speakers today, and going to some of the breakout sessions, one of the things that keeps coming back to me, and I think in a way is a common thread in both papers, that we keep hearing about a federal policy favoring arbitration. And nobody really seems to know where that came from.

And I think as people have said, it's pretty clear from the Federal Arbitration Act that Congress passed it to move away from what had been judicial hostility to arbitration, and to put arbitration agreements on equal footing with other contracts. And the Supreme Court has said that arbitration agreements are as enforceable as other contracts, but not more so. But it seems to me what we are hearing here and seeing in many court decisions is that the Court's pronouncement has really been expanded. And rather than no longer having judicial hostility to arbitration, that courts, and particularly corporations, really favor arbitration, as opposed to the enforcement of agreements to arbitrate.

And as I went from breakout session to breakout session, I heard a lot of you talking about responding to the question of whether or not your state favors arbitration, and a lot of people said, Yes. And the question was, is it by judicial decision or legislation? And there was some difference of opinion of different practices among the states.

But then people seemed to flesh it out and say, well, my state doesn't really favor pre-dispute mandatory, binding arbitration between private parties necessarily, but once a case has been filed, we favor referring cases to arbitration, but the decisions are often appealable. And I think it is really important to keep in mind where the supposed preference for arbitration really comes from, and who really created that.

The other thing I think is really important from Professor Schwartz's paper is the whole notion of the FAA overriding state contract analysis, and even moving into preempting state substantive law. I think what that is almost doing, rather than singling out arbitration for adverse treatment, is giving it sort of heightened treatment in the sense of deferring to the party who has drafted the contract. Because if you treat unconscionability analysis differently merely because it's in an arbitration context, then you are singling out arbitration for different treatment, when the FAA is supposed to put arbitration contracts on equal footing with other contract terms. But it's not supposed to be superior. So, there is really no reason to treat the analysis differently.

One of the other problems from my perspective in representing consumers with pre-dispute mandatory arbitration, is that there is no development of consumer law, because generally speaking, decisions are confidential. They certainly don't have any precedential value. So nobody can really use the decision in one arbitration to argue the next case. And I think if the FAA is used to supplant state substantive law as well, then that is really going the next step in terms of really not having a way in the public justice system to develop the law. And it's not just in the consumer area. It will be in employment and medical malpractice and many other areas.

And I frankly think that you should really be concerned about that, as judges, but also as people who elect state legislators, who are passing consumer protection laws and other laws that really won't be developed, and also as consumers and employees who won't be able to have your own rights enforced.

### **Richard T. Boyette**

I do have some disclaimers I would like to make. Unlike most of the other panelists and presenters that you have heard today, I'm not an academic, nor have I litigated issues of constitutional implications of the enforcement of arbitration provisions. I have not litigated arbitration issues generally in many years. You might ask, then, "What are you doing here?" I was invited to give a defense lawyer perspective to the program this afternoon because I am an officer in the DRI, which I would hope many of you know is the national organization of defense trial lawyers.

I think I can, from a general standpoint, say that most defense lawyers that I know in most places and most cases would prefer having their cases disposed of in a jury trial than in arbitration. In fact, one of the aims or goals of DRI is to preserve the civil jury system in the United States.

Having said that, when I go into court representing a party who is seeking to enforce an arbitration agreement, I am going to advocate enforceability of that agreement. But my experience is that most of the time I might advise that client that they are better off, at least in North Carolina, before one of our local juries than necessarily before an arbitrator. Someone once said that the definition of arbitrator is a combination of the root words for arbitrary and traitor. And, in at least one case, I had some experience along those lines when I arbitrated a construction case in which I was representing a contractor, and the arbitrator decided the case on some grounds that neither party had thought of nor argued.

My observations that I will share are based primarily on having read the papers and listened to the presentations. It would be my observation that FAA preemption is clear. Regardless of whether you agree with it or not, it is the law of the land, at least until such time as the Supreme Court changes its mind. I believe, and again, I'm no real student or scholar in these cases, but I believe that the field is open for state courts to apply state law of general applicability to the interpretation of contracts in cases to examine whether an arbitration provision is enforceable because of issues of fraud or unconscionability.

And it appears certainly from Justice Werdegar's address at lunch today that California is doing just that. Now, I have no idea of whether some of the measures that she has discussed have been challenged in the federal courts, or are making their way to the Supreme Court or not. But it seems that California at least, and I'm sure some other states, are of the opinion that they have the authority to look at arbitration agreements in particular cases, or to carve out certain classes of cases from arbitration under certain circumstances.

It has also been my observation, particularly in the breakout sessions this morning, that most states, like the federal courts and the federal law, have policies that favor arbitration. It is not always

**Why do more and more businesses prefer to choose arbitration for resolution of their disputes rather than our court systems?**

clear where those policies originated, whether it was language in appellate decisions somewhere along the way, or perhaps statute. In North Carolina, we have enacted the Uniform Arbitration Act. So I suppose that's a legislative expression of the preference for arbitration. But I'm wondering also, if perhaps on an unwritten basis, the

expression of preference for arbitration in many cases is not just a legislative expression. Perhaps to some extent from a practical standpoint, it's an expression of the frustration or problems related to the clogging of our courts and crowded dockets, and the need to move cases more expeditiously.

But from a business standpoint, ask ourselves why do more and more businesses prefer to choose arbitration for resolution of their disputes rather than our court systems? That certainly might go against the view of defense lawyers in many cases, where we think we've got a better shot in front of a jury than in front of an arbitrator. But somewhere along the way at some level, businesses are making the judgment that for reasons of cost, efficiency, certainty of outcome, or predictability of outcome, that they would prefer not to be in our court system. And why is it the perception exists, whether it's true or not, that businesses can't get a fair shake in our courts? And maybe those are issues we ought to look at.

It also may be a consideration that the manufacturers of goods and the providers of services, in pricing those goods and services, are looking at how disputes that arise are going to be resolved. And do we run the risk—if the logical extension of some of the arguments that states ought to be able to, from a wholesale standpoint, just do away with arbitration—that the cost of goods and services are going to go up as a result of that?

I do think that the analysis ought to be a balancing exercise. There is probably a sliding scale on a case-by-case basis as to whether an arbitration process is fair, whether the agreement is not unconscionable, whether there is mutuality of obligation, and whether fair resolution is

possible in an arbitration setting. And if those questions can be answered in the affirmative, then the parties ought to be free to contract to resolve their disputes by way of arbitration.

### **Honorable Larry Starcher**

We were talking about why we are here. And I suggested to Richard when we were getting ready to do this program this afternoon that I assumed he was here to provide some balance. But from my calculation, he needed to weigh about 850-900 pounds. Why I'm here is because I wrote an arbitration decision last year, that thanks to Paul Bland, was denied last December. So, I have had an opportunity to think about it a little bit.

I read Professor Schwartz's excellent paper last week, and I agree entirely with his perspective. I think it is the duty of state courts to insure that our system of federalism remains vigorous. States must retain the authority to develop their common law, and federal preemption in a given case must never be assumed. I also think that it has become the duty lately of state courts to help assure that the remarkable tool of arbitration is not hopelessly degraded from its current respected state where truly consenting parties, such as labor unions and management, can agree to resolve disputes quickly.

People who have worked hard to refine and bring respect to the arbitration forum must be aghast and dismayed to see their idealistic vision of arbitration essentially dragged through the mud by opportunistic drafters of contracts of adhesion, who are trying to get around the protection and remedies that the law gives to ordinary citizens. Professor Schwartz speaks in his paper of corporate contract drafters who load their contracts with self-serving provisions. I recently read an article entitled, "How to Draft a Bullet-Proof Arbitration Clause," which was drafted by a financial institution lawyer. And one of the author's suggestions in that article was that you put a little box on the contract where the consumer can check and agree, for a \$5 discount, to a very limiting arbitration clause in the contract. Well, this transparent effort to enhance the supposedly bargain-poor nature of the arbitration clause in a loan contract, quite frankly, made me a little sick when I read it. This cheap shot, this legalistic opportunism reflected in this kind of arbitration provision is decidedly not what is contemplated in the arbitration process.

Last year in the case I mentioned, *State ex rel. Dunlap v. Burger*, I had the chance to write a fairly major opinion on arbitration clauses. Our *Dunlap* case involved a consumer sales contract by a chain jewelry store, a nationwide store, and the direct damages in the case were something like \$8.46. Our court in that case held that the arbitration clause was unconscionable, because the drafter had attached several exculpatory provisions like prohibition of punitive damages, a bar on class actions, and reserving the right to go to court for the seller, but not the buyer. It also had claims of excessive arbitration fees.

As we drafted this decision, we contemplated how we could write this in a manner that was not likely to be reversed, understanding what could happen upstairs. We found a short, but very instructive law review article by Professor Paul Carrington from Duke University that was published in the *Harvard Journal of Legislation*. This article kind of offered a conceptual road map, showing how states can comply with Federal Arbitration Act jurisprudence and still protect the vindication of public rights. Tracking Carrington's approach in *Dunlap*, we focused not on the arbitration clause per se, but on any exculpatory clauses and adhesion contracts that would substantially restrict rights and remedies that exist for the benefit of the public.

We held that contract provisions that allow no class actions or no punitive damages are presumptively unconscionable, because such provisions attempt to immunize a party from the effect of laws that exist to protect the public. And we held that tying such provisions to arbitration language does not make the provision immune from the unconscionability scrutiny. Our case, as I told you, was appealed and certiorari was denied. But it also emphasized that the exculpatory clauses and adhesion contracts are used not just in consumer protection law, as you know, but they also attempt to restrict the enforcement of employment rights, the rights of professionals in small businesses, and in some cases, injunctions that are really public in nature. Therefore, when courts, yours and mine, speak in this area, I think it is helpful to set forth principles that apply to all remedy- and rights-limiting provisions in all contracts of adhesions. That's the route we took in *Dunlap*, and it has already been cited in several states, and not just for consumer cases.

**I do fear that the Supreme Court seems to be taking a path that can restrict, or even emasculate, state contract law.**

I am guardedly optimistic about the future in this area of the law, because there is a strong response in a number of state and federal courts to what I call “predatory arbitration-related provisions” in contracts of adhesion, and I think that is encouraging. But I do fear that the Supreme Court seems to be taking a path that can restrict, or even emasculate, state contract law, and perhaps state processes for dispute resolution. I agree with Professor Schwartz that it is the state courts, at least at this juncture in our history, that must be the guardians of federalism.

And we need to be particularly careful in how we draft our opinions as we do this. And that can be done, in my view by: (a) narrowly interpreting federal statutes and (b) giving strength in our own decisions to our own interests and our own state laws. Unless there are some clear congressional preemptions, I would say that you can build on your state law, and build your strengths if you want your cases to stand.

### **Response by Professor Schwartz**

I'd just like to make three basic comments that I hope will tie together some of the comments that have been made, both in the panel this afternoon, and a little bit from this morning.

First of all, Richard Boyette made the point that FAA preemption is the law of the land at this time, and he is right, it is. The *Southland* case is the law of the land. But how that dictates decisions in the cases that will be coming before you is far from clear. I think that really what it comes down to is a choice about what is your role in these kinds of cases. A state court judge, or any lower court judge, could look at an arbitration case and say, “Well, we have these pronouncements from the Supreme Court that there is this liberal federal policy favoring arbitration. Therefore, it is my mission to spread arbitration far and wide, to make it grow, to give it the benefit of the doubt in every case, to push the envelope, to expand it into new doctrinal areas.”

The other choice, and the one that I am suggesting that a judge, who is very conscious of the federalism issues here, should seriously consider taking is more of a “show-me” kind of attitude. I'm not going to push the envelope. Okay, the Supreme Court has held that this particular type of

state law, such as in *Perry v. Thomas*, or *Allied Bruce v. Terminex*, a state law that specifically targets arbitration agreements is preempted.

But that doesn't necessarily mean that any state law principle that a party seeking arbitration doesn't like is preempted. So, really it's a question of what your judicial disposition is going to be. Are you going to be really at the tip of the spearhead towards increasing arbitration and expanding it, or are you going to hold back?

And we all know, we learned this in law school, that there will be some cases where the controlling precedent is indeed controlling. It is on point. But in most cases, it is not quite so clear. We are typically talking about analogizing and extending from case to case. And so, it is not always the proper position to take that the Supreme Court seems to really like arbitration, so let me just kind of push the envelope, and go in that direction at every opportunity.

And that really leads to the second point, which I think this is a theme that comes out in Mark Englehart's remarks, Deborah Zuckerman's remarks, and Chief Justice Starcher's. Let's go back to the legislative history of the FAA, which says that the purpose of this statute is to place arbitration agreements, and now I'm quoting, because this language is burned in my brain, "on the same footing as other contracts." To put arbitration contracts on the same footing as other contracts, or as the Supreme Court said in the *Prima Paint* decision in 1966, "The FAA makes arbitration agreements as enforceable as other contracts, but not more so."

**As the Supreme Court said in the *Prima Paint* decision in 1966, "The FAA makes arbitration agreements as enforceable as other contracts, but not more so."**

Well, as you know from your experience with state contract law, no contract drafter is ever guaranteed that every word and every clause put into that contract is going to be enforced. Every contract is enforceable, but subject to certain rules that state contract law will provide. It may be the unconscionability doctrine. It may be statutory public policies that tell certain types of contract drafters that you may not do this, you may not force the parties you do business with to submit to certain kinds of procedures, or certain kinds of disadvantageous terms. You can't charge usurious interest rates, things like that. These are all state public policies that limit contract law. No contract drafter gets to simply wish those away.

Well, if arbitration agreements are as enforceable as other contracts, but not more so, then simply by, as Justice Starcher puts it, tying provisions to arbitration language, there shouldn't be a special exemption, a special kind of immunization from all these state contract laws simply because some contract terms can be grafted onto an arbitration clause. The point is the result of the case should not be arbitration no matter what, but treating arbitration contracts the same as other ones. If a contract that says you may not bring a class action against me is unenforceable as against public policy, or as unconscionable, then that contract should also be unenforceable or unconscionable if that "you may not bring a class action against me" language is put into an arbitration agreement. Arbitration agreements should be treated the same as other contracts, and not as somehow more enforceable.

The third point now reaches back to Professor Sternlight's comments from this morning, and this argument about jury trial waivers. The question that I think where her remarks and mine overlap, is the question of are state standards for civil jury trial waivers going to be preempted if you apply them to FAA cases?

And let me suggest to you that here is a place where the doctrine of constitutional avoidance comes in. Imagine, if you would for a moment, a federal statute. Congress passes a law that says no state may have a standard of civil jury trial waivers that is higher than the standard for enforcing adhesion contracts. Well, does Congress have the power to dictate to the states the standard for enforcing civil jury trial waivers in state court for state law claims? Again, I think it is highly questionable whether Congress could do that constitutionally.

Should the FAA be interpreted as achieving the same effect? I think if it were interpreted in that manner, it would raise serious constitutional problems. Applying the doctrine of constitutional avoidance then would strongly suggest that a state's civil jury trial waiver standard could be applied to an arbitration agreement without preemption, because a strong argument can be made that Congress doesn't have the power to alter state jury trial waivers in that respect.

So, just to wrap up then, I think that in regards to the FAA and state jury trial waivers, the U.S. Supreme Court has not addressed this issue. So it is not incumbent on state judges to say, well, we think this would be preemptive if it got to the Supreme Court. It is not incumbent on state judges to anticipate a pro-arbitration direction that the court might go in, but rather to faithfully apply these federalism-based statutory interpretation principles if a case like that were to come before the court.

## Questions and Comments

**Participant:** Having just survived a petition for a writ before the Supreme Court where I said that a particular statute was not preempted, I am very much aware of what it is for the federal government to hold a stick in the federal government's view of preemption. Can you come up with some practical suggestions as to how lawyers can suggest to judges that opinions be written, and that judges write the opinions so that at least the stick gets poked in somewhat more gently, so you don't stir up the beehive that I happened to see around the opinion that I wrote?

**Justice Starcher:** I think one of the things that you try to do, is you try to avoid the preemption issue as being the main issue in the case. Now, you may not always be able to do that, but if you can, and you can pin your decision on state contract law or some other area, then I think that's a route to go to avoid that preemption knife in your back. Because I think if you bring it up as a major concern, then it will be the major concern.

**Professor Schwartz:** I just want to add one thing. I guess this is the academic in me speaking now. I didn't used to talk or think this way when I was a practicing lawyer, but part of me wants to see this issue come up in front of the U.S. Supreme Court in a clear way. Paul is shaking his head. Maybe I'll just stop right there.

**Paul Bland (morning panelist):** The thing that we tell litigators in this area, and that we see that has been most successful in avoiding federal preemption, is where the evidentiary record about

the magnitude of the costs shows that the clause amounts to an exculpatory clause. Most states have a generally applicable rule of contract law that says, in a contract of adhesion, that you can't have an exculpatory clause. The bank can't write a contract that says—and this has nothing to do with arbitration—if we cheat you, if we breach your contract, there is nothing you can do about it. That would be an exculpatory clause. The adhesion would be unconscionable under general rules.

So, the *Dunlap* case that Justice Starcher wrote went through a bunch of evidence showing that in that case, even if arbitration clauses are generally enforceable, even if the federal government loves arbitration clauses according to the Supreme Court, the clause was written in such a way that the proof in that case showed that it amounted to an exculpatory clause, an adhesion contract. It just said, “No, you are never going to be able to get any remedy, no matter whether your claim is real or not.” And that argument has stood up again and again in certiorari petitions that we have seen, and a number of federal courts have endorsed that argument as well. And that, I think, is the way to set one of these cases up. It gets around preemption.

The problem is if lawyers don't create enough of a factual record. And I see a lot of that in working on appellate stuff. But that is the argument that is by far, the most successful. And I don't think there is a federal preemption argument for that. The Supreme Court has routinely said the reason that arbitration is cool under the FAA is that it is just another forum. It's just as good. We are not saying that you cannot go to get any remedy. We're saying arbitration is as good as anything else. And where in fact it's drafted so it's an exculpatory clause, that promise is broken, and I don't think the FAA has anything to say about it.

**Deborah Zuckerman:** Just to follow up on that, the Supreme Court, as Paul just said, has said that arbitration is just another forum. So, plaintiffs have to be able to vindicate their statutory rights. And if they can't vindicate their statutory rights in court or in arbitration, because they can't afford the cost, we need to build a record in a particular case showing that there is something in the arbitration clause or the arbitral forum's procedures that prevents a consumer, an employee, a patient, or whomever from really vindicating their rights. Then I think a good argument can be made that arbitration in that instance, is not just another forum, and the FAA won't preempt that.

**Mark Englehart:** One point to add to what Deborah has just said, in the *Randolph* case coming out of the Supreme Court, there certainly was language that opened the door to creating the type of factual record that she is talking about, and Paul is talking about. And if you want to see an example of a great factual record, look at Paul's *AT&T v. Ting* case. But the law is not quite as uniform in all jurisdictions about the rights of discovery, or the right to develop that kind of factual record in the context of an arbitration challenge. There are a number of states that have allowed that. It's my plea as a plaintiff lawyer that a lot of you as appellate judges allow that to happen in your jurisdictions, so that a plaintiff has the opportunity to create that kind of factual record, and to engage in discovery if need be, in order to be able to put those types of challenges together.



# The Judges' Comments

In the discussion groups, judges were invited to consider a number of issues raised by the group moderators related to the papers and oral remarks. The judges devoted more time to some issues than to others, and they raised other interesting points as well.

Remarks made by judges during the discussions are excerpted below, arranged by topic and summarized in the italicized sections at the beginning of each new topic. These remarks are edited for clarity only, and the editors did not alter the substance or intent of any comments. The comments of different participants are separated into offset paragraphs. Although some comments may appear to be responses to those immediately above them, they usually are not. (In some cases, a response by one judge to another is distinguished by two slashes (//) separating the comments in the same paragraph, and the response is italicized.)

The excerpts are individual remarks, not statements of consensus (for general points of agreement that arose out of the discussion groups, please see the following section). No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that the various viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

## **ARBITRATION AND ITS RISE IN THE STATES.**

### *Judges talked about the role and history of arbitration in their states.*

We don't have mandatory arbitration in our southern state at all.

Yes, it's happening in our southern state. It started with the nursing homes, a lot of nursing home litigation. So, now, when you go into a nursing home, you've got an arbitration provision. That is impacting a lot of what used to be very big litigation, and I think class actions is the issue.

Our northeastern state does not have binding arbitration.

Our Mid-western state has been big in unions, and if you try to take their rights to arbitration away in a union contract, every union in the state will go nuts. Every union in the state wants to go to arbitration, because it's an easier way to do it. So our arbitration has grown up around union labor arbitration groups.

We used to have all these insurance contracts, an underinsured motorist, an uninsured motorist with mandatory arbitration. The results were so bad for the insurance company from the arbitration, we no longer have mandatory arbitration deals in uninsured and underinsured motorists.

There is no mandatory arbitration resolution of cases. We usually see arbitration in the sense that two parties have a contract requiring arbitration, and one of them refuses to arbitrate. And then they come into court to force arbitration, in which case then the court will, in appropriate circumstances, order the contract to be arbitrated. And judgment can then be rendered in accordance with whatever the arbitrator finds after that has been done.

No one ever questioned the right of parties freely to contract for arbitration, and waive their rights to a jury, until we got into these one sided adhesive contracts being imposed on millions of consumers by a small band of predators who are running the banks, the credit industry, and the automobile industry. Oh, and I should add one other predator, the health industry.

The interesting thing is in our state's mandatory arbitration program, you can reject the arbitration and get your jury. The interesting issue we have not yet addressed is whether or not binding arbitration clauses in private contracts should be upheld, even though we as a state, have provided for rejection in the statutory mandatory arbitration.

*Some judges felt there was presumption at the Forum that arbitration was not fair, and they debated whether that was the case.*

Arbitration can be fair. It doesn't have to be unfair.

You see, I think the entire hypothesis here throughout this morning and the afternoon is that arbitration is unfair. Now, I'm not sure that that hypothesis has been demonstrated.

I don't think anybody is trying to discredit arbitration as an approach. I think what some of us are trying to do is to make sure that it is a voluntary procedure. That is the beauty of it, if it is voluntary.

Isn't it a little bit of a misnomer to suggest that they have no recourse? They do have recourse. It may not be one that is satisfactory to everyone, but they have recourse to arbitration, and we are all assuming that arbitration is unfair. If we start with that premise that the arbitration is unfair, then I can understand all of the concerns. But if we were to suggest a different premise,

**Arbitration can be fair. It doesn't have to be unfair.**

that the arbitration is fair, then I don't think we would all have these concerns, would we?

When I recall first learning about arbitration when I was a law student, I remember it being described as simply a substitute of forums. There was nothing bad about it. It was simply the parties voluntarily agreed that this would be a more efficient, quicker, and maybe more cost effective method to resolve their disputes. So I think maybe the issue is not whether arbitration is good or bad, or do we have to live with the inequities in order to deal with scarce judicial resources, but whether it's the role of the courts to ensure that it is just a substitute of a forum as opposed to a sacrifice of substantive rights. And I think that's what a lot of these cases seem to look at, without really kind of confronting that fundamental issue.

*Judges were asked if they had seen an increase in arbitration in their states.*

No.

Yes.

No.

Slight.

We've been seeing an increase in petitions for review of arbitration cases, gradual but I would say steady.

Over time, in terms of frequency of these kinds of challenges, at least in our southern state, we have gone from extremely rare to infrequent. There has been a gradual increase in the number, but it's by no means an explosion. And the area that is most frequently litigated now that gets to appeal are really questions about whether there was an agreement to arbitrate in the first place. We're at the threshold.

Absolutely.

We are seeing more arbitration.

There hasn't been a great increase in our Mid-western state.

In my southern state, I've seen one in 11 years. They just don't come up.

We have a steady stream of arbitration cases and the legislature recently adopted the Uniform Arbitration Act. There's a great deal of arbitration going on in our state, and some justices and retired judges are doing arbitration work, so there's a lot of it.

We're having two or three a month.

I'm on an intermediate appellate court, but for the first four or five years, I probably saw two or three arbitration cases. I am now seeing one at least every other month.

In our western state, at the supreme court level, we don't see that many disputes.

In 20 years on the trial court, and 10 years now on the court of appeals, we have only had one case that involved arbitration. I never saw it or I never heard of any others.

We see very little arbitration litigation.

I mentioned earlier we had these check-cashing cases, which are small claims. They tried to tie in doing away with the class actions. And that's really how it got before us. On the three years that I have been on the appellate bench, that's the only time we have dealt with any arbitration clauses.

I feel that there's more people objecting to arbitration per se.

We see them in financing agreements. Green Tree is very active in our state, unfortunately we have a lot of mobile homes, and they seem to finance about 90 percent of those.

***Judges discussed how arbitration has become more prevalent in medical malpractice disputes.***

When you sign into the hospital for the surgery, they have an arbitration agreement, it has become much more pervasive in the last 20 years, and presumably it will in the future some more.

A scary consent is starting to develop now in the physician cases, where some people now are being confronted with an arbitration clause.

You are under the knife, and you're going to argue with the doctor?

The best thing you can do in that circumstance is pass out. You pretend you're just not conscious to sign this.

That's where the unconscionable part comes, when you are forced to sign to get medical care at that hospital. It may be the one that they brought you to, and the family is signing the forms. And then malpractice occurs, and they say well, you need to arbitrate. And they say, well, wait a second, it was an unconscionable circumstance, because the person that signed didn't knowingly waive that right.

**You're in desperate need of medical services, you may bleed to death, but before you do, how about signing this before you pass out from loss of blood? What choice have got? That's coercion.**

You're in desperate need of medical services, you are bleeding, and he says, by the way, you may bleed to death, but before you do, how about signing this before you pass out from loss of blood? What choice have got? That's coercion.

But is there something about the relationship between doctor and patient that should cause us some concern when the medical officer or clinic in effect says you've got to sign this agreement before you get medical care?

We had the issue of waiving your rights in going to the hospital. That was big in the seventies and eighties. Women who were having a baby would have to sign this agreement that said you waive your right to sue for medical malpractice. We haven't had anything like that. We had legislation introduced to prevent hospitals. And the legislation simply went like this: (a) you don't have to sign them, you can refuse to sign the arbitration agreement; (b) if you did sign it, you had three days to revoke, sort of like mortgages. And then there were standards that they had to explain to you, that you understood.

We were kind of alluding to this today, and I'm not sure how relevant the subject matter of the contract is to the discussion. But let's assume it has got some relevance to us as persons, since

we are persons and judges at the same time. And the notion of a health care provider interposing this condition in order to get treatment. Now, somebody might say well, if that person is your family practitioner, you can always go find someone else. But if the anesthesiologist comes in to give you informed consent, and says by the way, you are going to waive any litigious claim you might have against me, and agree to arbitration if you want that new heart. So, I think some of this is fact intensive. That's why I think our plaintiff and defense bar are playing a very interesting game of minuet to figure out where they are going to take the next swing.

Going back to your doctors in your state, have any statistical studies been done on how the results of the arbitratable decisions compare with jury results? For example, in our northeastern state, where we don't have such a thing, but fully 60-70 percent of all medical malpractice cases go down the tubes. They don't make it beyond what we call a panel stage, which has to find it's a legitimate issue. But then if they get to trial, it's a defendant's verdict. So, is arbitration much better? So, that sort of undercuts a little bit of the argumentation that is being made today, wholesale unfairness is occurring.

We have required arbitration in medical malpractice cases for years. And we still do as a preliminary step to going to court.

***Several judges talked about the impact that arbitration and mediation may be having on trials in their state, including whether or not it has led to a decline in jury trials, as Professor Sternlight suggested.***

Our case numbers are up, our trial numbers are down, and I attribute that primarily to mediation. I think 60 to 70 percent of all cases, and we have mandatory mediation, 60 to 70 percent of all cases are settled at mediation and I know speaking from my calendar, from the time that you notice a case for trial, you get to trial within 90 days, and I have not had to roll over a case in over four years.

It's just too bad that state courts don't get enough funding to handle the cases expediently, so that people are not looking for other methods of resolving their disputes.

My question would be with the success of court-annexed arbitration and mediation, do we still have a back load in civil cases? Our jury trial numbers are down, and at the trial court level I'm wondering how many civil jury trials around the nation are actually being tried, and there are resultant problems with that reduction. I would express concern about that.

The backlog in our state is due primarily to criminal cases. The civil cases move pretty good.

Arbitration was the best thing since sliced bread. You got it done, and you got it done quickly. But we're finding, however, is that as it's evolving, and for example our main jurisdiction where you used to wait three years to have a case decided, you'll get the case decided within 12 months now. We're finding that sometimes arbitration is taking longer then if you go to the court system for a jury trial.

I have to say just as an aside I'm not comfortable with this whole concept that we're seeing the demise of the jury trial system. We just have a lot more cases and the percentage is dropping, but we're trying jury trials every day. The system is not under attack because of this arbitration thing.

Having worn a trial judge's cap for so long, I would be reluctant to buy into the proposition that arbitration is a causative factor in the decline of jury trials. I would add to the mix that I think it has more to do with the emphasis on trying criminal cases.

**We are either elected or we are appointed, but we are clearly accountable to the people. We are bound by unbelievably strict standards of ethical behavior. We are out there all the time trying to do the right thing.**

We use a phrase, this is the privatization of justice, and I think that kind of strikes home to me, because, you know, I get a paycheck from my state. I'm a public official, and that is something that I think is important to recognize as judges. We are either elected or we are appointed, but we are clearly accountable

to the people. We are bound by unbelievably strict standards of ethical behavior. We are out there all the time trying to do the right thing. Our decisions are reported. They are public. There is the sense of stare decisis and precedent and all those kind of things, and this [mandatory arbitration] seems to undermine all those things that, at least to me as a judge, are really important.

## **Arbitrators: Who They Are, What Their Powers Are, and Their Relation to the Court System**

*Judges discussed the general background of the people who often serve as arbitrators in their states.*

A lot of them [mediators] are former judges or lawyers who have achieved some prominence in the community. Most of the people who are mediating have received some sort of training at the National Judicial College.

The overwhelming majority of the mediators are practicing attorneys in our southern state as well. And we have a certification process that they must go through as well.

In our southern state, I would say 95 percent of our mediators are lawyers. They go to a 40 hour school, and they pass the test.

The arbitrators are appointed. They are former judges. They don't do apparently what they have done in California.

I'm not necessarily trying to help these folks out by cutting out their non-lawyer competition, but has any court said you got to be a lawyer to do this? It strikes me that there's an awful lot of what the practice of law is about that's involved in that.

It may not be a lawyer. A lot of arbitrators are not lawyers.

There are a lot of areas of specific arbitration where the parties certainly don't want lawyers. We have huge exchanges where they don't want lawyers for arbitrators, they want a trader to determine whether the trade has been made. This idea of an arbitrator being a lawyer, who is he advising? He's not advising anybody, he's making a decision. In Illinois prior to 1960 you didn't have to be a lawyer to be a judge, and I'm sure most states were like that years ago. That's substantially different than practicing law; you're not advising anybody.

If an arbitrator gets to decide jurisdictional issues, and certainly gets to decide evidentiary questions of evidence law and legal principle, why isn't that a practice of law?

We've spent the last 50 years trying to get to a professional judiciary without lay judges, we have been expanding the scope and liberality of discovery procedures, we have maintained the jury system, and this seems to be an end run to retrograde back to a situation that we spent the last 50 years in the practicing bar and the judiciary trying to remedy. And my personal opinion is except for those complicated, either the phenomenally expertise based or the fender bender, I think that the court system is better and the arbitration concept should stay out of it.

*Several judges discussed how their states regulated or certified arbitrators.*

Our western state does actually regulate arbitrators.

In our Mid-western state, because the court has established a mandatory court-annexed mandatory arbitration program, we actually have requirements they have to go through. They have to have so many hours of training before they can sit on a panel.

In our southern state, the courts do not supervise the arbitrators, except to the extent that they hear claims when someone is trying to set aside the award, that the arbitrators were suffering from partiality, and they also regulate the arbitrators insofar as they require that they perform only the duties that are prescribed by the statutes.

For our court-annexed arbitration, arbitrators have to be approved, but if the parties agree to pick the AAA, or you or me or somebody else, we don't regulate that.

In our western state, you need a printout of every case that you handled, let's say for AAA or whoever it is, the result, what the result was, how many times you represented this plaintiff or defendant, and so it becomes onerous, you have to have printouts and controlling the fairness of the arbitrator.

When you think about it, how ludicrous is it that California had to pass a statute to make arbitrators disclose conflicts of interest?

Could I ask you about just the regulation of arbitrators? I'm not sure why the court system

ought to have any control over arbitrators. Why should the court of justice regulate arbitrators? That's a contractual thing, as a rule. People ought to be able to buy a contract and pick whoever they want, and whatever qualifications they want.

*Some judges discussed whether arbitrators were part of their court system.*

It is not part of the judiciary. It is completely separate from the judiciary; there is no supervision whatsoever by the judiciary over the processes. In fact, most of the arbitrators are private attorneys—not retired judges, there are a few—but most of them are private attorneys.

If we are going to have some sort of regulatory control over arbitrators, I'm not sure the court system is the right place to place that control, because I can't imagine myself knowing what qualifications I ought to set for an engineer-arbitrator, an accounting arbitrator, or an actuary or anybody else. And I wouldn't want that responsibility, I don't think.

In our southern state, the judicial system in any ADR procedure is completely separate, even in court-ordered mediation situations. Our system is really a completely two-track system and they don't intersect.

That's the way it is in our Mid-western state [outside the judicial system].

The same thing in our southwestern state, it's outside.

**When you think about it, how ludicrous is it that California had to pass a statute to make arbitrators disclose conflicts of interest?**

We have all kinds of alternative dispute resolution mechanisms in our system, except arbitration. We do not have court-annexed arbitration. We do have court-annexed mediation. We recognize, because we have a rule which defines all of the alternative dispute mechanism modalities. And what we specialize in are settlement conferences, mediation, and sometimes evaluative mediation. That means the court can order the parties do it for a fee. But they are in the court system. They stay in the court system. And if they don't successfully settle the case, the case is then resolved by the court. So, the arbitration issue is something that comes to the court from outside, where the parties agree. They contract, and then we get the cases to decide whether or not an arbitration agreement in the first instance, ought to be enforced. And then sometimes whether or not to confirm it.

It certainly sounds sensible what California has done to bring within control by the state this whole private adjudication rule out there and subject it to a variety of standards to better ensure that the system works in a manner that's promised of something that actually does clearly resolve disputes so that people can believe in the value of the system.

***When asked if arbitrators in their state have any injunctive powers, judges strongly denied that was the case.***

Arbitrators are not judges. They can only make awards, and they can't even issue judgments.

No.

No way.

In our northeastern state, no. You're just not allowed. They do damages and that type of thing.

It depends on the fact situation. If you've got a landlord-tenant dispute, and they got an arbitration clause in it, and they are commercials, and one has to get out, then it will be enforced. But that's kind of an injunctive-type thing. But, when you are talking about an injunction, injunctions usually affect a lot of people, and they all aren't subject to the arbitration clause. So, that doesn't happen.

I agree in the sense that so much depends upon the particular facts. You can have an arbitration agreement which gives that right. If there is to be a dispute over the area where A may do business under this descriptive covenant, it will be submitted to arbitration. However, in order for any of these things to have effect in our state, you've got to come to court and move to confirm the arbitrator's award. And once you get a judgment confirming the arbitrator's award, then it becomes an injunction. So, the injunction is the action of the court confirming the action of the arbitrator.

## **Attitudes Towards Arbitration**

***Judges were asked if their state had a policy favoring arbitration.***

My question is favored as against what? It's not favored as against violating rights or providing process. The question is do we all like it when people decide voluntarily to arbitrate and take things out of the court system? Yes. Do we favor an argument that there should be mandatory arbitration as against other rights? If that's what that means, it's wrong.

I think there is a place for arbitration. And I think that the flexibility, if it is not overdone, is a plus.

Do we favor mandating arbitration? The answer is no. Do we favor enforcing negotiated arbitration clauses? My answer is yes.

We favor trials as opposed to arbitration.

In our state, there is absolutely no policy favoring pre-dispute arbitration agreements. As a matter of fact, traditionally our state has been very suspect of pre-dispute agreements requiring arbitration.

We have favored arbitration for more than eighty years, because I know of cases from the early twenties dealing with arbitration.

In our southern state, the supreme court is going to great length to enforce arbitration agreements, I think in favor of businesses, and probably there are very few instances when the arbitration agreement is not upheld. That's my opinion of it.

Our northeastern state clearly favors arbitration.

Well, in terms of whether or not mandatory arbitration is favored, we view that in a strictly contractual sense, and we believe in strict interpretation of contractual terms.

We have a judge on our supreme court who is very, very much against all of this kind of arbitrary mandatory mediation, all of these kind of things. And his concern is that by doing all of this, we really deprive ourselves of the opportunity to advance the law. That what we are likely to end up doing is just looking at criminal cases and divorces, and the development of the law will suffer from all of this that is going on.

I suspect in most states, other than perhaps Montana, that general public policy is in support of arbitration agreements on the theory that it is very costly to business to engage in litigation. Consequently, if you want to hold down the cost of services or hold down the cost of goods, et cetera, and you understand that people have to bargain for agreements that you are going to agree to arbitration if you have a dispute, and that is going to keep down litigation, that is going to keep down costs, et cetera. So perhaps that is the basis for the general public policy to enforce arbitration agreements.

**We have favored arbitration for more than eighty years, because I know of cases from the early twenties dealing with arbitration.**

We favor mediation or arbitration. We have a requirement now that when a plaintiff files a lawsuit that they notify their client, and the defendant must notify his or her client, that there are various ADR mechanisms in place. We have an obligation to conduct a case-management conference when the case is no more than 150 days old.

State policy in every state favors arbitration, and I think many courts treats arbitration in the very same manner as mediation.

Our southern state is big on mediation but we don't have any formal policy on arbitration and we don't have any binding policy upon arbitration.

I want to say that a lot of this pressure on the courts, and to the extent there is a policy favoring arbitration, I'm not aware of a stated one in our southern state, it comes from the business community. The business community is very pro-mandatory arbitration. The Chamber of

Commerce, state and national, are very pro-mandatory arbitration. They want to take the cases out of the hands of the scary runaway juries, and I think that's the bottom line.

In fact, our public policy argument manual in our southern state starts with the presumption that the arbitration agreement is valid and enforceable.

In our mid-Atlantic state, they are favored and enforced. You have to raise significant issues in trying to overturn an arbitration clause. Again, to use the criminal standard of knowingly waived, the parties are presumed to be on equal footing when they entered into that contract, or made that agreement. It's very difficult to overturn.

I think that was a good point, that none of us have empty courtrooms and waiting juries, and as a result of the backlog we get to the public policy that arbitration is a favored thing, and I don't think that's a bad premise. So we have what I think is a good public policy favoring arbitration and I'm not hearing that these unconscionability overreaching arguments aren't working at the state level, but suddenly here we are being asked to graft criminal context standards into the contract-based analysis, so I'm wondering what the real agenda is. I don't see that there's this demise of the jury trial. It's a little hysterical to me.

***Judges were asked if they favored arbitration as a reason to clear crowded court dockets.***

No.

No.

No.

We don't have crowded courts.

In our northeastern state, we favor arbitration because it lowers our court congestion.

In our western state, that was one of the motivating reasons for the mandatory, non-binding arbitration.

I'm told that the average trial court judge of general jurisdiction in the first circuit in our state, which comprises about 80 percent of the state's population, has an average civil caseload of 600. Now if that's true, arbitration is here to stay as a safety valve, as a manner of resolving disputes in a halfway expeditious way when the formal system is simply overburdened and the legislature is unwilling adequately to fund the judiciary so that it can operate as it needs to do. I think that, to a very substantial degree, it is a preoccupation with resource allocation that forces the courts to endorse ADR even under circumstances in which it may be unfair to large classes of people.

Do we somehow bend our principles to get rid of these cases? I just don't think so.

I wonder if there's any kind of a relationship, either stated or perhaps subliminal relationship, between funding of the courts and the aspect of arbitration. Many state courts today are facing a crisis because of funding, I wonder if the availability of easy arbitration and mandatory arbitration in some aspects of our state jurisprudence is somehow inexplicably intertwined to that. I just wonder that.

I think when you're dealing with the issue of backlog, this congestion in courts, I think it depends on the jurisdiction you're from. I would suspect in Alabama, Mississippi, Oklahoma, or Missouri, you can get a trial within a year on a civil case. You're not looking at seven-year backlog really. I think you also find out that they don't have a proliferation of dispute resolution, and they haven't developed this cottage industry in dispute resolution in the states either.

You know, I think that's kind of a cynical way to even put it, a way for courts to just slough off cases or because the court dockets are crowded. It's an access to justice issue, and some of these cases are too expensive to prosecute.

And rather than deny them any kind of method at all of dispute resolution—that's the whole point of so much of what's either court-annexed or private—is to get something that is simple and quick for people with small cases, who otherwise wouldn't get to go and prosecute their case. And the courts

**I think it's very cynical and probably unfair to the legal system, which takes a bashing anyhow, to say well, it's just because the judges are too busy and the courts are too crowded.**

I think are to be commended for being part of that process of looking for alternatives, looking for ways to bring people some measure of justice, as opposed to just turning their back on the problem, because the lawyers aren't going to cut the costs. But I think it's very cynical and probably unfair to the legal system, which takes a bashing anyhow, to say well, it's just because the judges are too busy and the courts are too crowded.

It would seem that the court system that we have now is sufficient to handle this. I don't, at least in our jurisdiction, see such a crush that the people don't have, and shouldn't have a right to come into a court where they have a free judge and have their day in court. And if our courts are so overburdened then we need to expand our courts. The concept that we're not going to add a judge or any judicial resources for 40 or 50 years is nonsense, and that we're going to create instead a whole different system to deal with this litigation is, I think, wrongheaded.

I haven't looked at our cases recently but in kind of to respond to the ADR, I think that in the early 1980s we realized that mediation, non-binding arbitration, other things like that worked very well as a supplement to the jury trial system and to unclogging the courts.

The reason for mandatory non-binding arbitration for certain disputes for up to X number of dollars is our crowded court dockets. That's what everybody publicly says, including Pennsylvania, where they started it all. But we had a very serious problem in our Mid-western

state with substandard insurance carriers who were crowding our dockets, because they never settled a case. Never. It was a serious problem in our state, and nobody said anything about it, but that was one of the primary motivations behind getting the general assembly to pass the act.

I think that the speaker who said, I think there's one driving force that runs the arbitration market today and that is the backlog of civil jury cases in the country. I think that the judge is sitting there, he's got a docket that he'll never finish in his lifetime, and when arbitration comes along, it goes. I think that that is the primary reason why arbitration has taken off, because of the backlog.

***Judges discussed whether their state's policy favoring arbitration emanated from the judiciary.***

We have a very strong policy favoring arbitration, and it is judicially imposed through consistent opinions going back many, many years that have favored the process.

Interestingly enough, our mandatory arbitration—our court-annexed arbitration—was not a credit to the legislature. It was a supreme court rule.

Our mid-Atlantic state experience, to the extent that we call it a policy, emanates from supreme court decisions.

We do have a policy favoring arbitration, but to tell you the truth, I don't know where it came from, probably court decisions. It is not specified by the legislature.

I think that's just reflective of an increasing bias throughout the country that I think it was implicit in the papers that were presented in that we all really need to 'fess up to and that is that for various reasons, maybe most notably caseload, alternative dispute resolution is becoming more and more attractive to judiciaries throughout the country whether the respective bars like it or not. The judiciaries push arbitration, mediation, and other alternative modes and that's why Professor Sternlight's hypothesis I think is correct. Courts tend to begin from the proposition of the perspective that arbitration or whatever form of ADR is at issue is favored, and because it's favored, certain things follow. One's analytical approach to the legitimacy of the ADR mechanism is ultimately driven by the assumption. And the reasoning can get very circular.

***Other judges identified their state legislatures as the source of policies favoring arbitration.***

In terms of policy, we ought to keep in mind I think most states that have also adopted the uniform arbitration act as a matter of their own state's law. And until *Southland* and those cases came out, most of the arbitration cases in our state were under the uniform act of their own state law. Nobody raised the federal act, even though they are essentially the same. So I think the legislatures have set the policies favoring arbitration as well. The state courts really have more leeway to play with those acts than they do with the federal.

I think it's legislative policy that we enforce. Now, I must tell you, I am in favor myself of alternative dispute resolution mechanisms when the parties themselves enter into these agreements, because it does in fact provide them with a basis for resolving a dispute which takes it off of our docket. But I'm not so sure that courts are saying they are in favor of a policy when the parties themselves don't agree to it, which is where the real sticking point is in this whole discussion.

Our western state's legislature adopted a provision that specifically favors arbitration and mediation.

Our western state's legislative policy is in favor of ADR, not specifically arbitration or mediation, but encouraging the courts, and, in fact, requiring the courts to set up ADR programs in every county.

It's legislative. There is an arbitration act.

***Judges described the arbitration laws in their states.***

All states have the Uniform Arbitration Act.

Our southern state has got a statute quite similar to the FAA.

We have an arbitration act, but it provides for a judicial review. So it is not binding arbitration.

We have a state arbitration act, but the requirements are so onerous that a lot of times the people that don't want arbitration can avoid it because the act says that any contract containing arbitration has to have it on the front page of the contract in bold letters, underlined. And it rarely has that.

To the best of my knowledge we do not have our own arbitration act in our southern state and the courts do not per se get involved in arbitration.

Our southern state has its own arbitration act, but I'm not sure how, in these types of contracts of adhesion how it would apply. Typically, they are going to provide for the FAA, because they are national contracts. But our state has got its own act and procedures.

Our Mid-western state does too, but it doesn't really do much except authorize the supreme court to deal with it.

***Judges discussed the differences between mediation, which they all favored, and binding arbitration, which had a mixed reception.***

I think non-binding arbitration is very different from mediation. Mediation is a process where the parties concur and reach their own resolution of their dispute. Non-binding arbitration, an arbitrator or a panel of arbitrators come up with a decision. They can take it or leave it.

Let me clear it up. I'll give you the terms of discourse. Arbitration is always mandatory. If you want to define it the way it should be, arbitration is when you submit it to an arbitrator, and the arbitrator makes a decision. The decision is final. Mediation is when you get a third party to facilitate a settlement.

It becomes an oxymoron when you have mandatory, binding arbitration that is subject to de novo review.

We encourage mediation, not arbitration. There's a big difference between the two, no question about it.

I think that it's really a different question, what you are talking about. We are talking mandatory arbitration, but you don't have to stick to it. That's just totally different, because we have that in our state a mandatory arbitration in the superior court, but

**It becomes an oxymoron when you have mandatory, binding arbitration that is subject to de novo review.**

whatever you get you can take it or go for more. And it is apples and oranges. It's really not the same thing. You are not waiving a jury trial by it, so it's really a different question.

We have a rule, and our rule specifically does not purport to be arbitration. It is mediation. We define the terms in a way that makes clear what it is we are talking about when we talk about mediation. And then we have a rule that sets qualifications.

*Several judges discussed mediation programs that their states have put into place.*

Our southern state has just implemented an appellate mediation program along the lines that Florida uses. So, they looked at some of the other states, and they are looking to hopefully, particularly in areas of domestic relations or workers' compensation at our intermediate court level, to have maybe 40 percent success rates, or even at least suspend the briefing schedule during that of period of time, and we're real excited about it. We have just implemented it and have not seen the results yet, but we are hopeful.

In our southern state, we have a mandatory mediation program—not arbitration—with trained mediators that all civil cases must go through before they can go to trial.

Even in the court of appeals they have a mediation component. And it is doing extremely well.

In our southern state, we have a similar situation where every case in superior court and now in civil district court—which is the smallest jurisdiction court—has mandatory mediation. That has resulted in a tremendous number of cases being settled, and the lawyers do like that. It has also made it so that you can get a jury trial very quickly. As a consequence of that, I think arbitration is not favored by the trial lawyers in our state.

There is no binding arbitration provision in existence in our southern state, but we are leaning towards some mandatory mediation there, which is non-binding as to its results. It is strictly on a voluntary or on a non-binding basis. And it is based up on the discretion of the trial judge whether or not to order non-binding mediation. But arbitration has not established itself at this point in time in our state.

Our northeastern state has a number of alternate dispute resolution kinds of programs. We have what we call court-annexed mediation, which is not binding. A judge can order that in either a case that is claimed to a jury trial, or not claimed to a jury trial. It's not binding, and it's available.

We tried to get planned mediating for cases that are bound for the appellate process. And lawyers are really reluctant to get involved in it, because they have written their briefs.

I drafted the rule in our southern state years ago after going through this in the Sixth Circuit, and it has far exceeded our expectations of settling cases that are on appeal at the court of appeals level. Of course they pick and choose the cases they want, but they settle about 40 percent of them, which is surprising I think.

**I can force them into it, but I can't force them to dance.**

Lawyers were very suspicious of mediation for a long time, particular in our southern part of the state. But it's now pretty widespread.

I can mandate that a case go to mediation. I can't really mandate that they mediate in good faith. Everything that goes on in that proceeding is confidential, but I can force them into it, but I can't force them to dance, so to speak, but I can get them into the environment. In theory, it is all voluntary. Mediation is not supposed to be an enforced proceeding.

It sounds like from listening to the discussions today and at lunch that there may not be this huge need for all these cases to go into arbitration if mediation is as widespread everywhere and is reducing caseloads as people seem to be saying. And also it sounds like from the lunch speaker that the more arbitration systems get tweaked so that they're considered to be consistent with state law, at least in California, the more it looks like the system we already have, the justice system which seems to have functioned pretty well as it's been improved over the years. So I just wonder whether there's the need for this great rush into arbitration.

***Several judges discussed the costs associated with arbitration, as well as with going to court.***

Consumers don't have the \$10,000 or \$12,000 that some of these contracts require them to put up front so that they can go to arbitration.

We have several hoops that we can go through—small claims court, appeals to arbitration, trial de novo before a board of arbitrators, trial after that. Once they ultimately get to the trial court, it's expensive. It's \$80,000 for a \$300 case. But they can get their jury trial right.

It's not realistic to tell a small time person before you can step your foot into this system you've got to pay a couple thousand dollars.

Well, it depends on who's paying for it, it depends on what the terms are. In some credit card cases, the credit card company is more than willing to pay for the cost of the arbitration. They don't pass that onto anybody; they just want the arbitration as opposed to a jury trial. So it depends on the agreement.

I think another problem is the cost of civil litigation. I really do think you cannot try—it doesn't make any economic sense to try a case under \$40,000 in court.

***In some states, there are financial benchmarks that, if met, may require litigants to go to arbitration.***

Our western state has a mandatory arbitration scheme for lower-priced cases.

We've got mandatory arbitration in commercial disputes of \$25,000 and below.

In our western state, we have two kinds of arbitration. One is contractual, the other is mandatory arbitration. And that began, I couldn't tell you how many years ago, but it was established by court rule initially, and adopted by the legislation. It is mandatory arbitration that began with I believe with sums of \$25,000 or less. It was raised to \$35,000, and now it's \$50,000 or less.

We have mandatory arbitration of cases within an amount and controversy of, I think, \$40,000 and under, but it is not binding.

Our mandatory arbitration laws are pretty much like they are in all industrial states. They are based on Pennsylvania's \$50,000. So, really significant damages are not impacted by the standard mandatory arbitration program in our state or any other big state.

Cases of \$30,000 and under must go to arbitration. The way it comes down, if you are dissatisfied with the outcome, you may seek a jury trial. But if you do not participate in good faith in the arbitration proceedings, you're out. You are going to be bound by the arbitrator's findings. And we now have a form that requires the arbitrators to indicate whether or not the parties have participated in good faith. This was brought about by the experiential history of arbitration. We have had cases where, for example, an insurance company won't respond to discovery. They won't bring their client in. They will sit by.

Our Mid-Atlantic state has mandatory arbitration in civil cases under \$25,000, and in some counties opting up to \$50,000. You have a right to a trial de novo thereafter. But in my county, two-thirds of the cases don't get appealed. So, in effect, the non-binding arbitration becomes final, because both parties have agreed it's not worth taking it further.

We have a little variation on that in our Mid-western state. We have the "mandatory" arbitration for civil matter under \$50,000. Both parties have the ability to decline the

arbitrators award and ask for a trial de novo, save one exception. If the arbitrators find or a trial judge finds, on motion, that the parties seeking to set aside the award did not participate in arbitration in good faith, such as sitting back and listening, then in that particular case they're debarred from setting the award aside and it then becomes binding. And we do it, it's by Supreme Court rules. It's withstood the constitutional challenge.

## **Ruling on Arbitration Clauses**

*Judges were asked whether they ruled on arbitration cases.*

Yes.

Yes.

We've had quite a few.

Four or five times a month, average.

Zilch.

We have been involved in some. I didn't say that there was a lot of big growth in litigation about it, but we have some cases.

We have not had a great many reported decisions. Our supreme court has touched it. We have had some appellate court decisions. We have had a great many decisions that touch on our own mandatory arbitration system, the court-imposed mandatory arbitration system.

We have.

I have only been on the court of appeals for nine years now, and I think I have seen one published case, maybe two in nine years, where they have said the arbitration agreement is not a valid agreement.

We really have had very few appellate arbitration decisions. We have had several recently from our court that we elected not to publish, just because we didn't feel that we had the expertise to really make a correct decision.

Unless my memory is failing, in the last eleven and a half years we have had only one matter challenging the legitimacy, the enforceability of an arbitration agreement, and that was in the context of the provision that appeared on an employment application.

Now, I have been on the supreme court for 10 years, and I have only seen one reach our level, and it was on a writ of prohibition.

In our southern state, it's a huge issue.

There are a number of cases in the appellate courts in our southern state dealing with various issues

of arbitration, and one before the supreme court dealing with whether the arbitrator or the trial court is the entity that makes the decision as to unconscionability of the contract.

I think you guys are a little ahead of the curve on this. We have arbitration disputes that we see—whether or not you waive arbitration by not paying your money and stuff—but I haven't see anything that dealt specifically with a preemption issue, whether or not a case was preempted by the FAA.

**It's like the West Nile virus. Some states got it, and some states never did.**

It's really a surprise to me given the extent to which we push ADR and arbitration in our state, that there's been so little litigation that's comes up to us at the appellate level.

It's like the West Nile virus. Some states got it, and some states never did.

*Some judges talked about their rulings on cases at the appellate level.*

Well, my court has written a case, and we had quite a lot of legal authority to support us. We said that if you claimed fraud or duress or some defense like that, that had to go to the arbitration clause itself, not to the balance of the contract. I think that is well established.

When we wrote the opinion, we were accused of being judicial activists, because we wrote into the opinion that in order to have a valid arbitration under these particular agreements, you must protect what we call due process rights. So, we wrote in eight rights. What we tried to do in the opinion is get rid of all that, and say it's not a valid arbitration. It was a little activism—yes, a lot of activism. In order to have the valid arbitration, you needed to protect each person's due process rights, and it couldn't be a sham.

The other reason why I think our court is looking at it a little more, at least I am, is that some of the development of the civil law in our state is starting to atrophy because we aren't getting the cases that work their way up now through the civil jury trial system and there is some concern. Our lawyers are complaining and said "We need some guidance here but we're not getting it." The court is getting cases in a lot of those areas.

We upheld that against the argument that these contracts were invalid under a provision of the state constitution that prohibited contracts waiving constitutional rights. So, in our Mid-western state, arbitration clauses are valid, and will be upheld, even against explicit protections in the constitution.

I must say that our Mid-western supreme court strictly enforces contract provisions. I don't think they are using knowing, voluntary, and intelligent other than in a criminal setting. It would go more to a fairness standard. And so far, even those things that looked very unfair, well, it's there. It's fair. You've got an opportunity to read it. You declined your opportunity to read it. You lose. So, I think that's the current climate of our Supreme Court.

Arbitration is sort of a new creature. It's one of the reasons why I'm here because I wrote a case recently that was a controversial case on our court of appeals involving a real estate transaction. The question was whether mandatory arbitration, which was part of the contract, governed this particular case. We circumvented that issue by saying that the contract itself had been improperly induced by fraud and therefore it was a matter for the courts to determine. The common law cause of action involved with the fraudulent inducement really preempted the arbitration issue, and that's how we handled it. That has been a very controversial case in my state and one of my colleagues who's here with me took me to task over it. Whereupon I said, "Well, what we're basically doing is abdicating our judicial role if we allow arbitration to take over." The next thing, we've had an article on the privatization of justice from Roscoe Pound and I suggested why don't we both go and see what's happening to us. And that's why we're here.

I wrote an appeal on a case where two businesses had entered into a contract where they agreed to submit to mandatory arbitration all disputes between them. They had a dispute, and one party attempted to trigger arbitration, and the other party refused to do it. They went to the trial court. A trial court ruled that they did not have to go to arbitration. They appealed that to our court, and we ruled that they did have to go to arbitration. They had contended that the particular dispute between them did not come within the arbitration clause, and we ruled that it did. And so, they were compelled to go to arbitration.

There has been a recent court of appeals case in the eastern part of our state which did invalidate an arbitration agreement. And I haven't read it, but basically I understand the facts were so horrible, that it had to go away. And even the defense bar thought that case was appropriately decided, it was such a bad set of facts.

**"Well, what we're basically doing is abdicating our judicial role if we allow arbitration to take over."**

One of the problems I have with arbitration is the scope or standard of review an appellate court can apply in reviewing an award. There can be an egregious error of law, and we can't reverse, even though everything is preserved and it's before us as an issue, unless the arbitrator knew that he was making it and he knew what the law was and that he intentionally violated it. Why can't we correct an error of law that everybody knows is an error of law, except the arbitrator?

That will be the next step in the law—how do you appeal from the arbitrator—and I am just wondering what case law is being developed in this area.

## The Right to Trial by Jury and the Waiving of Constitutional Rights

*One of the fundamental issues underlying the Forum is the issue of right to trial by jury and whether mandatory arbitration clauses violate that right. Judges discussed their state's right to trial by jury in civil cases.*

We have a right to jury trial in civil cases. However, generally you have to demand that right to a jury trial.

We have a state constitutional provision expressly protecting or creating a fundamental right to a jury trial in civil cases.

Our right to trial by jury in civil cases applies only to common law actions.

I can assure that we have a constitutional right to trial by jury cases in our Mid-western state. I want to tell you that you we also have mandatory arbitration in our state.

Our southern state has a constitutional provision not just for jury trial, but guaranteeing access to court. Those two analyses have never crossed paths very clearly. There have been cases where it would seem like the issue should have come up, but it has not been directly addressed, and I think that that is something that our state courts are going to be dealing with immediately.

Our constitution predated the United States Constitution. We have always jealously guarded the jury trial rights. Even in the smallest of claims, even if it's a \$10 claim, ultimately a plaintiff or defendant could get their jury trial right.

We have it in the our northeastern state's constitution, which is older than the federal Constitution. The language of the jury trial right is much stronger than the Seventh Amendment.

Our state constitution actually has two provisions protecting the right to jury trial. And in addition to that, I think the other side of the coin is we have an open courts provision—a right to remedy provision. We're one of the 38 states that has that. It seems to me it's difficult to separate those two issues when this comes up.

We do have a constitutional right to a jury trial. And in the civil case you simply have to claim that within a given number of days. If you don't claim it, you have waived it.

Some states have a constitutional provision similar to the federal constitution. Other states have additional language that says the right to jury trial shall remain inviolate, or something a little bit beyond the federal language.

In civil cases, we have a very specific grant of a right to jury trial in the constitution, which actually predates the United States Constitution, and it has this wonderful specific affirmative grant of the right to a jury trial in civil cases.

I come from a state with a very strong constitution with respect to jury trial. We do not have mandatory arbitration.

***Judges discussed what it takes to waive the right to jury trial in civil cases in their state.***

In our southern state, we're kind of at extremes. At the criminal end, the courts want to be sure that the defendant gets his right to a jury trial. At the civil end we're at the opposite extreme, you have a constitutional right that is easily waivable. It's not only waivable by contract, but when you get into litigation, the mere failure to request a jury trial at the initial pleadings waives a jury trial. It's that simple. It doesn't have to be knowing, voluntary, and intelligent. In fact, a lot of times the lawyers will come in and say "Oops, I made a mistake." And the answer is basically, "Too bad."

Let me ask a question. What right as citizens can we not give away? I see people all the time waive their right to an attorney, which is a stupid thing to do. They waive their right to a jury trial. They waive all kinds of rights.

I think the answer to your question in terms of burden of proof is going to boil down to a procedural question on who raises it. Under our state law, what will happen is the plaintiff, who has signed one of these boilerplate provisions, will demand a jury trial. The defendant will say no jury trial, because he waived it. The burden is immediately on that person to prove it. So, I think a lot of that question is dictated by the procedure.

What I found of interest though, and I have seen it in the waiver of jury trial area, our northeastern state has a constitutional right to a jury trial in civil areas, but somebody has to demand it.

**When you get into litigation, the mere failure to request a jury trial at the initial pleadings waives a jury trial.... In fact, a lot of times the lawyers will come in and say "Oops, I made a mistake." And the answer is basically, "Too bad."**

The analysis of what involves a waiver of a criminal jury trial is a very, very much higher standard in our state. And a lot of the language that seemed to be creeping into the discussion today doesn't come up in any of our cases as far as waiver of the civil jury trial.

I've never seen the issue of a waiver in a civil case in all the time I've been on the bench and I can't even think of a case that addresses it.

I would think the procedural differences between the right of jury trial on a civil case and a criminal case suggests that they're really not on an equal footing and there's something more substantial about waiving your right to a jury trial in a criminal case than in a civil case.

You have a waiver, of course you can waive in criminal cases, but in the civil cases, when the plaintiff files they have to make a demand for a jury trial and pay the jury fee. If they do not then the defense within 30 days has to answer and they can make the demand for a jury trial

and pay, but after the jury trial is demanded it cannot be withdrawn unless everybody agrees to it.

I think that would be a very hard argument to make, because you can waive constitutional rights in any context—in a criminal case, anything—and so why simply in a contract would you be precluded from waiving a constitutional right?

In civil cases, you must file a jury demand with your appearance. If you fail to do so you have no right to trial by jury. The only exception to that is if another party has filed a jury demand and then subsequently is either eliminated from the case or waives the jury, then you have a reasonable period of time thereafter to file a demand.

In our western state in civil cases, one of the litigants must require or demand a jury. Otherwise they waive the right to a trial by jury if they do not do something affirmative as far as demanding trial by jury.

Our court and the state supreme court has been pretty conservative in determining what's necessary for a waiver of any right, whether it is a constitutional right, a contractual right, or a statutory right. Number one, you have to know what that right is in order to find a valid waiver of it, which I guess comes down to knowing waiver of a right. And, as to a constitutional provision, I can't tell you a case in our southern state dealing with it, but I know that we would lay down a pretty stringent standard on waiving, either in civil or criminal case, a right to trial by jury.

I disagree with Paul Bland when he said if you have provision in the agreement that says you're not going to speak out against a certain issue or a certain company, or you'll vote only for certain candidates that we list for you, would a court take that as an enforcement provision? The answer is No. I'm not even sure how you'd enforce it—show up at the voting booth and say “Let's watch you vote. Stick your vote in the ballot box.” But what's interesting is you would not use a waiver analysis to throw that out. You wouldn't say “Did you knowingly and intelligently waive your right to free speech?” You'd just do a public policy thing. You'd do something that would say that's a provision that we're just not going to enforce. You would not say “Let's determine did you knowingly and intelligently waive your right to free speech.” Because what if the answer is “Yes, I did? I saw it there, I knew what it meant, I went ahead and agreed to it.” You'd still not enforce it.

***Many judges discussed the higher standards for the waiver of the right to trial by jury in criminal cases, and most felt that waivers in those cases should be scrutinized more heavily than in civil cases.***

Jury trial is absolutely presumed. If there should be a waiver, it's got to be a waiver by the defendant personally in open court, in writing, accompanied by counsel, and responding to questions from the court making clear that the defendant understands the implications of the waiver. It's got to be fully written, signed, and acknowledged.

I am just saying that a criminal jury trial waiver is an animal unto itself, and it involves government. You are handing over to the government an awful lot of power over your life. You are saying sentence me, and you are giving up just a number of very serious constitutional rights when you do. Now, when you give up a civil jury trial, are you necessarily giving up many attendant constitutional rights? No.

From a trial judge's perspective trying civil and criminal cases, I suspect being spanked by an appellate court for not having tried a criminal or finding yourself on the front page of the local newspaper for releasing a "criminal" takes a greater priority over worrying about whether a proper jury trial analysis has been undertaken to determine an arbitration clause will or will not be upheld.

For the criminal, we have the same knowing and voluntary waiver requirement, and it is presumed unless waived, although we don't have to have all of the formalities that other states require. It has to be shown on the record that the person has done so knowingly and voluntarily.

To waive a jury trial in a criminal case is almost, you really have to work at it. The courts scrutinize those waivers, because you have a right to appeal a criminal conviction. And that's always an issue if there has been a jury trial waiver, and immediately the lawyer's competence comes up.

Our state's standard in criminal cases is quite high and applies equally to the state and to the defendant.

Even if the defendant waives, if our state wants a jury trial, then the defendant gets one.

In our northeastern state, the people do not have a right to object. The defendant waives his jury trial and it's knowing, intelligent, signed. The people can't object.

I'm kind of known for my liberal leanings, but in this case I have to say I don't think they should impose the criminal standard for waiving a jury trial on a civil contract for waiver of arbitration.

There should be a higher standard, because in a criminal case you are relieving the state of an awesome responsibility to come into court, marshal witnesses, prove guilt beyond a reasonable doubt, and take away someone's liberty. And with a civil jury trial waiver, you're talking about money, property.

It seems to me what we've got to talk about is whether the right to jury trial in a civil case is of the same constitutional dignity as the right to a jury trial in a criminal case? And personally, I think the answer to that is yes. You can trace it back to the Magna Carta. And if in fact the rights are of the same constitutional magnitude, then I think we get into a discussion about how do you memorialize the waiver of that right?

You know, once you said that you have to have the kind of admonitions that we require in criminal cases, you are essentially saying no arbitration anymore. The truth is, you would have to have somebody sitting in judicial robes in every automobile agency in America in order to make that meaningful.

*One of the arguments that Professor Sternlight made was that it may be possible to overturn mandatory arbitration clauses because they violate the fundamental right in many states of a right to trial by jury in civil cases. Most judges, especially those who have ruled on arbitration clauses, said that this particular argument is not being made by lawyers.*

We have not dealt with the right to jury trial in these cases. That's never been raised. We have never addressed it. I found it interesting that I have never heard some of these arguments made.

I have not seen any appellate case that has dealt with the jury trial issue in the context of arbitration.

I was sitting here thinking about whether or not we have had that argument in our mid-Atlantic state. And the reason I'm thinking we have is because Paul Bland has appeared before us a couple of times. I rather think he might have raised the darn thing, but I don't recall it as being one of the major points that has been raised in any of the cases that have come before us.

I'm a trial judge. I think just recently, in the last 10 days or so, I had a motion to dismiss a complaint based upon the arbitration clause which was in the contract. And they are

**I have been on our appellate court for eighteen and a half years, and have not seen it once in that time.**

briefing it out. So, I maybe am going to be a little bit ahead of the curve, and they might be surprised at how astute I am, and maybe disappointed in what my decision is.

I have not seen a case since I've been on the court that involves the issues of what constitutes waiver of that right in a civil case. It hasn't come up. It may be one of those that the lawyers don't raise.

We have addressed, as mentioned in her paper, the infringement of the jury trial right, which does exist in our western state in civil cases, and held a statute requiring mandatory arbitration of certain kinds of motor vehicle claims to be an infringement of the jury trial right.

I have been on our appellate court for eighteen and a half years, and have not seen it once in that time.

The cases in our Mid-western state don't come up. I have never seen a case where a lawyer is coming to argue that, by signing a contract that has an arbitration clause in it, that it is an involuntary waiver of the jury trial. The come up mainly by the attorneys saying this process isn't fair.

What we usually hear is the same thing you hear, that ain't right, or that dog don't hunt.

The arguments that the attorneys are making challenging these agreements are really not very well formed at this point. They are adopting the old southern theory of “It just ain’t right.”

Every lawyer that I’ve seen that brings this up attacks it from the access to the courts perspective as opposed to the jury trial.

As I said before, today it’s become innovative, because I think we have one case pending, as I said before in our northeastern state about this taking away the right to a jury trial. Until I read the article and the case came up in the supreme court in the last couple of months, that argument was never seen or heard by any of us, at least by me, in 14 years.

I really don’t recall ever in the almost 18 years of sitting on courts of review, that the problem that is presented in this particular forum ever came before the court. I don’t recall anybody ever arguing that there has been a diminution in the right to jury trial because of arbitration. So this is all new to me. It’s very interesting, and I find it helpful. Not only interesting, but it alerts me to a problem that I didn’t know existed before.

**What we usually hear is the same thing you hear, that ain’t right, or that dog don’t hunt.**

As far as this arbitration business comes, I’ve been on the court of appeals in our northeastern state for 14 years, and I’ve never seen an argument concerning trial by jury rights in an arbitration case. There presently is one pending for our state supreme court and that has the

argument of trial by jury right, but I think as I understand, the big argument in that case is you didn’t make this argument before the trial bench. So, their odds of being successful at the supreme court, if the trial judge didn’t rule on it, is diminuous, because it’s up to the lawyer to bring this to the trial judge’s attention to rule on it before it gets to the appellate bench.

We dealt with the unconscionability issue in an employment application case and we ultimately just painted by the numbers in terms of *Southland* preemption analysis and we held that this poor employee was stuck with the arbitration even though he had simply submitted the employment application. But at no time in the course of that litigation did anyone, much less the plaintiff, invoke his constitutional right to a jury trial and that’s what seems to tie the morning session together with the afternoon session.

***A few judges suggested that lawyers be made aware of this argument so that they can bring it before the bench.***

It’s the chicken or the egg problem. All of my appellate courts aren’t going to take up issues that aren’t raised. So if the lawyers don’t play the tune, we are not going to dance. And the fact of the matter is in the two cases where we have addressed it, it was actually not raised, and we ended up having to, because of bad facts, had to piece together a rationale to decide the case. And I think it’s endemic of the fact that lawyers, in my experience, are really leery about raising questions of state constitutional law. It’s an uncharted area for a lot of our bar, and so they don’t want to raise it, because they can’t necessarily find analogous precedents to it. The

U.S. Supreme Court cases don't help. We are just not seeing lawyers raising it. Until they do, it's really going to be hard to thrash it out.

It is not presented either at the trial bench and/or at the appellate bench in terms of does this violate the state constitution. So I think there is plenty of room to try to help educate the judges by help educating the lawyers to present the issue and frame the issue appropriately.

The arguments are pretty impressive, and I was wondering when I was listening whether or not these arguments are presentations to be made to lawyers at the same time because I have never seen this issue.

I think the trial courts are going to accept that argument, if the lawyer comes to court, and is prepared to tell us what they want to do, and why they want to do it. And if they have a good concept of where they are going, and how they are going to get there, so that it makes sense, then I think they are going to get the result just exactly as you would anticipate. I think trial judges are very careful about making a record, and providing an opportunity to make a record, when it seems like there is an objective in mind.

***A couple of judges discussed whether the jury trial argument could be addressed by judges even if it is not raised by attorneys.***

Playing the role of the devil's advocate and the unrealistic idealist, is the type of function of the judge to be the gatekeeper? I mean, if nobody else is going to stand up, who will? I understand it's very idealistic.

It would be raised in the constitutional context. And your first principle of review is that you don't reach a constitutional issue unless you have to. And the kinds of contracts they are talking about, we can always find an unconstitutional dodge around that question.

You see cases that come up in which the parties have not really identified the real issue, and you say, okay, they have done all this, but the crucial issue here is this, and we, *sua sponte*, decide this case this way. It is done by the trial courts; it is done by the appellate courts. Personally, I see arbitration, as it is coming into play, as kind of supplementing the existing legal system, and denying many people the right of access.

Part of the problem is that you cannot be, if you will, an advocate, and yet we do it all the time *sua sponte*.

We are supposed to adjudicate, but we are not investigators or prosecutors. We resolve controversies that are brought to us, but if nobody brings a controversy to us....

*Several judges discussed the standards for waiving the right to jury trial, including whether a person knowingly did so.*

I would be surprised if most people even know what the heck arbitration is. They are skimming down the contract, but they wouldn't know what they were signing.

We do engage in a lot of legal fictions. We engage in a legal fiction that someone who signs a contract that is 47 pages long has read everything in the contract, knows everything, and certainly has agreed to it. But what is the alternative then? If you don't engage in some of these legal fictions, then are you going to litigate every sentence in a contract as to whether did you agree to that or you didn't agree with that. I mean, there are problems.

I think the test in civil or criminal cases in our southwestern state, and in most states, is knowingly, voluntarily, and intelligently. But there are some of us who believe that anybody who knowingly and voluntarily waives his right or her right to a jury trial, whether it's criminal or civil, can't be very intelligent.

I have always wondered if there is a difference between knowing and intelligent. If you know about something, I mean, do you have to prove that you were intelligent enough to realize what you might be giving up or something. If you know about it, you're giving it up. I don't know if any other states and courts have explored this. There is really a difference between knowing and intelligent.

We have cases that indicate that it requires a known waiver of it. Most of the cases come up, with interestingly enough, a Hispanic plaintiff who didn't speak English very well, and so you have a question whether he knowingly executed. On the other hand, they don't argue that the contract is invalid, just that the area of arbitration is invalid.

When you park your car in a parking garage and it says we're not responsible for damages, it's in fine print on the back of the thing that you got from the ticket that came out of the machine that let you into the garage. At that moment you just formed a contract.

How about the ones where you really don't even know you're signing the damn thing, you're just not aware of it? Or you get something in the mail? You really can't say it's voluntary and intelligent, but you still got a contract people are enforcing.

## **Assessing the Merits of Contracts**

*Judges discussed arbitration in the context of contract law, and how that affects their interpretation of challenges to arbitration clauses.*

Here's the rub. If it's going to be interpreted like any other contract, contract law has all these presumptions that other constitutional contexts don't have. We presume you know what you're signing.

The freedom to contract is the bedrock of the common law. And it has never changed, to my knowledge, except the one caveat—is the clause against public policy? That would be the one thing that would negate it. And you begin with the assumption that the parties are equal. We look at disparity, but only after presuming that the parties freely agreed to enter into this agreement, because their signatures are on it. That’s where you start.// But the presumption is kind of in pencil.

I think what we are talking about here are not necessarily the contracts between financially sophisticated folks. We are talking about this new breed of stealth contracts.

I would enforce them, or I would put a very high burden on the consumer to show that it shouldn’t be enforced. I mean a high burden.

Because you have a consumer saying sure, “I read the documents. I knew I was getting a credit card.” Or “I knew I was buying a refrigerator. I knew it cost this amount. I knew that it had warranties. I knew that I had three days to rescind. I saw the arbitration provision, and I’ll keep all these other paragraphs, but I don’t want to keep that one.” And once you have a person saying “Yes, I understood and I read it,” then they’re in and the contract analysis kicks in. I don’t think that’s unfair because people do have an opportunity to

walk away from a contract that has a provision that they don’t like, and people do it all the time. So that to me is the real issue

**I think what we are talking about here are not necessarily the contracts between financially sophisticated folks. We are talking about this new breed of stealth contracts.**

One of the things that really disturbs me in all of this is that we have a situation where now in arbitration agreements, they are taking away the substantive rights of damages and

remedies. And these contracts are being drawn unilaterally by some company or corporation, or somebody that doesn’t have to suffer those damages that are guaranteed by the Constitution, and by the statutes of the different states.

I did have an interesting personal experience. I was refinancing a mortgage several years ago, and they brought me a form at the closing, and said this is the waiver of jury trial form. I said, “I’m a judge. I believe in the jury system. I’m not waiving a jury trial.” They weren’t going to let me go through with it. It took them 45 minutes to call in their lawyers, and I think partially because they knew I was a judge, they said, “Well, don’t worry about it, you don’t have to sign it.” It was not a meeting of the minds.

I wonder, and I guess there haven’t been any studies done yet, but it would be fascinating to have an academic conduct a study about just exactly how successful could John Q. Public be with some of these major corporations that are using these provisions, to say, “Either you agree to take it out, or I’m taking my business elsewhere,” and just see their reaction.

*Several judges discussed whether some of these contracts utilizing mandatory arbitration were contracts of adhesion.*

Let's look at it. These are adhesion contracts. There is no negotiation. There is no consent. You just have to take it, period. We made it very clear that, under the state constitution, you have the right to a jury trial in contract cases. This case involved title insurance claims, and it was a contract of adhesion. And we struck it down and said they are entitled to a jury trial period.

Where I think the people who are pushing arbitration are going to destroy the institution is using it in contracts of adhesion. It was fine as long as it was between equal parties in an aboveboard negotiated way. Once it went over the edge, where one party was imposing it on the other, I think it becomes destructive. That is really the difference—the rest of it is fine—but that is going to be a problem.

**If you want the card, sign. If you don't want the card, don't sign.**

If it's an adhesion contract where people literally sat down—we got an equal bargaining position power between the parties—and really discussed this issue and it is voluntary and intelligent, I would enforce it. I have more problems with the case where that doesn't happen, where it's tucked away in some technical language in the contract. People really don't read the contract. Are you going to enforce those?

I don't think necessarily small print means adhesion. Adhesion means take it or leave it.

I know what I am giving away. I don't want to do it, but if I want to do this transaction, I'm really being forced to do it, because they are not going to change that adhesion contract. They stick it to you. You either sign it or you don't, and if you leave him, that entity, you go to another one, you're going to get another. An adhesion contract is what you are going to get.

If you want the card, sign. If you don't want the card, don't sign.

They are all contracts of adhesion. I have looked at some of them. I have signed them, and just for the heck of it, I stop and say, "Well, hell, I don't want to go to arbitration on this deal." And I'm just kind of kidding, I'm not real concerned about it, but I'll say it just to see what happens. What the salesman says, "I'm sorry. I don't know. This is our contract." You either have to sign it or not. So it is that sort of situation. It's—and it doesn't matter that I've seen it—just that I don't have the bargaining power to make this corporation go change all of these adhesion contracts.

The courts in our state, and I think in most of the industrial states, have a tendency to look on arbitration contracts as contracts of adhesion, certainly on the commercial side. You take a traditional contract analysis of the contract. It isn't difficult to find adhesion when the contract is set out by General Motors Finance, for example.

The problem that I have is that, as a practical matter, they are becoming so prolific that there really isn't a contract that you can enter into without one. If you want to buy a certain type of good,

you can't go to some other vendor, because almost everybody has the arbitration agreements. Like you were talking about cars. So you say, "Well, okay, I won't buy a Chevy. I'll go buy a Ford." But then when you try to buy a Ford, you are going to have to do the same thing. So you say, "Okay. I won't buy a Ford. I'll go buy a Dodge." There is nowhere you could go. As a practical matter, you have no recourse other than to agree to an arbitration agreement.

You are premising all this on disparate bargaining power. That got mentioned about half a dozen times this afternoon. I'm not so sure that the bargaining power is as disparate as we think. In my personal dealings, I have never agreed to one of those clauses, and I have called my credit card company. I say, "I simply won't agree to this. So, you can either agree to X out this particular provision, or I'll just go to Citibank, it doesn't matter to me." And I have had pretty good luck personally with people saying, "Yes, initial and X it out. We will send you a provision, and it will not be enforced."

When you're looking at an adhesion contract, does it make a difference whether or not they could go to another credit card company and get one without the arbitration provision? You don't look at the market.

***One standard of assessing the validity of contracts that judges discussed in detail was whether the terms of the contract were unconscionable. Several suggested that was a standard that was used regularly to overturn mandatory arbitration clauses.***

In terms of unconscionability, the standard of appellate review for that places a great deal of authority in the trial court. In other words, if there is a finding of unconscionability and there is any competent, substantial evidence—at least in our southern state—generally, the courts aren't going to overturn that finding. There is a lot of deference given to a trial court's finding, especially if there are some findings of fact that support a conclusion of unconscionability. It is very rarely overturned.

I'm a trial court judge, so I have a little different perspective on this, but I believe that in most instances our high court will look at unconscionability, and give a lot of discretion to the trial court judge. I think we are more inclined to say that unconscionability really has to be determined on a case-by-case basis, and it is almost impossible to lay down any hard and fast rules for. By the same token, the unconscionability argument is very seldom, if ever, made.

It's so fact-pattern based and it's so based on the circumstances, which means the factors and the criteria shift every time you have a different set of circumstances. What might be unconscionable in my situation might not be for the lady who cleaned my room today.

We tend to look at any case that comes before us, and I think one of the first things we look for in analyzing a contract is unconscionability. Was there a disparity of bargaining power between these parties? It's almost an unwritten rule of analysis.

Unconscionability isn't a standard. It's a legal theory but it's not a standard, and that's why I keep getting mucked up here.

Its problem is its definition. The American Law Institute, after many years, has now amended the definition of unconscionability under Articles 1 and 2 of the Uniform Commercial Code, and they have added a few words and changed it, and most courts have extraordinary difficulties in applying it to specific cases.

I would like to know the availability of the unconscionability defense in arbitration cases, because I believe there are so many instances where it could be applicable if it were available. For example, who negotiates a credit card agreement? No one, absolutely no one.

That's where you create the problem, but I think our cases have said that the unconscionability or contract of adhesion approach has got to be done with the whole contract, you can't just look at the arbitration clause and say well, that's unconscionable.

It seems to me that this unconscionability argument would be more successful than a right to trial by jury argument, because they are all going to say you voluntarily waived it. By the time you get through with the hearings and the trial court on that, in contracts of adhesion, the unconscionability, especially to a consumer who has little or nothing to say about these contracts, would be more appealing to me than the other. You are not going to get a right to a trial by jury if they agree to an arbitration clause.

## **The Federal Arbitration Act and Preemption**

*Judges discussed the Federal Arbitration Act, and how it often limited their ability to even review arbitration clauses using state law considerations.*

You've got the FAA. You've got to deal with it.

The FAA was a meaningless statute until the middle or late eighties. It was in existence from 1928 to then, and you couldn't find one half of one quarter of one percent of the lawyers in America who knew that it existed. All of the sudden, some corporations decided that this was an alternative way of saving money. It's flowing. And the question is, the trial lawyers now want to put a finger in the dike of losing their right to a jury trial. That's where we are, isn't it?

Our job is to first come up with a sensible way of understanding how these principles do fit together and I think Schwartz is right, that there's a whole host of aspects of this that are far from fully ordained by what *Southland* did. So whatever the future of *Southland* from the perspective of the U.S. Supreme Court, I think there's a lot there for us to think about and try to make sense of.

In our southern state, we've had, in the last couple years, at least five cases dealing with the FAA and we pretty much have always come out to getting around the FAA and rule on unconscionability.

Frankly, I've been on the bench for 27 years. I have never heard this FAA preemption argument.

That [the FAA] has never come up in front of me.

We haven't had it either. I think it's a nonissue, to be perfectly honest with you. I don't see how that act could preempt anything we would do in state substantive contract or other law. We would write our way around it. We have had case after case where we have written our way around federal United States Supreme Court law. And they have denied certiorari. There are hundreds of techniques to do.

**The feds read that as saying every contract involves interstate commerce and therefore preempts the field. That's nonsense—it can't mean every contract.**

No, we have it, and it was raised, and we found there was preemption.

It was not raised in the one case that I can recall.

It's certainly something in our state courts we are aware of, but I personally—this is anecdotal—have had one case involving the issue of preemption in an arbitration dispute in the last five or six years.

Our cases have been under the state law and I myself have not seen any preemption arguments.

I hadn't seen the issue. We talked about preemption but in cases, and I'm talking about 20 cases, I've never seen the issue of preemption come up. The *Southland* case came up but unconscionability, the parameters of the clause, or the fairness of the clause itself, were the issues. The other issues, like the jury trial issue, were not even mentioned. I can see it will be coming out in a bit, but to date I haven't seen it.

I think it's important that you read closely section two because that's what you're talking about in the FAA. The feds read that as saying every contract—they're kind of saying this by implication—involves interstate commerce and therefore preempts the field. That's nonsense—it can't mean every contract. Not every contract has any federal implications, unless it involves something specifically federal or interstate commerce. That's the way you get around it.

I agree basically with what Professor Schwartz said, that one need not give greater effect to *Southland* than its holding requires, and that holding I think can still be characterized as reasonably narrow. So, there's quite a bit of latitude there to make sense of what that statute really does, FAA Section 2, really does, until they tell you otherwise.

I do want to say that for myself, although we have not seen the FAA problem or the issue, it's good to know that it's there. I have appreciate having had the exposure that today provided, because if it comes, we'll be ready.

In the civil rights case I told you about this morning, they argued preemption. And until today, I never understood what they were talking about. The defense raised the FAA, and they said you are preempted. I read the FAA, and I read it, and I said, I don't understand what they are talking about. I don't understand how it even applies to this case. So, when

we wrote the opinion, we just simply said the Federal Arbitration Act doesn't apply to the issues involved in this case, and we went ahead and signed the petition. Now I'm beginning to understand what they are talking about, why some states think that it does apply. But I don't believe that issue has ever been raised successfully in our Mid-western state.

***Judges also discussed the issue of preemption, in the context of the FAA and the larger issue of federalism.***

We are very preemption-minded in ERISA cases, because they back that up to the hilt. So, we have one of those suckers and we said, oh brother, we can't write our way around this.

You can preempt any state law, and constitutional rights are just another form of state law.

I've never had a preemption issue.

You mentioned labor. Come to think of it, a lot of our background, at least in terms of state courts, if we have got sucked into any kind of organized labor dispute, is that they do raise preemption of the National Labor Relations Act. And our traditional response has been to run like the dickens. So, this may be kind of a pre-conditioned response to a concept that bears some rethinking in a different context.

When you address preemption analysis you don't just talk about preemption analysis, you've got to talk about what's the breadth of the preemption, what has the U.S. Supreme Court directed their preemption remarks towards, state statutory law? State common law? What's preempted? Remedy? The U.S. Supreme Court has been quite clear as to what its preemption analysis is, it's done it under the Medical Devices Act, and they've done it I think three times in the last five years and told us exactly what the procedure is supposed to be. But we haven't gone into that. What have they preempted? What's the breadth of the preemption as opposed to merely saying avoid the preemption at all costs? I mean that's not an answer to anything, that's anarchy, that's judicial anarchy, that's exactly what I called it. We have an obligation to follow the mandates of the U.S. Supreme Court to the extent that we understand them, not to avoid them. Yeah, we do have two sovereigns but we owe fealty to both of them, not just one of them. So what is the breadth of the preemption?

# Points of Agreement and Closing Comments

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it was achieved—on the issues raised in the Forum, and to characterize their groups' points of agreement in a few sentences, which the moderators presented at the closing plenary session. The moderators' comments and their informal summaries of their groups' discussions follow, edited for clarity.

## JUDICIAL EXPERIENCE WITH MANDATORY ARBITRATION ISSUES

The justices we had in our discussion group have had almost no experience with mandatory arbitration agreement issues in cases at all. For the most part, they haven't seen them. They haven't had FAA issues raised. The FAA has never been cited to them.

They are curious that this is a topic for the Pound Forum, because they have never seen this, mandatory arbitration agreements. And when it was pointed out that in some states this is a very, very large issue, they said, "Well, I guess it's like the West Nile virus, in some states you have it, and some states you don't."

They did all express the appreciation for the heads up that this was giving them in the expectation that they are likely to see these kinds of agreements in their states in the future.

Several of the courts represented in our group have increasingly seen disputes over arbitration clauses, ranging from five cases in the last two years to a high of two to three a month. Other jurisdictions, however, have not seen any preemption issues, and have not seen many disputes over arbitration clauses.

I think a lot of the discussion around particularly this morning's session in our group was more hypothetical than real, simply because they don't have any experience with anybody raising that issue in any of their courts.

Some of our group members had seen a few—very few cases—raising the disputes, but all in recent times. Many of our members had not seen the disputes about arbitration in contract clauses.

Have they had occasion to rule on a challenge to a binding arbitration agreement? Some had, some hadn't. I don't think there was enough of a consensus to make any analysis, really.

The big message from this was that the judges see that these issues are coming. There are certain segments of society that do not want cases to go into the courts.

Our group also echoed the fact that there weren't that many of these issues that were coming up before their courts on appeal. And we discussed that it's a raging problem down on the trial level. Which means that every decision that is articulated by a state supreme court

concerning these various issues are going to become all the more important, because that seems to be the thing that is fueling the use of arbitration as a trial tactic at the lower level.

#### ARBITRATION FAVORED AS A WAY TO CLEAR COURT DOCKETS

To the question this afternoon that implied that there could be some bending of jurisprudence to accommodate docket pressure, the reaction was visceral, immediate, and unanimous that none of the courts would feel any influence whatsoever by docket pressure to rule in favor of mandatory arbitration agreements.

The question of whether or not our courts represented in our group are favoring arbitration because of docket problems and to clear dockets was treated similarly—I think a degree of indignation about the question was expressed, and people would not let that be an influence

There was an agreement that there may be a relationship between the expansion of arbitration and the backlog in the courts, the expense of litigation, and problems with court funding.

**The general consensus was they are in the business as public servants to administer justice, and that is their role.**

With regard to the issue of arbitration being a good thing to clear the docket, the general consensus was they are in the business as public servants to administer justice, and that is their role. And the answer to clearing the

docket is more funding for judiciary and the courts, not pushing people to arbitration when it's not appropriate.

The docket is important. I don't think any judge or justice I'm sure in the room would say "We've got docket problems, so forget about the rights of the individuals." But there is a pressure in the courts on docket and docket control is important. And therefore, ADR type programs are of interest to the judges.

There was a heated discussion about judicial budgets, and how the concern about the lack of resources is really not justified under the circumstances. And hopefully, in terms of evaluating the enforcement of these provisions, that that is an issue that will sort of come to light in various legislatures across the country.

There certainly is a relationship they felt, between the desire of the drafters of the arbitration clauses to stay out of the courts, and their increasing use.

In terms of turning to arbitration clauses to relieve clogged courts, it would certainly be okay to do that where there is post-dispute binding arbitration between commercial entities, or for that matter pre-dispute binding arbitration between commercial entities. It's not okay to do that where the contracts are unconscionable. And a great concern was expressed about cases involving public rights such as gender discrimination, civil rights issues, or racial discrimination.

## MANDATORY ARBITRATION AND OTHER ADR PROGRAMS

We spent some time talking about the differences between arbitration clauses and other ADR programs. I think the consensus, if there was one, was that they are two completely different animals, and the analysis and the issues that come up are quite different.

The general consensus was voluntary arbitration in the historic context of labor mediation, construction disputes, and commercial contracts between corporations, was great. But the envelope is getting pushed now with adhesive contracts, where we are dealing with consumers, unequal bargaining power. And that binding arbitration is not appropriate in that context, and there is real concern.

Many of the judges came from jurisdictions where there are court-annexed or court-operated ADR programs. The judges are much more familiar with those programs, but not so much with the private mandatory arbitration agreements coming under litigation.

## JURY TRIAL WAIVERS

There was a lot of discussion about the standards for the waiver of jury trial, and any variants that there might be, or whether there should be any between their application in the criminal context, and their application to civil contract doctrine.

As to the right to a jury trial, our group felt that while the question might be the same, or use the same terms, the procedures are markedly different between the civil and criminal contexts, so that in fact as a practical matter, the right to jury trial may not be on the same footing in those two contexts.

The standards for waiver of right to jury trial in criminal cases were very high, and people were very animated about how high they are, and how difficult it is to withstand appeal from a trial court on a waiver of the right to jury trial in a criminal case. But I don't think we really got a consensus about how that argument might play in a civil standing

I think the question of the right to jury trial as an attack on an arbitration clause was, by and large, a new idea to our group members.

The issue is not just waiver of right to jury trial, but access to the courts. Notions of unconscionability and overreaching allow courts to evaluate the enforceability of arbitration agreement. The role of the waiver of right to jury trial as a part of that evaluation is food for thought.

The question of waiver of right to jury trial in civil cases, I think this is true of all of the discussion points. The judges didn't really have experience with specific cases. A lot of it was well, it depends on the facts of the case. Criminal law on right on waiver of right to jury trial as well developed in the civil context. It's not so well developed. And in the arbitration area, the justices and the judges hadn't seen anything.

## LAWYERS NOT RAISING JURY TRIAL ARGUMENTS

We practicing lawyers need to take back to our fellow lawyers the concern that civil lawyers are way behind the criminal defense bar in terms of raising waiver issue and right to jury trial.

The issue of the right to jury, and specifically that issue being raised on appeal, hasn't been seen much. The consensus from the appellate judges was that it just hasn't been properly raised below, and preserved on appeal, and it just has not been ripe. So, when the issue comes up, it should be raised and preserved.

The other reason why the courts haven't seen it is if there is a constitutional issue as compared to another easier way to resolve the case, the courts naturally will go for the easier way to dispose of the case, instead of stepping into a constitutional issue. But we should all, having been educated, keep these issues in mind to preserve for an appeal.

Not many cases are raising these issues we heard from the panel. The justices and judges are not seeing many of them. They do see cases coming up on the scope of an arbitration agreement.

The right to jury trial is not being raised.

Attorneys must brief the issues with materials such as those we heard from today, and adequately raise the issues. If they do want to do that, the judges said they would allow the lawyers to make the record. The judges want to encourage that if the issue was raised.

Unless these cases are brought raising state constitutional claims, they may never see the light of day once they get to the appellate level.

## EVALUATING ARBITRATION CLAUSES AND CONTRACTS

In applying that right to an arbitration clause, the problem they felt, was the presumption under traditional contract principles, that the contract is valid. There was consensus that generally clauses will be enforced, unless the court determines they are unconscionable. The jurisdictions varied markedly as to how ready they were to declare them unconscionable.

There was a unanimous agreement that there will be a complete distinction between post-transaction, boilerplate, and pre-utilization agreements in terms of their enforceability in the various courts.

On the question of whether arbitration is favored, and whether it is enforced as written, we had a little discussion about the tendency of the more industrial state members of our group to say yes, it is enforced as written. It is presumed that arbitration clauses are to be enforced as written.

Arbitration clauses are like any other contract, and have the same burdens of proof, and the same chances of success or failure when challenged in court.

There is an appreciation that judges are, in some states, addressing the concern about the

implications of where this body of law leads, and is likely to be addressed by many others in the future.

## PREEMPTION

If you get an FAA preemption argument, the question was what would you do with it, and the answer was, and I quote, “We would write our way around it.”

The sense was from the state court justices that they simply aren’t going to kowtow to what the U.S. Supreme Court thinks state law should be, and they are going to apply state law, and they are going to write their way around the FAA if they have to deal with that preemption.

There was a question as to what the breadth of the preemption is. We had a fairly intense debate with the members of the afternoon panel. And there was an agreement at the conclusion of that discussion, that the judges in our group still didn’t know the answer to the question as to what the breadth of the preemption issues would be.

Judges were not timid about applying state law, and not simply deferring to the U.S. Supreme Court or the FAA.

Judges did not feel encumbered by *Southland* or the FAA in their determination of whether a mandatory arbitration agreement is void or unenforceable.

Our group had a very interesting discussion about the FAA and the response to the attack on federalism. The observation was made of course that from an FAA perspective, that may preempt state law, unless there is a violation of the state constitutional right to a jury trial. A federal statute, although it can preempt a state law, cannot trump a state constitutional right. Of course a state Supreme Court may give more rights under your state constitution, but cannot give less than the federal. And therefore, that is an issue which needs to clearly be talked about among the trial bars.

**Judges were not timid about applying state law, and not simply deferring to the U.S. Supreme Court or the FAA.**

It was pointed out as a reminder to everybody that Section 2 of the FAA still provides that these contracts are enforceable save upon such grounds as exist in law and equity for the revocation of any contract, which of course would presumably include any violation of a state constitutional right to a jury trial.

## PANELIST COMMENTS AT CLOSING PLENARY SESSION

**Professor Sternlight:** I had the opportunity to sit in on a bunch of the small group discussions and hear all of your discussions, and that was really interesting. And I had just a few things to say based on that.

One was I heard a lot of the groups struggling with the idea of well, what does it mean for arbitration to be “favored.” And you see that over and over again in a lot of the decisions; arbitration is favored. It’s in the Supreme Court decisions. It’s in a lot of your decisions.

And I just want to offer my own insight, which is that the first time that appeared in a Supreme Court decision was in the 1980s, and they never really explained what they meant. But if you think about it, that phrase, “arbitration is favored,” could be interpreted in either of two ways. It could either mean arbitration is looked upon with favor as in we don’t hate it. It’s okay, we look upon it with favor.

Or it could be read to say we prefer arbitration to litigation, which is the way some have interpreted it. And I urge you all in your future decisions, to make clear that you mean the former and not the latter, because there really is no justification in Supreme Court precedent, nor in the statute, nor legislative history, nor anywhere else, to say that arbitration ought to be favored over litigation. And I think we have gone down a wrong track to the extent we do that.

**There really is no justification in Supreme Court precedent, nor in the statute, nor legislative history, nor anywhere else, to say that arbitration ought to be favored over litigation.**

The second point was something I should have said this morning on the jury trial rights, which is simply to let you know that the Supreme Court has never said anything at all about the right to a jury trial, and how that relates to arbitration. I think some people are

assuming well, the Supreme Court must have said there’s no problem with jury trial rights, because after all, they have issued all these decisions endorsing arbitration. Well, they have endorsed arbitration, but they have never been faced with a jury trial argument challenge. So, it’s really fertile ground for argument and opportunity for you all to issue any decisions.

And finally on the preemption point, I think there is a lot of confusion out there, as there frankly should be, because it is not quite clear where we are in terms of preemption. But I just wanted to let you know that I believe that although there is confusion in the preemption area, that there is plenty of room for you folks to do a lot of what you might want to do without fearing preemption. It is clear that certain things the state legislatures would do would be preempted, and it’s clear that certain things wouldn’t be preempted. But there is a lot of gray area in between, and that is where we are going to see future litigation. So I think that there is room for you folks to issue decisions that you might want to issue on the jury trial issue.

# Appendices

## PARTICIPANT BIOGRAPHIES

### Paper Presenters

**Jean R. Sternlight** is Professor of Law at the University of Nevada-Las Vegas Boyd School of Law and is also Director of the Saltman Center for Conflict Resolution. Professor Sternlight received her B.A. from Swarthmore College, Phi Beta Kappa and with High Honors. She received her J.D., cum laude, from Harvard Law School, where she was Editor-in-Chief of the Harvard Civil Rights-Civil Liberties Law Review. Sternlight then clerked for United States District Judge (now Chief Judge) Marilyn Hall Patel in San Francisco. After practicing for eight years at a plaintiff-side employment firm in Philadelphia, she began her academic career at Florida State University College of Law in 1992. She moved to the University of Missouri-Columbia in 1999, and then to UNLV in 2003. Some of her articles on the subject of mandatory arbitration are *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2003); *Is the U.S. Out on a Limb?: Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002); *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669 (2001); and *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1-126 (2000).

**David S. Schwartz** is Assistant Professor of Law at the University of Wisconsin-Madison. Professor Schwartz earned his B.A, magna cum laude, and M.A. at Yale University and his J.D. from Yale Law School, where he was Articles Editor of the Yale Law Journal. After graduating law school, Professor Schwartz clerked for the Honorable Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit. Before joining the faculty at Wisconsin, he practiced law for 12 years, specializing in employment discrimination and civil rights litigation, and for the three years just prior to joining the UW Law School faculty in the Fall of 1999, he was Senior Staff Attorney at the American Civil Liberties Union of Southern California, in Los Angeles. Professor Schwartz teaches Equal Employment Law, Evidence, Constitutional Law, and other courses relating to his practice background. His scholarly interests currently focus on workers' rights and the law of the workplace, civil rights, and constitutional law. He is the author of two important articles in the field of mandatory arbitration: *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2003); and *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

### Panelists

**F. Paul Bland, Jr.**, is Staff Attorney with Trial Lawyers for Public Justice in Washington, D.C. He received his A.B. from Georgetown University and J.D. from Harvard Law School. Mr. Bland is co-chair of the Board of Directors of the National Association of Consumer Advocates. He is the co-author of CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER ISSUES, a Manual published by the National Consumer Law Center and TLPJ. In 2001, he was named Maryland Trial Lawyer of the Year for his work in *Wells v. Chevy Chase Bank*, 363 Md. 232, 768 A.2d 620 (2001), and in 2002, he was named San Francisco Trial Lawyer of the Year, along with co-lead counsel Jim Sturdevant, for his work in *Ting v. AT&T*, 182 F.Supp.2d 902 (N.D.Cal. 2002), both cases relating to arbitration issues. Mr. Bland was formerly Chief Nominations Counsel of the U.S. Senate Judiciary Committee from 1989 to 1990.

**Richard T. Boyette** practices law in Raleigh, North Carolina with Cranfill, Sumner & Hartzog, LLP. He received his B.A. and J.D., with honors, from the University of North Carolina, where he was a member of the Phi Delta Phi honor society. After graduation, Mr. Boyette clerked for Chief Judge Walter E. Brock of the North Carolina Court of Appeals and then served as Assistant District Attorney for the Twelfth Judicial District. Mr. Boyette is the Immediate Past President of the Defense Research Institute and has served on its board since 1998. Also, he chaired the DRI ADR Committee from 1998-1999. He is a past President of the North Carolina Association of Defense Attorneys.

**J. Mark Englehart** is an attorney practicing in Montgomery, Alabama, with the firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. Before joining the firm in January 1999, he practiced in the areas of employment law, constitutional and civil rights law representing plaintiffs and governmental entities, in both individual actions and class actions. He also practiced in the areas of wrongful death, personal injury, and general civil litigation, including nursing home negligence. Since joining Beasley Allen, Mr. Englehart has handled nursing home negligence litigation, class action cases, mass torts product liability actions, complex business cases and environmental and toxic tort matters. He also has given seminar presentations on the plaintiff's perspective in civil rights and employment actions, and challenging binding arbitration. He was a member of the Alabama ACLU's legal committee from 1991 through 1997. Mr. Englehart is a graduate of George Washington University and Harvard Law School.

**Reynolds Holding** is a journalist who served as an investigative reporter and legal columnist for the San Francisco Chronicle at the time of the 2003 Pound Forum. Mr. Holding's "Private Justice" series in the Chronicle in 2001, examined the world of mandatory arbitration and its effect on the rights of individuals. He graduated from Harvard College and Duke University School of Law and practiced law at the New York firm of Debevoise & Plimpton for nine years. His journalism career started between college and law school with the Shreveport (Louisiana) Journal, where he wrote news stories and editorials as assistant editor of the paper's editorial page. Mr. Holding joined the Chronicle in 1991 as a legal affairs writer, covering the courts and trends in the law. He began writing a weekly legal column, "Holding Court," in 1995 and became a full-time investigative reporter in 1997. His stories have ranged from uncovering deadly killings at California prisons to documenting financial fraud in Silicon Valley. In 1999, he was a Pulitzer Prize finalist for a series on the dangers of medical needles. In 2001, he received a Science in Society Journalism Award from the National Association of Science Writers for stories he co-wrote about the influenza vaccine industry. He received a Consumer Excellence Award from Consumer Action and the American Board of Trial Advocates Media Award in 2002.

**Eric Mogilnicki** is currently Chief of Staff to Senator Edward Kennedy of Massachusetts. At the time of the 2003 Pound Forum, he practiced law with Wilmer, Cutler & Pickering in Washington, D.C., where his practice involved the defense of financial institutions in individual and class actions. He was a leader in the use of arbitration clauses in consumer credit contracts, advised financial institutions on that issue, defended the use of such agreements in a variety of courts, and testified before Congress and the FTC on the issue. Mr. Mogilnicki has served as counsel to the American Bankers Association and other financial trade associations in litigation and as amicus curiae in the U.S. Supreme Court. Mr. Mogilnicki has provided pro bono litigation or counseling assistance to the Brady Center (as lead counsel on their Supreme Court amicus brief in defense of the constitutionality of the Brady Act), Common Cause, the Partnership for National Service, and other public interest organizations. Mr. Mogilnicki is a graduate of Yale University (B.A. 1982, summa cum laude, Phi Beta Kappa; J.D. 1986), where he served as Editor of the Yale Law and Policy Review. Prior to law school, he served as a legislative assistant to U.S. Representative Gerry Studds. From 1987 to 1991, Mr. Mogilnicki was Assistant Attorney General in the Massachusetts Attorney General's Office, serving in the Executive Bureau (1987-1991) and as Chief Elections Counsel (1989-1991).

**Honorable Larry V. Starcher**, of the West Virginia Supreme Court of Appeals, earned his A.B. in 1964 and his J.D. in 1967 from West Virginia University. Prior to being elected Circuit Judge of Monongalia County in 1976, he served as an Assistant to the Vice-President for Off-Campus Education at WVU, as Director of the North Central West Virginia Legal Aid Society, and as a private lawyer. He served as circuit judge for 20 years, 18 as chief judge. While sitting as a circuit judge, Justice Starcher served as a special judge in 23 of West Virginia's 55 counties. He has held all offices in the West Virginia Judicial Association, including President in 1992-93. In 1978, he was a Fellow of the National Endowment for the Humanities at Harvard University. Justice Starcher also has served as an Adjunct Lecturer at the West Virginia University College of Law from 1992 to the present. In November 1996, he was elected to the Supreme Court of Appeals. He served as Chief Justice in 1999 and in 2003.

**Honorable Terry N. Trieweiler** is a retired justice of the Montana Supreme Court. He was elected a Justice on the Montana Supreme Court in 1990 and served there until April 2003. He graduated from Drake University School of Law in 1973 and was admitted to practice in Montana in 1975. Justice Trieweiler was certified as a specialist in civil trial advocacy by the National Board of Trial Advocates in 1982, elected president of the Montana Trial Lawyers Association in 1984, and elected president of the State Bar of Montana in 1986. He was listed in Best Lawyers of America in 1987 and 1989). He has also served as a member of ATLA's Board of Governors and as a member of the Board of Directors of the American Board of Trial Advocates. He has been a member of the International Society of Barristers since 1985, and has taught civil procedure at the University of Montana Law School prior to joining the Montana Supreme Court. He is the author of several opinions involving mandatory arbitration. Justice Trieweiler is a member of the Pound Institute's Judicial Advisory Board.

**Deborah Zuckerman** is Senior Attorney with the American Association of Retired Persons (AARP) Foundation, where she represents AARP as amicus curiae in the U.S. Supreme Court and federal and state courts around the country. She also conducts litigation representing AARP or consumers in individual and class actions designed to benefit a significant number of consumers. While she works on all non-mortgage-related consumer issues, her areas of expertise include challenging mandatory, binding, pre-dispute arbitration clauses; telemarketing and direct mail fraud; sweepstakes and prize promotions; living trust scams; funeral and cemetery practices; and predatory lending, particularly payday loans. She is on the Board of Directors of the National Association of Consumer Advocates, and served the maximum three terms as a member of the Steering Committee of the D.C. Bar Antitrust and Consumer Law Section. Ms. Zuckerman graduated magna cum laude in Social Work from SUNY-Buffalo and holds a J.D. from the George Washington University. Prior to working for the AARP Foundation, she worked for the American Bar Association and the Epilepsy Foundation of America. She served on the National Consumer Disputes Advisory Committee of the American Arbitration Association from 1997-1998.

## **Discussion Group Moderators**

**Sharon J. Arkin** practices law in Newport Beach, California. She received her B.S. from the University of California, Riverside, and her J.D. from Western State University School of Law. Her practice is concentrated in business torts, insurance litigation (ERISA, HMOs, bad faith actions), and she has written and lectured widely on those subjects. Ms. Arkin is a Governor of the Association of Trial Lawyers of America, a past-president of the Consumer Attorneys of California, and a Trustee and Fellow of the Pound Civil Justice Institute. She was a contributing author for a major business litigation treatise, *BUSINESS TORTS* (Matthew Bender, 1991).

**Kathryn Clarke** is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a B.A. from Whitman College, an M.A. from Portland State University, and a J.D. from the Northwestern School of Law of Lewis and Clark College. She served as president of the Oregon Trial Lawyers Association in 1995-96, and is a governor of the Association of Trial Lawyers of America and a Fellow of the Pound Institute.

**Gregory S. Cusimano** is a founding partner of Cusimano, Keener, Roberts, Kimberley & Miles, P.C. in Gadsden, Alabama. He specializes in products liability, fraud, bad faith, personal injury, and professional negligence cases. Mr. Cusimano received a B.S. and J.D. from the University of Alabama. He has published several articles on tort law and lectured frequently to various organizations. Mr. Cusimano is a Fellow and former Trustee of the Pound Institute. He is also on the Board of Governors of the Association of Trial Lawyers of America. Mr. Cusimano received ATLA's Lifetime Achievement Award in 2000.

**Mark S. Davis** practices in Honolulu, Hawaii. He received his B.A. from Tulane University and his J.D. from Washington University, and has served as an adjunct professor at the University of Hawaii Law School. He is a member of the American College of Trial Lawyers and a Fellow and Trustee of the Pound Institute, where he holds the position of Secretary.

**William A. Gaylord** practices in Portland, Oregon, specializing in major products liability and medical negligence litigation. He received his B.S. from Oregon State University and his J.D. from the Northwestern School of Law of Lewis and Clark College. He has been integrally involved in constitutional litigation involving Oregon legislation on damage award limits. He is a member of Trial Lawyers for Public Justice, a past president of the Oregon Trial Lawyers Association, and a Fellow of the Pound Institute.

**Wayne D. Parsons** practices law in Honolulu, Hawaii. He has received B.S., M.S., and J.D. from the University of Michigan. He is a member of the Board of Governors of ATLA. He is a past president of the Consumer Lawyers of Hawaii and is a director of the Hawaii State Bar Association. He is a Fellow of the Pound Institute. Mr. Parsons has been active in educating the public about the work of lawyers and the courts and is a founder of the Hawaii Peoples' Law School Program and the Hawaii Appleseed Center for Public Interest Law.

**Ellen Relkin** practices law in New York City, where she concentrates on pharmaceutical products liability, toxic torts, medical malpractice, and women's health issues. She received her B.A. from Cornell University and her J.D. from Rutgers University, where she served as executive editor of the *Women's Rights Law Reporter*. She is a member of the American Law Institute and a Fellow of the Pound Institute.

**Herman J. Russomanno** practices law in Miami, Florida. He received his B.A., *magna cum laude*, from Rutgers University, and his J.D. from Cumberland School of Law of Samford University in Birmingham, Alabama. He has served as president of the Florida Bar and as a member of the American Bar Association's House of Delegates. He is a fellow of the American College of Trial Lawyers and treasurer of the Pound Institute.

**Larry A. Tawwater** practices law in Oklahoma City, specializing in products liability, aviation, and general negligence litigation. He received both his B.A. and J.D. degrees from the University of Oklahoma. He has served as president of the Oklahoma Trial Lawyers Association and as a governor of the Association of Trial Lawyers of America. He is a member of the American Society of Law, Medicine and Ethics, the American Judicature Society, and the International Society of Barristers, and is a Fellow of the Pound Institute.

**John Vail** is Vice President and Senior Litigation Counsel with the Center for Constitutional Litigation. He has been counsel on several cases in the United States Supreme Court, and spearheads ATLA's fight against mandatory arbitration. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School. Mr. Vail is President of the Board of Directors of the Virginia chapter of the American Civil Liberties Union.

### **Forum Moderator**

**Mark S. Mandell** practices law in Providence, Rhode Island. He received his B.A. from the University of Alabama and his J.D. from Georgetown University Law Center. From 2001-03, he was the president of the Roscoe Pound Institute, and he continues to serve as a trustee of the Institute. He has served as president of the Rhode Island Bar Association and as chair of the Federal Board of Bar Examiners for the U.S. District Court for the District of Rhode Island. He is a member of both the American Law Institute and the American Judicature Society and is a past-president of the Association of Trial Lawyers of America.

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# About the Pound Civil Justice Institute

## What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute (known at the time of the 2003 Forum as the Roscoe Pound Institute) is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Roscoe Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual forums, in reports and publications, and through grants and educational awards, the Pound Civil Justice Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

## What Programs Does the Institute Sponsor?

**Annual Forum for State Appellate Court Judges**—The Annual Forum for State Appellate Court Judges brings together judges from state Supreme Courts and Intermediate Appellate Courts, legal scholars, practicing attorneys, legislators, and the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as secrecy in the courts, judicial independence, the jury as a fact-finder, and the use of scientific evidence. The Forum is one of the Institute's most respected programs, and has been called "one of the best seminars available to jurists in the country."

**Regional Trial Court Judges Forum**—Following the success of the Annual Forum, the Institute created a program for trial court and other judges conducted at judicial seminars around the country. In order to expand our outreach to the judicial community, this program is held in conjunction with national and regional groups working with judges. These programs feature panels comprised of judges, lawyers, and legal scholars engaging the attendees in a dialogue on important judicial issues. The Pound Institute has held regional Forums in Texas, Hawaii, South Carolina, and Alaska and examined such topics as judicial independence, scientific evidence, the civil jury, and secrecy in the courts.

**Law Professors Symposium**—One of the primary goals of the Pound Civil Justice Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on the subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The papers from the 2002 Symposium appear in a special issue of the Duke law journal, *Law and Contemporary Problems* [67 LAW & CONTEMPORARY PROBLEMS (2004)]. The Pound Institute held its Symposium in 2005 on medical malpractice at Vanderbilt Law School, and the papers from that program will appear in the *Vanderbilt Law Review* in 2006.

**Research**—The Institute actively promotes research through grants to scholars and academic institutions, as well as through in-house scholarship. We have sponsored academic research on soft-tissue injury cases, juror bias, and the contribution that lawyers make to the economy. Our goal is to ensure that first-rate, respected, and useful research is conducted on the civil justice system.

**Civil Justice Digest**—The *Civil Justice Digest* was created to alert judges and law professors to information and scholarship that supports the utility of the civil justice system or counters negative campaigns against it. Through the *CJD* we seek to provide a sophisticated readership of judges and law professors with information and commentary on current issues affecting the civil justice system, including material that debunks the myths of a jury system run amok. The *CJD* is distributed without charge to more than 10,000 federal and state judges, law professors, and law libraries. If you would like to be on the mailing list for *CJD*, please e-mail us at [pound@roscoepound.org](mailto:pound@roscoepound.org).

**Law School Awards**—The Pound Institute annually presents three law school awards which recognize individuals

whose accomplishments serve to further the cause of justice: The **Elaine Osborne Jacobson Award** was established in 1991 to recognize women law students with an aptitude for, and commitment to, a career of advocacy for the health care needs of women, children, the elderly, and disabled persons; the **Richard S. Jacobson Award for Teaching Trial Advocacy** recognizes outstanding law professors who exemplify the best attributes of the trial lawyer: teacher, mentor, and advocate; the **Roscoe Hogan Environmental Law Essay Contest** is designed to develop law student interest and scholarship in environmental law and serves to provide law students with the opportunity to investigate and offer solutions to the multitude of injustices inflicted on the environment.

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## PAPERS OF THE POUND CIVIL JUSTICE INSTITUTE

### Reports of the Annual Forums for State Court Judges

2002 • *State Courts and Federal Authority: A Threat to Judicial Independence?* Report of the tenth Forum for State Appellate Court Judges. Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc, the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, the relationship between state courts and legislatures and federal courts. (Price per bound copy-\$40)

2001 • *The Jury as Fact Finder and Community Presence in Civil Justice.* Report of the ninth Forum for State Appellate Court Judges. Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact finders, and possible future approaches to trial by jury in the United States. (Price per bound copy-\$40)

2000 • *Open Courts with Sealed Files: Secrecy's Impact on American Justice.* Report of the eighth Forum for State Appellate Court Judges. Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests. (Price per bound copy-\$40)

1999 • *Controversies Surrounding Discovery and Its Effect on the Courts.* Report of the seventh Forum for State Appellate Court Judges. Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery. (\$40)

1998 • *Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty."* Report of the sixth Forum for State Appellate Court Judges. Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses to these challenges by judges, judicial institutions, the organized bar, and citizen organizations. (\$40)

1997 • *Scientific Evidence in the Courts: Concepts and Controversies.* Report of the fifth Forum for State Appellate Court Judges. Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence (Only available in electronic format at [www.roscoepound.org](http://www.roscoepound.org)). (Free)

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The Federal Arbitration Act, not state law, governs the interpretation, enforcement of these policies and practices. ANY AND ALL DISPUTES ARISING BETWEEN YOU AND THE COMPANY, CONTRACT, STATUTE, TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE) MUST BE RESOLVED BY BINDING AND FINAL ARBITRATION TO THE USE OF THIS PRODUCT OR SERVICE.

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ARBITRATOR CAN AWARD ONLY COMPENSATORY DAMAGES UNDER ANY CIRCUMSTANCES. PUNITIVE DAMAGES MAY BE AVAILABLE UNDER APPLICABLE LAW. YOU WILL BE RESPONSIBLE FOR RECOVERING YOUR OWN ATTORNEY'S FEES. YOU WILL NOT BE ENTITLED TO RECOVER SUCH DAMAGES OR LITIGATION COSTS.