

EMPLOYMENT ARBITRATION AND VOLUNTARY CONSENT

*Stephen J. Ware**

CONTENTS

I.	INTRODUCTION	84
II.	EMPLOYMENT ARBITRATION IN THE U.S.	87
	<i>A. Overview of Arbitration</i>	87
	<i>B. Collective Bargaining Arbitration</i>	90
	<i>C. Individual Employment Arbitration</i>	94
III.	VOLUNTARY CONSENT AND THE CONTRACTUAL NATURE OF ARBITRATION	103
	<i>A. Voluntary Consent and Pre-Dispute Arbitration Agreements</i>	103
	<i>B. Contract Law Doctrines and Employment Arbitration</i> .	113
	1. Mutual Assent	113
	2. Duress	120
	3. Other Contract Defenses	126
	<i>C. Separability</i>	128
	1. <i>Prima Paint</i>	129
	2. Departures from <i>Prima Paint</i>	132
IV.	THE INSUFFICIENCY OF VOLUNTARY CONSENT	138
	<i>A. Voluntariness, Coercion, and Baselines</i>	139
	<i>B. Employment Arbitration</i>	141

* Associate Professor of Law, Cumberland School of Law, Samford University. J.D., University of Chicago, 1990; B.A., University of Pennsylvania, 1987. Thanks to Alan Rau, Ian Macneil, Ed Brunet, Tom Berg, George Wright, Sarah Rudolph Cole, Cliff Palefsky, Henry Strickland, Maureen Kane Berg, and Lee Clanton. This Article was written with support from a summer research grant provided by the Cumberland School of Law, Samford University.

C. <i>Securities Employment Arbitration</i>	145
1. The Securities Industry's Regulatory Environment	146
2. SROs as Private Associations or Occupational Licensors	149
3. The Wrong Baseline	155
V. CONCLUSION	159

I. INTRODUCTION

Employment arbitration is booming. Arbitration of disputes involving unionized employees has been routine for half a century and such disputes continue to be arbitrated in large numbers.¹ In contrast, arbitration of disputes involving non-union employees was virtually non-existent until the 1970s.² Since then, it has grown substantially, and its growth is likely to continue.³

The boom in non-union employment arbitration has caused great concern about protecting employees' access to courts. Many commentators worry that the resolution of employment disputes in arbitration, rather than in court, poses dangers to employees, particularly those asserting claims of race, sex, and age discrimination.⁴ Virtually every commentator agrees that employment disputes should be litigated, rather than arbitrated, unless the employee has voluntarily consented to arbitration.⁵ While courts and commentators agree that an employee's voluntary consent is a prerequisite to employment arbitration,⁶ they do not agree on when an employee's consent is voluntary and when it is coerced.⁷ This Article analyzes that disagreement and proposes a method of distinguishing voluntary consent from coerced consent in employment arbitration. In other words, I propose a conceptual framework for

1. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 3, 6, 9-10 (4th ed. 1985); FAIRWEATHER'S *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 1-9 (Ray J. Schoonhoven ed., 3d ed. 1991).

2. See *infra* notes 54-59 and accompanying text.

3. See *infra* notes 74-87 and accompanying text.

4. Some commentators worry less about dangers to the employee involved than about a broader "public interest." See *infra* notes 92-93 and accompanying text.

5. See *infra* Part III.A.

6. See *infra* Part III.A.

7. For definitions of the terms "consent," "voluntary," and "coercion," see *infra* text accompanying notes 118-21.

ensuring that employment arbitration is a voluntary process of dispute resolution. After this emphasis on the importance of voluntariness to arbitration, I then argue that it is not the only important consideration. My second goal in this Article is to show that additional legal reforms are warranted even after the law is changed to ensure that employment arbitration proceeds only with the voluntary consent of the parties involved.

In discussing whether arbitration under particular circumstances is consensual, and whether that consent is voluntary or coerced, this Article is confined to employment arbitration. While consent issues pervade arbitration in all contexts,⁸ I discuss them in the employment context for two reasons. The first reason is that concern about consent issues is heightened when one's livelihood is at stake. The second reason is that such issues, particularly the distinction between voluntarily-assumed duties and coercively-assumed duties, are most clearly illuminated by analysis of the various types of contemporary employment arbitration agreements.

Many commentators contend that much contemporary employment arbitration occurs without the voluntary consent of the employee involved.⁹ While I agree, I do so for very different reasons than most other commentators. These differences lead me to a very different view about what doctrinal changes are necessary to ensure that employment arbitration is the product of voluntary consent. To analyze these different views on consent issues in employment arbitration, it is necessary to

8. See generally Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at 37 (discussing pre-dispute arbitration clauses in contracts prepared by real estate brokers, finance companies, health care providers, and insurers, as well as World Cup Soccer tickets and Cheerios sweepstakes). Consent issues have generated controversy with respect to arbitration involving: (1) Borrowers; see Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 305-06 (1995); Michael Ferry, *Is It Time for Mandatory Arbitration in Contracts?*, BUS. L. TODAY, May-June 1995, at 22, 22-23; (2) Investors; see Susan Antilla, *At the Bar: Brokerage Firms Steer Dissatisfied Customers Away from Court, but in Only One Direction*, N.Y. TIMES, May 12, 1995, at A29; Margaret A. Jacobs & Michael Siconolfi, *Losing Battles: Investors Fare Poorly Fighting Wall Street—And May Do Worse*, WALL ST. J., Feb. 8, 1995, at A1 (stating that "mandatory arbitration has earned a reputation for being stacked squarely against brokerage-firm customers"); (3) Franchisees; see *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247-48 (9th Cir.), cert. denied, 116 S. Ct. 275 (1995); (4) Bank customers; see Richard C. Reuben, *Decision Gives Banking ADR a Boost*, A.B.A. J., Dec. 1994, at 32, 33; and (5) Insurance policyholders; see Alan I. Widiss, *The Enforceability of Arbitration Terms in Uninsured Motorist Coverages and Other Form Contracts*, 66 IOWA L. REV. 241, 260-65 (1981).

9. See *infra* notes 98-112 and accompanying text.

provide a general background on employment arbitration. I do this in Part II.

Then, in Part III, I begin analyzing consent issues. The first step is both definitional and substantive. To meaningfully discuss "voluntary consent" in employment arbitration, one must select a definition of the terms "voluntary" and "consent." I select the understandings of these terms that are embodied in contract law. On a theoretical level then, Part III is an argument for a contractual approach to arbitration law—an argument that arbitration law is, and ought to be, essentially a branch of contract law. On a doctrinal level, Part III argues that, contrary to most commentators, only one change in the law is needed to ensure that employment arbitration is voluntary and consensual. That change is the repeal of the "separability" doctrine adopted by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹⁰ With this one change, arbitration law will be well-suited to ensure that employment arbitration proceeds only with the voluntary consent of the parties involved.

I argue in Part IV, however, that making arbitration voluntary and consensual is a necessary, but insufficient reform. It is insufficient because the concept of "voluntariness" is so malleable. The distinction between voluntarily-assumed duties and coercively-assumed duties presupposes a baseline of rights that exist prior to the assumption of the duty in question. The content of the baseline rights determines whether the subsequent assumption of a duty, such as the duty to arbitrate, is voluntary or coerced. For this reason, I contend that commentators should focus not just on voluntary consent, but also on the baseline rights underlying that voluntary consent. Much of our discomfort with contemporary employment arbitration, I suggest, is due, not to any lack of voluntary consent, but rather to a baseline that should be changed.

10. 388 U.S. 395 (1967).

II. EMPLOYMENT ARBITRATION IN THE U.S.

A. Overview of Arbitration

Parties have entered into arbitration agreements¹¹ and resolved their disputes by arbitration for centuries.¹² Some parties, however, breach their arbitration agreements. They refuse to arbitrate a dispute even though they have agreed to do so. Or they do arbitrate, but lose, and refuse to comply with the arbitration awards against them even though they have agreed to do so. These two types of breach raise the key issues of arbitration law.¹³

In the United States, courts have long dealt firmly with the second form of breach, refusal to comply with an arbitration award. Courts have long enforced arbitration awards, and they have done so without much second-guessing of the arbitrator's decision on the merits of the dispute.¹⁴ Until the 1920s, however, courts dealt much less firmly with the first form of breach, refusal to arbitrate. Prior to the 1920s, an agreement to arbitrate a future dispute was generally enforceable only by the remedy of nominal money damages, not by the remedy of specific performance.¹⁵

11. The term "arbitration agreement" can cause confusion unless used in light of the distinction between a contract clause requiring the parties to arbitrate, rather than litigate, certain claims (the "arbitration clause"), and a contract containing the clause (the "container contract"). Sometimes the arbitration clause is the only term of a contract. In such a case there is no distinction between the arbitration clause and the container contract, but usually an arbitration clause is part of a contract with many other terms. The term "arbitration agreement," as used in this Article, refers to the "container contract."

12. See generally Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984).

13. See I IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 4.1.1 (1994). This treatise by Ian R. Macneil, Richard E. Speidel, and Thomas J. Stipanowich, with contributions by G. Richard Shell, is an invaluable resource for anyone interested in arbitration law.

14. See I *id.* § 4.3.2.1.

15. See I *id.* § 4.3.2.2 (explaining that in the period 1800-1920 agreements to arbitrate future disputes were not specifically enforceable in the United States); WESLEY A. STURGES, *COMMERCIAL ARBITRATION AND AWARDS* § 87 (1930); see also *Munson v. Straits of Dover S. S. Co.*, 102 F. 926 (2d Cir. 1900) (holding that a plaintiff, who sought damages in the form of lawyer's fees and costs incurred in defending a lawsuit for breach of an agreement to arbitrate, was entitled to nominal damages only).

Bruce Benson says "the assumption of court hostility toward arbitration prior to passage of modern arbitration statutes in the 1920s is clearly unwarranted for some courts, and perhaps unwarranted for most." Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 486 (1995). I disagree. So long as courts typically refused to order specific performance of broad

Consider, for example, a sales contract between Buyer and Seller containing the following standard arbitration clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If Buyer sought to arbitrate its claim that the goods were not as warranted, and Seller refused to do so, the only remedy a court would grant Buyer would be nominal money damages for Seller's breach of the arbitration clause.¹⁶ The court would do nothing more to encourage Seller to arbitrate. Therefore, unless Buyer could bring sufficient private pressure on Seller to arbitrate,¹⁷ Buyer would have to bring its breach

arbitration agreements, it is fair to characterize courts as "hostile" toward arbitration. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 20 (1992) (damages remedy was "largely ineffective"). Benson contends that during the 19th century, courts moved toward enforcing executory agreements to arbitrate *specific* disputes, and the law of two states provided generally for the enforcement of executory arbitration agreements. See Benson, *supra*, at 485-86. For the proposition that "the general movement . . . was in the direction of holding contracts to arbitrate *specific* future disputes to be binding," Benson cites only Jacob T. Levy, Note, *The Transformation of Arbitration Law, 1835-1870: The Lessening of Judicial Hostility Towards Private Dispute Resolution* (on file with the *Hofstra Law Review*). Benson, *supra*, at 486. Levy does make this assertion, but cites no cases or other authority to support it. Levy, *supra*, at 13-14.

For the proposition that the law of two states provided generally for the enforcement of executory arbitration agreements, Benson cites *Snodgrass v. Gavit*, 28 Pa. 221 (1857) and *Condon v. South Side R.R. Co.*, 55 Va. (14 Gratt.) 484 (1858). See Benson, *supra*, at 486. In neither of these cases, however, did a court enforce an executory arbitration agreement. In fact, *Snodgrass* is an example of a court's refusal to do so. See 28 Pa. at 224. *Snodgrass* involved a construction contract containing an arbitration clause. The builder received partial payment and successfully sued the owner for additional money. See *id.* at 223. The owner argued the trial court "erred in giving judgment that the plaintiff could recover, there being no evidence that the case had been submitted to arbitration." *Id.* The Pennsylvania Supreme Court affirmed the verdict, apparently on the ground that the owner had waived its right to arbitration by refusing to choose arbitrators. See *id.* at 224. *Condon* had nothing to do with the enforcement of an executory agreement. It involved the court's confirmation of an arbitrator's award. See 55 Va. (14 Gratt.) at 489.

16. See *Munson*, 102 F. at 928.

17. Contracting parties often perform because of private, rather than government, enforcement. See generally David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990). That point applies to the performance of arbitration agreements like other contracts. See Benson, *supra* note 15, at 484; see also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992). After analyzing the New York Diamond Dealers Club arbitration system, Bernstein concluded that

[u]nlike a court, the [New York Diamond Dealers Club arbitrator] has the ability to bring unique pressures on the losing party to pay: it can put him out of business almost instantaneously by hanging his picture in the clubroom of every bourse in the world with a notice that he failed to pay his debt.

of warranty claim in court. The parties would litigate, rather than arbitrate, despite the arbitration clause in their sales contract.

Another example arising out of the contract between Buyer and Seller would be a lawsuit by Seller asserting that Buyer did not pay for the goods. Buyer might move to dismiss or stay the action on the ground that Seller agreed to arbitrate such a claim. The court would reject Buyer's defense and hear Seller's claim. Again, the parties would litigate, rather than arbitrate, despite the arbitration clause in their sales contract.

Changing the result in cases like the two examples above required making pre-dispute arbitration agreements enforceable through the remedy of specific performance. That was precisely the effect of the "modern" arbitration statutes enacted in the 1920s.¹⁸ New York was the first state to enact a "modern" arbitration statute, i.e., a statute making pre-dispute arbitration agreements enforceable by specific performance.¹⁹ The United States Arbitration Act, renamed the Federal Arbitration Act ("FAA") in 1947,²⁰ was enacted in 1925.²¹ It was the

Bernstein, *supra*, at 149.

18. Bruce Benson rejects "the contention that modern arbitration statutes were necessary to counter general and widespread judicial hostility [to arbitration]." Benson, *supra* note 15, at 486-87. He rightly emphasizes that "[a]rbitration was well established and growing rapidly long before the statutes were passed, as nonlegal [private] sanctions induced many members of the business community to live up to their commitments to arbitrate and to accept arbitration rulings." *Id.* at 497. But the argument that private sanctions are sufficient to induce performance is strongest regarding agreements among members of the same trade association and other repeat-players. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 457 (1996) (citing Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 281 (1990)); see also Charny, *supra* note 17, at 408-26. Private sanctions are unlikely to induce performance of arbitration agreements between parties who neither share membership in a close-knit group, nor expect to have further dealings with each other. With respect to this enormous class of contracts, judicial enforcement may be the only enforcement that induces performance.

Benson supports the hypothesis that the modern arbitration statutes were the result of an attempt by lawyers to ensure themselves a role in the arbitration process. See Benson, *supra* note 15, at 492. On this reading of history, arbitration prior to the 1920s—which generally did not involve lawyers—was a threat to lawyers' incomes and the modern arbitration statutes were "written in a way that would lead to a role for lawyers in the arbitration process." *Id.* While this may be true, it does not undercut the virtue of statutes directing courts to enforce arbitration agreements. What it does is suggest the possibility of arbitration agreements providing that they are to be enforced only through private sanctions. Courts should enforce such agreements by refusing to order any remedy for their breach. See Charny, *supra* note 17, at 426-29.

19. See 1 MACNEIL ET AL., *supra* note 13, § 5.4.1.

20. Act of July 30, 1947, ch. 392, 61 Stat. 669.

21. See 9 U.S.C. §§ 1-15 (1925) (repealed 1947).

first modern federal arbitration statute.²² It makes arbitration agreements affecting interstate commerce²³ enforceable by specific performance.

For example, if Buyer sought to arbitrate its claim that the goods were not as warranted and Seller refused to do so, Section Four of the FAA entitles Buyer to a court order "directing that . . . arbitration proceed in the manner provided for in [Buyer and Seller's] agreement."²⁴ Or if Seller sued Buyer asserting that Buyer did not pay for the goods, Section Three of the FAA instructs the court to "stay the trial of the action until . . . arbitration has been had in accordance with the terms of the agreement."²⁵ Section Two of the FAA requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."²⁶

B. Collective Bargaining Arbitration

While the FAA was the first modern federal arbitration statute, it did not have a significant impact on employment arbitration until the 1970s.²⁷ Employment arbitration prior to the 1970s was shaped more by the Labor Management Relations Act of 1947²⁸ ("LMRA") than the FAA.²⁹ An analysis of the LMRA's impact on employment arbitration

22. Other early federal arbitration statutes were not "modern" because they did not make pre-dispute arbitration agreements enforceable by the remedy of specific performance. The following statutes enforced only post-dispute arbitration agreements between common carriers and their employees: Transportation Act of 1920, ch. 91, 41 Stat. 456, 470 (codified as amended in scattered sections of 49 U.S.C.) (setting up a Railway Labor Board with arbitration authority but no enforcement power); Act of July 15, 1913, ch. 6, 38 Stat. 103, 104 (repealed 1926) (establishing the Board of Mediation and Conciliation to mediate railway labor disputes); Act of June 1, 1898, ch. 370, 30 Stat. 424 (repealed 1913) (enforcing post-dispute arbitration agreements between railroads and their employees); and Act of Oct. 1, 1888, ch. 1063, 25 Stat. 501 (repealed 1898).

The Railway Labor Act, as amended, still governs disputes in the railroad industry. 45 U.S.C. §§ 151-188 (1994). The Act prescribes the way arbitration will be conducted in the event of a post-dispute agreement to arbitrate, see 45 U.S.C. § 157 (1994); it does not, however, make pre-dispute arbitration agreements enforceable. Under the Railway Labor Act, claims that a rail or airline industry collective bargaining agreement has been breached "must be submitted for resolution to the National Railway Adjustment Board. Decisions of the Adjustment Board interpreting the agreement are subject to limited review in the federal district court." MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 1.13, at 27 (1988).

23. See *infra* notes 68-69, 73 and accompanying text.

24. 9 U.S.C. § 4 (1994).

25. *Id.* § 3.

26. *Id.* § 2.

27. See *infra* text accompanying notes 68-74.

28. 29 U.S.C. §§ 141-144, 171-188 (1994).

29. "Arbitration agreements have a long track record in the context of collectively bargained agreements between a union and an employer. In recent years, arbitration agreements have gained

requires a brief overview of the law governing labor unions.

The National Labor Relations Act³⁰ ("NLRA"), enacted in 1935, grants employees the right to form labor unions.³¹ The NLRA requires employers to contract with the union as well as with individual employees.³² The employer's contract with the union is called a "collective bargaining agreement."³³ Its contract with the employee, which is rarely in writing, incorporates the terms of the collective bargaining agreement.³⁴

increasing favor in other employer-employee contexts." Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMPLOYEE REL. L.J. 205, 209 (1993).

30. 29 U.S.C. §§ 151-169.

31. See *id.* § 157. Section 157 explains that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" *Id.*

32. See 29 U.S.C. § 159(a) (1924).

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Id. "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ." 29 U.S.C. § 158(a)(5) (1994).

33. DENNIS R. NOLAN, *LABOR ARBITRATION LAW AND PRACTICE* 35-36 (1979).

Strictly speaking, [collective bargaining agreements] are not contracts at all, for only in individual contracts of employment, express or implied, is consideration (the offer of work and the promise to do it) exchanged. In Great Britain this is still the law, but in the United States a number of courts gave practical effect to labor agreements by treating them either as stating a "custom" or "usage" which is reflected in each individual contract of employment, or by treating the union as an "agent" of its members, or by regarding individual employees as third party beneficiaries of the contract between the union and the employer.

Id.

34. The Supreme Court has stated:

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the . . . union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. . . . In the sense of contracts of hiring, individual contracts between the employer

Almost every collective bargaining agreement contains an arbitration clause.³⁵ The clauses vary, but generally provide for arbitration of "grievances," the labor law term for claims alleging breach of the collective bargaining agreement.³⁶ Under most collective bargaining agreements, if an employee has a grievance she has no individual right to arbitration; the employee must persuade the union to demand arbitration.³⁷ If the union demands arbitration and the employee's grievance is arbitrated, that decision will be final and enforced by courts.³⁸ If the union refuses to demand arbitration, the employee can sue the employer only after proving that the union's refusal to arbitrate was a breach of its duty to the employee, the "duty of fair representation."³⁹ Some collective bargaining agreements allow the employer to assert grievances in arbitration; others do not.

Two important types of cases commonly arise out of the arbitration clauses in collective bargaining agreements.⁴⁰ In the first type of case, one party refuses to arbitrate a grievance and the other party seeks a court order compelling arbitration. In the second type of case, a party does arbitrate, but loses, and refuses to comply with the arbitration

and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

J. I. Case Co. v. NLRB, 321 U.S. 332, 334-36 (1944).

35. See ELKOURI & ELKOURI, *supra* note 1, at 61; 1 MACNEIL ET AL., *supra* note 13, § 11.1.

36. One commentator has noted that

"[I]nterest" arbitration is distinguished from the more familiar grievance or "rights" arbitration by the fact that in the former situation the designated neutral is employed to determine the actual contract terms which will bind the parties during the life of their new agreement, while in the latter situation the arbitrator is only empowered to decide disputes concerning the interpretation and application of the terms of an already existing contract. The grievance arbiter is generally precluded from adding to or modifying the terms of the contract in dispute.

Charles B. Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C. L. REV. 557, 558 n.8 (1980) (citing ELKOURI & ELKOURI, *supra* note 1, 47-50).

37. See PLAYER, *supra* note 22, § 1.13.

38. This finality applies only to claims covered by the arbitration clause in the collective bargaining agreement. Most such clauses make arbitrable only claims asserting a breach of the agreement. They do not make arbitrable, for example, statutory employment discrimination claims the employee might have against the employer.

An arbitrator's award against the employee does not prevent the employee from securing a *de novo* adjudication of the issue in federal court applying the standards of the employment discrimination legislation. The arbitrator's award only is evidence going to the issue and is in no way binding on the court.

Id. § 1.13, at 31-32.

39. *Id.* § 1.13, at 31.

40. These two types correspond to the two types of breach discussed previously in connection with Buyer and Seller. See *supra* text accompanying notes 16-17.

award, so the other party seeks a court order enforcing the award. Both types of cases involve a breach of the arbitration clause. The LMRA,⁴¹ as interpreted by the Supreme Court in the landmark case *Textile Workers Union v. Lincoln Mills*,⁴² requires courts to deal firmly with both forms of breach, i.e., to compel arbitration and to enforce an arbitration award.⁴³

While *Lincoln Mills* held that arbitration clauses in collective bargaining agreements are enforceable under the LMRA, *Lincoln Mills* simply ignored the FAA. As stated above, the FAA makes pre-dispute arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."⁴⁴ But Section One of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁴⁵ Although *Lincoln Mills* did not mention the FAA, or perhaps *because* it did not

41. The LMRA provides in pertinent part:

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. § 185(a)-(b) (1994).

42. 353 U.S. 448 (1957).

43. "Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate." *Id.* at 456 (citation omitted) (footnote omitted).

The "substantive law to apply in suits under [the LMRA] is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* In other words, the federal courts were directed to develop a federal common law governing collective bargaining agreements. State courts have concurrent jurisdiction to enforce collective bargaining agreements, see *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 511-14 (1962), including arbitration clauses, but they must apply the federal common law of collective bargaining and enforcement. See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

44. 9 U.S.C. § 2 (1994).

45. *Id.* § 1.

mention the FAA, "[t]he most natural reading of the Court's opinion in *Lincoln Mills* . . . is that the FAA in no way governs collective bargaining arbitration."⁴⁶ The Supreme Court's subsequent opinions on collective bargaining arbitration did not address the FAA until 1987.⁴⁷ That year, the Court intimated that although the FAA does not govern collective bargaining arbitration, courts may look to it for guidance in fashioning the rules of federal common law which govern collective bargaining arbitration.⁴⁸

C. Individual Employment Arbitration⁴⁹

While arbitration clauses in collective bargaining agreements have long been enforceable under the LMRA, it remains an open question whether arbitration clauses in individual employment contracts are enforceable under federal law. The LMRA certainly does not make them so.⁵⁰ Moreover, Section One of the FAA provides that the FAA does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁵¹

The scope of Section One's exclusion is plainly of tremendous importance to individual employment arbitration. If the exclusion is construed broadly, the FAA does not require enforcement of individual

46. 1 MACNEIL ET AL., *supra* note 13, § 11.3.1, at 11:9.

47. See, e.g., *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); 1 MACNEIL ET AL., *supra* note 13, § 11.3.1.

48. See *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987). The Court stated:

The [FAA] does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," but the federal courts have often looked to the [FAA] for guidance in labor arbitration cases, especially in the wake of the holding that [the LMRA] empowers the federal courts to fashion rules of federal common law to govern "[s]uits for violation of contracts between an employer and a labor organization" under the federal labor laws.

Id. (citations omitted).

49. Arbitration in the United States has often been divided into two categories: "labor arbitration" and "commercial arbitration." Under this terminology, arbitration arising out of a collective bargaining agreement is "labor arbitration" and arbitration arising out of a non-unionized employee's employment contract is "commercial arbitration." See *Warrior & Gulf Navigation Co.*, 363 U.S. at 578; 1 MACNEIL ET AL., *supra* note 13, § 11.3.1, at 11:10. To call arbitration arising out of any employment contract "commercial," as opposed to "labor," is inconsistent with the ordinary meaning of those words. Therefore, this Article uses the terms "collective bargaining arbitration" and "individual employment arbitration," instead of "labor" and "commercial" arbitration.

50. That is because the LMRA covers only "contracts between an employer and a labor organization." 29 U.S.C. § 185(a) (1994).

51. 9 U.S.C. § 1 (1994).

employment arbitration agreements; such agreements would be enforceable only when state law makes them so.⁵² Alternatively, the exclusion could be narrowly construed to cover only certain classes of employees so the FAA would require enforcement of agreements involving other employees.⁵³

Despite the importance of determining the scope of Section One's exclusion, many years passed before courts began to do so. That may be explained by the paucity of individual employment arbitration cases before the 1970s.⁵⁴ Individual employment arbitration itself was likely

52. Employment arbitration agreements are enforceable under the law of most, but not all, states. See Hope B. Eastman & David M. Rothenstein, *The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground*, 20 EMPLOYEE REL. L.J. 595, 598-600 (1995); see also UNIF. ARBITRATION ACT § 1 n.1, 7 U.L.A. 1 (1985 & Supp. 1996).

53. Commentators have debated this topic extensively. Some argue that employment contracts fall outside the scope of the FAA altogether. See Cole, *supra* note 18, at 449; Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 226-29, 234 (1992); Matthew W. Finkin, "Workers, Contracts" *Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Sharonna Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 141-48 (1996); Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1701, 1721-22 (1995); Jennifer A. Magyar, Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 653 (1992). Others argue that the FAA excludes only certain types of employment contracts. See 1 MACNEIL ET AL., *supra* note 13, § 11.2.2 ("The phrase 'contracts of employment' in the exclusion means only collective bargaining agreements."); James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 114 (1993) (arguing that the "FAA is best interpreted as excluding only those individual and collective contracts of employees in the transportation industry or who are otherwise directly engaged in interstate or foreign commerce"); Gerard Morales & Kelly Humphrey, *The Enforceability of Agreements to Arbitrate Employment Disputes*, 43 LAB. L.J. 663, 668-69 (1992) (arguing that Congress intended the exclusion to apply only to workers in the transportation industry); R. James Filiault, Comment, *Enforcing Mandatory Arbitration Clauses in Employment Contracts: A Common Sense Approach to the Federal Arbitration Act's Section 1 Exclusion*, 36 SANTA CLARA L. REV. 559, 571 (1996) (explaining how many federal courts have held that "arbitration clauses in contracts of employment of those in the transportation industry are exempt from the FAA"); William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2179 (1995) (arguing that the FAA exclusion should be limited to workers in the transportation industries); Patrick D. Smith, Comment, *The Court Opens the Door to Arbitration of Employment Disputes: Gilmer v. Interstate/Johnson Lane Corp.*, 17 J. CORP. L. 865, 885 n.200 (1992) (explaining how courts have construed the FAA provision narrowly rather than broadly as advocated by the dissent in *Gilmer*).

54. The few earlier cases include *Livingston v. Shreveport-Texas League Baseball Corp.*, 128 F. Supp. 191, 201 (W.D. La. 1955) (enforcing employment arbitration award against baseball manager under Louisiana arbitration statute despite statute's exclusion of "contracts of employment of labor" because "labor" should not be construed to include mental or professional tasks), *aff'd*, 228 F.2d 623 (5th Cir. 1956); *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825, 832 (S.D.N.Y. 1946) (holding FAA not applicable to opera singer's pre-dispute employment arbitration agreement because

quite rare during this period. There are many possible reasons for this. First, the prevalence of the employment "at-will" doctrine undoubtedly kept down the number of employment claims.⁵⁵ Second, employment contracts not embodied in a writing cannot contain an enforceable arbitration clause; the FAA and state arbitration laws enforce only *written* agreements to arbitrate.⁵⁶ Written employment contracts were rare until quite recently.⁵⁷ A third possible reason for the dearth of individual

the contract did "not evidence a transaction arising out of interstate or foreign commerce"), *aff'd*, 163 F.2d 310 (2d Cir. 1947); *Kerr v. Nelson*, 59 P.2d 821, 823 (Cal. 1936) (enforcing employment arbitration award against sales manager's employer under California arbitration statute despite statute's exclusion of "contracts pertaining to labor" because "labor" should not have been construed to include mental or professional tasks); *Universal Pictures Corp. v. Superior Court*, 50 P.2d 500, 501-02 (Cal. Ct. App. 1935) (same); and *In re S. M. Goldberg Enterprises*, 225 N.Y.S. 513, 516 (Sup. Ct.) (enforcing pre-dispute employment arbitration agreement apparently under New York, rather than federal, arbitration statute), *aff'd*, 225 N.Y.S. 909 (App. Div. 1927).

55. Where employment at-will is the legal rule, the employer can fire the employee and the employee can quit at any time, for any reason or no reason at all. This rule is a default rule and parties can contract around it. See Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 680 (1994) (explaining how the rule is the result of courts responding to problems of nineteenth century employment law cases). One commentator describes the current status of the employment at-will rule as follows:

Today, most jurisdictions are placing limits on the application of the traditional "at-will" doctrine. However, a number of states continue to apply the traditional concept and refuse to create any non-statutory exception. Even states which recognize limits on the employer's right to discharge construe the limits as narrow "exceptions" to the usual common law rule allowing termination of at-will employees.

PLAYER, *supra* note 22, § 1.01, at 3 (footnote omitted). "Taken together, the explosion of individual rights legislation and the development of limitations on the employment at-will rule have vastly increased the legal resources available to employees to challenge various employer decisions." Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 695 (1993). What Berger calls "individual rights legislation," i.e., statutes forbidding employers from discriminating on the basis of race, sex, age, disability, etc., are themselves limitations on the employment at-will rule. In fact, they are perhaps the most significant departure from employment at-will.

With a clear rule stating that employees can quit at any time for any reason and employers can fire at any time for any reason, there is little room for dispute. Alternative rules breed more litigation. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 970-73 (1984); see also Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 12 (1993) (stating that the litigation-cost argument is the strongest argument for Epstein's polar position in favor of the employment at-will rule).

56. See 9 U.S.C. § 2 (1994); see also Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 768 (1990).

57. See Gerald D. Skoning, *The Law of Wrongful Discharge: Contractual Causes of Action*, in 18TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 801, 805 (PLI Litig. & Admin. Practice Course Handbook Series No. 375, 1989). "In the past, individual employment contracts were generally used only for high level employees, but increasingly such contract may become more widespread as the result of the erosion of the employment-at-will doctrine." *Id.* at 804; see also Christopher H. Mills, *Drafting Employment Agreements: Practical and Legal Considerations*, in HANDLING CORPORATE EMPLOYMENT PROBLEMS 1991, at 407, 410 (PLI Litig. & Admin. Practice Course Handbook Series

employment arbitration was that parties (particularly employers advised by lawyers) were reluctant to arbitrate disputes because they lacked confidence in the finality of arbitration decisions, i.e., they feared that courts would reopen a dispute after it had been arbitrated.⁵⁸ The pro-arbitration trend in the courts over the last twenty years⁵⁹ has undoubtedly reduced those fears and led to greater confidence that arbitration decisions will be enforced by courts. Whatever the historical reason, courts were slow to interpret the "contracts of employment" exclusion in Section One of the FAA.

One of the earlier individual employment arbitration cases, *Bernhardt v. Polygraphic Co. of America*,⁶⁰ reached the Supreme Court in 1955. Polygraphic fired Bernhardt who sued, alleging breach of his employment contract. Polygraphic then moved for a stay pending arbitration because the employment contract contained an arbitration clause.⁶¹ The relevant state, Vermont,⁶² did not have a modern arbitration statute.⁶³ Therefore, Bernhardt's promise to arbitrate would be enforceable by specific performance, i.e., a stay of his lawsuit, only if the FAA governed his employment agreement.⁶⁴ The Court held that the FAA did not govern because the agreement did not involve interstate commerce.⁶⁵ Therefore, Vermont law governed.⁶⁶ This conclusion allowed the Court to avoid the issue of whether Section One's exception for employment contracts applied to Bernhardt's contract.⁶⁷

Cases involving individual employment arbitration became more common in the 1970s. In the early 1970s, courts first concluded that certain individual employment contracts "evidence[d] a transaction involving [interstate] commerce"⁶⁸ under FAA Section Two.⁶⁹ This

No. 410, 1991) (finding that "written employment contracts are most frequently used with senior executives or sales personnel").

58. See Berger, *supra* note 55, at 718 n.164.

59. See *infra* note 275.

60. 350 U.S. 198 (1956).

61. See *id.* at 199.

62. The Supreme Court proceeded on the assumption that the governing state's law was Vermont's, but it remanded that choice of law issue to the district court. See *id.* at 205.

63. See *id.* at 204-05.

64. See *id.* at 200-01.

65. See *id.* ("There is no showing that [Bernhardt] while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce . . .").

66. See *id.*

67. See *id.* at 201 n.3.

68. 9 U.S.C. § 2 (1994).

holding forced the courts to confront the issue *Bernhardt* had avoided, the scope of Section One's exclusion. Cases in the early 1970s held that Section One did not exclude from FAA coverage employees of securities broker-dealers⁷⁰ and the professional basketball superstar, "Dr. J."⁷¹ These pre-dispute employment arbitration agreements were, therefore, enforceable under Section Two of the FAA. These precedents have been followed quite consistently with respect to different types of individual employment agreements.⁷² Courts have generally treated Section One's exclusion to exclude only collective bargaining agreements.⁷³ Individual employment agreements are governed by the FAA.

During the 1970s, courts began to routinely enforce arbitration

69. See *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1068-69 (2d Cir. 1972) (professional basketball player); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (securities employee); *Rust v. Drexel Firestone, Inc.*, 352 F. Supp. 715, 716 (S.D.N.Y. 1972) (securities employee); *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367, 1371 (D.D.C. 1972) (securities employee); *Miller v. Puritan Fashions Corp.*, 516 S.W.2d 234, 238 (Tex. Civ. App. 1974) (sales representative); *Marmlin v. Susan Thomas, Inc.*, 490 S.W.2d 634, 636 (Tex. Civ. App. 1973) (sales representative).

70. See *Dickstein*, 443 F.2d at 785; *Legg, Mason & Co.*, 351 F. Supp. at 1371.

71. See *Erving*, 468 F.2d at 1069.

72. Few cases hold that an individual employment arbitration agreement comes within FAA Section One's exclusion. See 1 MACNEIL ET AL., *supra* note 13, § 11.2. Two that do are *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311-12 (6th Cir. 1991), and *Wilder v. Whitaker Corp.*, 215 Cal. Rptr. 536 (Ct. App. 1985).

73. See 1 MACNEIL ET AL., *supra* note 13, § 11.4.3.

The casual approach of the courts in applying the FAA to individual employment contracts without even noting th[e] question [of the exclusion in Section 1] suggests that the exclusion applies only to collective bargaining agreements. Many courts, with little or no analysis, have held, for example, employment contracts of securities brokers, who are clearly involved in interstate commerce, to be covered by the FAA despite the § 1 exclusion.

Id. Contrary to Macneil, Sharon Hoffman contends that "the majority of courts which have interpreted [Section One's] exclusionary provision support the proposition that all employment contracts fall outside the scope of the [FAA's] coverage." Hoffman, *supra* note 53, at 148. Although Hoffman's article cites Macneil repeatedly, it does not acknowledge that Macneil takes the contrary position on the empirical question of how courts have construed Section One's exclusion.

Courts have disagreed about whether Section One applies to some or all collective bargaining agreements. Compare *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984) and *United Electric Radio & Machine Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (holding that Section One applies to production workers in addition to transportation workers) and *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers, (U.E.) Local 437*, 207 F.2d 450, 452-53 (3d Cir. 1953) (stating that Section One only applies to transportation workers), with *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990) (holding that Section One does not apply to "contracts of employment"), and *United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989) (holding that the FAA is inapplicable to all collective bargaining agreements since they are "contracts of employment").

clauses in individual employment agreements,⁷⁴ although some held that certain claims, such as ERISA⁷⁵ or antitrust violations, were not arbitrable because of statute⁷⁶ or "public policy."⁷⁷ These claims, therefore, would be heard in court even if the parties had agreed in their employment contract to arbitrate them. The number of individual employment arbitration cases grew substantially in the 1980s,⁷⁸ and it was during this period that many courts held that employment discrimination claims were not arbitrable.⁷⁹ In 1991, however, the Supreme Court held to the contrary in *Gilmer v. Interstate/Johnson Lane Corp.*⁸⁰ by holding that an employee's age discrimination claim was arbitrable.⁸¹

74. See cases cited *supra* note 69.

75. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1974).

76. See *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 100 Cal. Rptr. 791, 798 (Ct. App. 1972) (stating that the relevant state labor statute could only lead one to conclude that "an employee cannot be required to arbitrate a claim for wages"), *cert. granted*, 410 U.S. 908, *and aff'd*, 414 U.S. 117 (1973).

77. See *Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561, 566 (S.D.N.Y. 1978); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 275-76 (E.D. Pa. 1977).

78. See I MACNEIL ET AL., *supra* note 13, § 5.2. While the number of reported employment arbitration cases grew substantially during the 1980s, it is harder to quantify the growth in the number of employment arbitration proceedings due to the availability of various arbitration forums. In the early 1990s, an average of 500 such claims were filed with the American Arbitration Association per year. See Steven M. Kaufmann & John A. Chanin, *Directing the Flood: The Arbitration of Employment Claims*, 10 LAB. LAW. 217, 218 (1994). Additional employment arbitration claims are filed with securities industry self regulatory organizations. See *infra* Part IV.C. Others may be filed with other organizations such as JAMS/Endispute. See Richard C. Reuben, *Getting Out of a J.A.M.S.*, A.B.A. J., Apr. 1996, at 41.

79. See, e.g., *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186-87 (1st Cir. 1989); *Nicholson*, 877 F.2d at 227-28; *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-06 (8th Cir. 1988); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543, 546-47 (D.N.J. 1987); *Horne v. New England Patriots Football Club, Inc.*, 489 F. Supp. 465, 470 (D. Mass. 1980).

80. 500 U.S. 20 (1991).

81. As a condition of Gilmer's employment with Interstate, Gilmer was required to register as a securities representative with several stock exchanges including the New York Stock Exchange ("NYSE"). Interstate required this of its employees in order for it to remain a member of the NYSE. See *id.* at 23. The NYSE registration application (Form U-4) provided that Gilmer "agree[d] to arbitrate any dispute, claim or controversy" arising between him and Interstate "that [was] required to be arbitrated under the rules, constitutions or bylaws of the organizations with which [he] register[ed]." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 n.1 (4th Cir. 1990) (quoting paragraph 5 of Gilmer's securities registration application), *cert. granted in part*, 498 U.S. 809 (1990), *and aff'd*, 500 U.S. 20 (1991). NYSE Rule 347 required the arbitration of any controversy between Gilmer and Interstate arising out of the termination of Gilmer's employment. See *id.*

When Gilmer was 62 years old, Interstate fired him. Gilmer filed an age discrimination charge with the Equal Opportunity Employment Commission ("EEOC"). He then sued Interstate alleging that Interstate had fired him because of his age, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). 29 U.S.C. §§ 621-634 (1994). Interstate, citing the arbitration clause in the Form U-4 Gilmer had executed, moved to dismiss the case and to compel arbitration.

Since *Gilmer*, the Fifth,⁸² Sixth,⁸³ Ninth,⁸⁴ Tenth,⁸⁵ and Eleventh⁸⁶ Circuits have all held that employees' claims of race or sex discrimination are also arbitrable.

Gilmer has been quite controversial. Since *Gilmer*, it appears that more employers have begun to insist upon arbitration agreements as a condition of employment.⁸⁷ Numerous commentators have attacked

The Supreme Court ruled for Interstate and relegated *Gilmer's* claim to arbitration. See *Gilmer*, 500 U.S. at 35.

82. See *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

83. See *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991).

84. See *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1442 (9th Cir. 1994).

85. See *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994).

86. See *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992).

87. See Mary A. Bedikian, *Transforming At-Will Employment Disputes Into Wrongful Discharge Claims: Fertile Ground for ADR*, 1993 J. DISP. RESOL. 113, 141-42 (stating that there is a "current tide of aggressively incorporating arbitration clauses into employer handbooks and personnel manuals"). Some commentators have found that

more and more large companies are requiring employees to agree at the outset to submit claims of discrimination that might arise during their employment to binding arbitration [I]n recent years, companies like Hughes Aircraft, ITT, Rockwell International, the Travelers Corporation, and Brown & Root have adopted policies that require arbitration of discrimination claims for some or all of their employees

Eastman & Rothenstein, *supra* note 52, at 597; see also Garry G. Mathiason & Pavneet Singh Uppal, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, in *EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS* 875 (A.L.J.-A.B.A. 1994); Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 448 (1995); Jordan L. Resnick, Note, *Beyond Mastrobuono: A Practitioners' Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913, 921 n.44 (1995) (discussing the number of companies that have implemented pre-dispute arbitration programs for employment-related disputes); Steven A. Holmes, *Some Employees Lose Right to Sue for Bias at Work*, N.Y. TIMES, Mar. 18, 1994, at A1 (addressing the growth of arbitration policies in corporations and the response of Congress and the judiciary); Margaret A. Jacobs, *Judges Appear to Be Growing Skeptical of Arbitration*, WALL ST. J., Dec. 22, 1994, at B2 ("Emboldened by pro-arbitration rulings by the Supreme Court, hundreds of employers in recent years have put mandatory arbitration clauses in standard contracts with employees."); Joann S. Lublin, *Companies Try to Prevent Fired Executives from Suing*, WALL ST. J., June 28, 1995, at B1 ("More than 100 big companies have litigation-alternative programs covering at least some employees, up from about 10 a decade ago"); Richard B. Schmitt, *More Law Firms Seek Arbitration for Internal Disputes*, WALL ST. J., Sept. 26, 1994, at B18 (discussing the increase in law firms seeking arbitration for internal disputes).

If *Gilmer* remains good law, employment arbitration is likely to grow even more. See S. Gale Dick, *ADR at the Crossroads*, 49 DISP. RESOL. J. 47, 52 (1994) ("More and more firms in certain industries are inserting mandatory arbitration clauses into their employment contracts [E]mployment disputes promise to be one of the biggest growth areas for ADR in the coming years."). An American Bar Association survey of employer responses to *Gilmer* found that 54.5% of respondents considered expanding their use of ADR in light of *Gilmer* but plan to refrain

Gilmer, arguing that pre-dispute employment arbitration agreements should be unenforceable.⁸⁸ United States senators and representatives and the Chairman of the Equal Employment Opportunity Commission have expressed agreement with these arguments.⁸⁹ The gist of many of these arguments is that arbitration arising out of pre-dispute arbitration agreements often proceeds without the voluntary consent of the employee involved.⁹⁰ It is these arguments I address in the next Part of the Article. As these arguments have focused on individual employment arbitration, rather than collective bargaining arbitration, I address them in the non-union context.⁹¹

There is another ground for attacking *Gilmer* that I do not address in this Article. That is the argument that certain types of claims, such as employment discrimination claims, should never be arbitrable regardless of whether the parties involved have voluntarily consented to arbitration. Commentators attacking *Gilmer* on this "arbitrability" ground argue, in other words, that when an employee has agreed to arbitrate all claims arising out of employment, a court should enforce that agreement if the claim is of one type (such as contract) but not if the claim is of another type (such as employment discrimination).⁹² This argument is based on

from taking action until there are more judicial or legislative developments. See *Corporate Survey of Alternative Dispute Resolution in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, REPORT OF THE SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION OF THE COMMITTEE ON EMPLOYEE RIGHTS AND RESPONSIBILITIES OF THE LABOR LAW SECTION OF THE AMERICAN BAR ASSOCIATION (Apr. 8, 1992). A GAO survey found that 9.9% of employers arbitrate employment disputes and "[r]oughly one-fourth to one-half of . . . [those] make its use mandatory for all covered employees." *ADR Use in Employment Discrimination*, DISP. RESOL. TIMES, Fall 1995, at 2 (citing GENERAL ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (GAO/HEHS-95-150 1995) [hereinafter 1995 GAO REPORT]).

88. See *infra* notes 102-04 and accompanying text; see also Jennifer R. Dowd, *Age Discrimination, 1990-91 Annual Survey of Labor and Employment Law*, 33 B.C. L. REV. 435, 445 (1992) ("*Gilmer* threatens to undermine the ADEA's attempt to protect workers from the waiver of civil rights.>").

89. See *infra* notes 105-12 and accompanying text.

90. See *infra* notes 108-12 and accompanying text.

91. Courts are just beginning to enforce collective bargaining agreement clauses requiring arbitration of employment discrimination claims. See, e.g., *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885-86 (4th Cir. 1996).

92. See, e.g., Cooper, *supra* note 53, at 211 (stating that "[l]abor arbitration proceedings . . . are too thin to protect statutory rights and develop public law"); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: A Review of Doctrine and Policy*, 14 HOFSTRA LAB. L.J. (forthcoming); Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMP. & LAB. L. 209, 211 (1995) (opposing enforcement of pre-dispute arbitration agreements with respect to Title VII claims); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 573 (1990) (arguing that Title VII and ADEA claims should not be subject to arbitration "[because] arbitration procedures

the notion that certain claims have such importance to people who are not parties to the dispute that the freedom of the parties to choose how to resolve their dispute should be restricted to advance the interests of these nonparties.⁹³ The courts have thoroughly rejected this argument.⁹⁴ I do too. I share Jeffrey Stempel's view that

courts confronted with arbitrability questions should enforce written agreements to arbitrate without regard to the subject matter of the dispute or to the legal claims in the dispute unless the party resisting arbitration can demonstrate, by a preponderance of the evidence, that the arbitration "contract" between the parties is voidable because it was not the product of sufficiently genuine consent between the parties.⁹⁵

Those who reject this contractual approach to arbitration will undoubtedly continue trying to reverse the judicial trend toward making all claims arbitrable. Whether or not they succeed on that front, however, the issue of voluntary consent remains. Whatever claims are arbitrable, disputes will arise over whether particular parties have, or have not, formed enforceable agreements to arbitrate those claims.

and institutions appear to be . . . poorly adapted to resolving disputes touching on rights to personal dignity and equal protection"); see also Resnick, *supra* note 87, at 918 n.26 (citing various commentators who argue that certain causes of action should not be arbitrable). Perhaps the strongest theoretical argument for this position is made by Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059 (1987).

93. See, e.g., Morgan, *supra* note 92, at 1062, 1082 (arguing for the need to "distinguish those legal rights that can logically be shaped and enforced in accordance with the will of the parties concerned," from "those rights . . . which are imposed by the state in furtherance of the collective interest"). A variant of this argument is that, while all claims may be arbitrable, courts should review, *de novo*, arbitrators' decisions on certain claims to advance "the public justice goals of statutory and common-law regulation of the employment relationship." Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1190 (1993); see also Berger, *supra* note 55, at 718 (theorizing that a distinction should be demarcated between private disagreements based on contract and those that violate statutory rights since the latter involve an issue of public concern and as such may warrant potential judicial review).

94. See 2 MACNEIL ET AL., *supra* note 13, § 16.

95. Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1426 (1991).

III. VOLUNTARY CONSENT AND THE CONTRACTUAL NATURE OF ARBITRATION

A. *Voluntary Consent and Pre-Dispute Arbitration Agreements*

Ensuring that disputes are resolved by arbitration only when the parties have voluntarily consented to it is a widely held goal.⁹⁶ Many commentators express concern that much of contemporary employment arbitration occurs without the voluntary consent of the employees involved.⁹⁷ I share this concern and seek, in this Part, to propose a conceptual framework for ensuring that employment arbitration proceeds only through the voluntary consent of the parties involved.

Commentators' concerns about ensuring voluntary consent in employment arbitration are raised by the following hypothetical based on actual recent cases.⁹⁸ Upon starting her job, Employee signs a form providing that all disputes arising out of her employment will be resolved through arbitration. Some time later, Employee alleges that she has suffered sexual harassment at work. Employee sues Employer alleging a violation of Title VII of the Civil Rights Act of 1964.⁹⁹ Employer moves to dismiss the case on the ground that Employee waived her right

96. Not everyone, however, is concerned about ensuring voluntary consent to arbitration. Alan Rau and Edward Sherman question "whether it is really productive to worry too much about the existence of true 'consent' to arbitration." Alan Scott Rau & Edward Sherman, *Arbitration in Contracts of Adhesion* 6 (Sept. 3, 1994) (unpublished manuscript, on file with the *Hofstra Law Review*). They suggest we might "change the focus of our thinking and . . . approach arbitration as a question of economic regulation of certain disputes rather than as a means of giving effect to private ordering." *Id.* Rather than focusing on contract formation, the law should "place the highest priority on regulating the arbitration process itself." *Id.* at 7. This might be accomplished by courts reviewing arbitration awards with less deference, or by direct regulation of arbitration providers.

97. See *infra* notes 102-04 and accompanying text.

98. This hypothetical example of Employer and Employee is based on the actual cases discussed in Margaret A. Jacobs, *Riding Crop and Slurs: How Wall Street Deals with a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1.

99. 42 U.S.C. § 2000e (1994). The EEOC enforces employment discrimination laws and investigates charges of employment discrimination by private sector employers. If it finds reasonable cause to believe that discrimination has occurred, the EEOC attempts to persuade the employer to eliminate and remedy the discrimination. Remedies may include reinstatement, back pay, or money damages. If the EEOC is unable to persuade the employer to take action, the EEOC or the employee may sue the employer. The employee may bring suit only after the EEOC has issued her a "right to sue" notice. See GENERAL ACCOUNTING OFFICE, *EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES* 4 (GAO/HEHS-94-17 1994) [hereinafter 1994 GAO REPORT]; see also Megan L. Dunphy, Comment, *Mandatory Arbitration: Stripping Securities Industry Employees of Their Civil Rights*, 44 CATH. U. L. REV. 1169, 1181-82 n.57 (1995).

to sue when she executed the form providing for arbitration. The court grants Employer's motion, so Employee brings her claim in arbitration. The arbitration is conducted by Employer's trade association. Two of the three arbitrators are white men over sixty years of age.¹⁰⁰ Employee fares worse in the arbitration than one expects she would have if the claim had been heard in court.¹⁰¹

Cases like this have provoked a great outcry from commentators who contend that employees are being "forced"¹⁰² into "mandatory"¹⁰³ or "compulsory"¹⁰⁴ arbitration of their employment disputes.

100. A United States General Accounting Office study of employment discrimination arbitration proceedings before the NYSE and the National Association of Securities Dealers ("NASD") estimated that 97% of NYSE and NASD arbitrators were white and 89% were male averaging 60 years of age. See 1994 GAO REPORT, *supra* note 99, at 8.

101. We can, of course, never know what would have happened had an arbitrated claim been litigated instead. However, lawyers who regularly litigate sexual harassment claims would most likely predict better results for the plaintiffs as discussed in Jacobs, *supra* note 98, at A1, had their claims been heard in court. See William M. Howard, *Arbitrating Claims of Employment Discrimination*, 1995 J. DISP. RESOL. 40 (comparing results of employment litigation and arbitration).

102. See Cooper, *supra* note 53, at 229 (finding that "the FAA exclusion was to protect employees who might otherwise be forced into arbitration agreements"); Hoffman, *supra* note 53, at 132-33 ("Employees who wish to obtain employment or retain their positions with employers who have instituted compulsory arbitration programs are thereby forced to relinquish their rights of access to the courts . . ."); Michael Ferry, *Mandatory Arbitration Clauses Raise Concerns*, ST. LOUIS POST-DISPATCH, Nov. 5, 1994, at 2D (referring to predispute arbitration as "forced arbitration"); Margaret A. Jacobs, *Woman Claims Arbiters of Bias Are Biased, Too*, WALL ST. J., Sept. 19, 1994, at B1 (describing woman who signed pre-dispute arbitration agreement as a "woman forced to arbitrate a sexual-harassment claim"); Carol Kleiman, *Settling Disputes by Arbitration Full of Pitfalls for Employees*, CHI. TRIB., Dec. 13, 1994, at B2 ("Some employers are forcing all employees to sign employment contracts that state they will use arbitration to settle disputes."); see also Stempel, *supra* note 95, at 1386 (stating that "[a]n employee's predispute agreement to arbitrate, especially when made a precondition of employment by the employer at the behest of an organization such as the New York Stock Exchange . . . seems devoid of meaningful consent").

103. See, e.g., Eastman & Rothenstein, *supra* note 52, at 595 (finding that "a growing number of . . . courts have upheld and enforced mandatory agreements to arbitrate between employers and employees") (emphasis omitted); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preface for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701 (1996) ("[T]he Supreme Court refuses to recognize that unregulated mandatory binding arbitration agreements can be determined to consumers, employees, and other little guys."); Michele M. Buse, Comment, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 PEPP. L. REV. 1485, 1523 (1995) (concluding that "an employee will likely release her right to court adjudication by agreeing to the mandatory arbitration provision in order to find a job or retain her current position"); Heidi M. Hellekson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. 435 (1994).

The arbitration of Title VII claims can benefit all parties involved, but only when

the parties voluntarily decide to arbitrate after the employer's disputed behavior has already occurred. This ideal situation, however, is not the norm in arbitration agreements that are written into employment contracts. These largely nonnegotiable contracts are often offered on a "take it or leave it" basis and therefore do not qualify as being voluntary.

Id. at 456-57; see also Mark D. Klimck, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 OHIO ST. J. ON DISP. RESOL. 425 (1993) (noting that an arbitration agreement may waive an employee's right to a judicial forum regarding Title VII violations); Margaret A. Jacobs, *Required Job-Bias Arbitration Stirs Critics*, WALL ST. J., June 22, 1994, at B5 (noting that increased usage of mandatory arbitration in job related discrimination claims has prompted Congress to introduce legislation restricting its use); Jacobs, *supra* note 98, at A6 (discussing the growth of mandatory arbitration in securities firms and large corporations "as a fast, efficient and cheap alternative to employee lawsuits"); Margaret A. Jacobs, *Workers Call Some Private Justice Unjust*, WALL ST. J., Jan. 26, 1995, at B1 (discussing the ramifications of *Gilmer* as many companies across different industries are requiring employees to sign arbitration agreements, thus forfeiting their rights to a judicial proceeding); Frank E.A. Sander & Mark C. Fleming, *Arbitration of Employment Disputes Under Federal Protective Statutes: How Safe Are Employment Rights?*, DISP. RESOL. MAG., at 13 (Spring 1996) (Employers are "making mandatory arbitration provisions a feature—and often a condition—of employment."); L.M. Sixel, *Court Says Arbitration Rule Void/Employees Can't Be Forced to Sign*, HOUS. CHRON., Apr. 18, 1995 (Business), at 1 ("[M]ore and more employers are forcing their employees to abide by mandatory arbitration as a way to settle disputes.").

Even defenders of *Gilmer* use the term "mandatory" to describe pre-dispute arbitration agreements. See Thomas K. Plofchan, Jr., *Coming Home to Contract: Loosening the Death-Grip of Statutorily Created Rights on Arbitration in the Non-Union World*, 6 OHIO ST. J. ON DISP. RESOL. 243, 249 (1991); see also Edward P. Radetic, Note, *Gilmer v. Interstate/Johnson Lane Corporation: The Supreme Court Endorses Mandatory Arbitration of ADEA Claims*, 36 ST. LOUIS U. L.J. 741, 749-57 (1992) (discussing the holding in *Gilmer* as an endorsement of mandatory arbitration in ADEA claims).

104. See, e.g., R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1866 n.13 (1994) (defining compulsory arbitration as "judicial enforcement of contractual agreements to resolve employment disputes through binding arbitration"); Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 593 (1995) (stating that "employers and employees are increasingly entering into, and courts are increasingly enforcing, compulsory arbitration agreements") (footnote omitted); Stuart H. Bompey & Michael P. Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 EMPLOYEE REL. L.J. 197, 197 (1993) (*Gilmer* addresses when "an employer [can] compel an employee to arbitrate employment discrimination claims."); Dumphy, *supra* note 99, at 1169 (stating that the Supreme Court's holding in *Gilmer* "opened the door to compulsory arbitration of employment discrimination claims in the securities industry's private arbitration system"); Carolyn Grace & Gretchen Van Ness, *A Road Not Taken: Reconsidering Mandatory Arbitration of Securities Disputes*, BOSTON B.J., Jan./Feb. 1992, at 24, 26 (finding that since Supreme Court intervention "employees in the securities industry have been compelled to arbitrate common law and statutory claims against their employers"); Jeffrey R. Knight, *Enforcing Arbitration Agreements Between Employers and Employees*, 61 DEF. COUNS. J. 251, 259 (1994) ("The broad federal policy favoring arbitration of disputes is nowhere more evident than in the area of compulsory, employment-related arbitration agreements."); Steven A. Holmes, *Arbiters of Bias in Securities Industry Have Slight Experience in Labor Law*, N.Y. TIMES, Apr. 5, 1994, at B6 (discussing a Congressional study which concluded that "more employees are compelled to submit complaints of job discrimination and sexual harassment to arbitration"); Ronald Turner,

To prevent outcomes like the one in Employee's hypothetical case, United States senators and representatives have introduced legislation to direct courts to hear claims like Employee's, rather than relegating them to arbitration.¹⁰⁵ The Equal Employment Opportunity Commission ("EEOC") and the National Labor Relations Board ("NLRB") are pursuing the same agenda: to prevent enforcement of pre-dispute employment arbitration agreements.¹⁰⁶ These legislators and administrative agencies use the same terminology as the commentators discussed above.¹⁰⁷ The commentators often use the label "voluntary" to describe employment arbitration in which employees agree, *after a dispute has arisen*, to resolve that dispute by arbitration.¹⁰⁸ The legislators and agencies praise such arbitration, but oppose arbitration in cases like Employee's cases in which the employee seeks to litigate, rather than

Compulsory Arbitration of Employment Discrimination Claims, 31 WAKE FOREST L. REV. 231, 290 (1996) ("[C]ompulsory arbitration, while lawful, is not acceptable and should not be enforced absent the establishment of certain safeguards and processes.").

105. See Civil Rights Procedures Protection Act of 1994, H.R. 4981, 103d Cong.; Protection From Coercive Employment Agreements Act, S. 2012, 103d Cong. The Civil Rights Procedures Protection Act of 1994 was introduced by Reps. Schroeder (D-Colo.), Markey (D-Mass.), and Margolies-Mezvinsky (D-Pa.) and was designed to prevent enforcement of pre-dispute agreements to arbitrate employment discrimination claims. The Protection From Coercive Employment Agreements Act was introduced by Sen. Feingold (D-Wis.) on April 13, 1994, and was also aimed at rendering pre-dispute arbitration agreements covering employment discrimination claims unenforceable. For a further discussion of these unenacted bills, see Eastman & Rothenstein, *supra* note 52, at 601-03.

106. In one case, the EEOC obtained a preliminary injunction against an employer, preventing the employer from requiring employees to sign an arbitration agreement. See *United States EEOC v. River Oaks Imaging and Diagnostic*, No. CIV.A. H-95-755, 1995 WL 264003, at *1 (S.D. Tex. Apr. 19, 1995). For a more detailed discussion of this case, see Hoffman, *supra* note 53, at 136-40. According to EEOC Commissioner Paul Miller, "[t]he problem is mandatory arbitration clauses that are imposed on employees as a condition of employment or continuing employment. We basically see these as ways to circumvent a party's right to file in federal court and their civil rights as set out by Congress." Margaret A. Jacobs, *Policies Requiring Arbitration Challenged*, WALL ST. J., Oct. 16, 1995, at B5. In addition, the NLRB's general counsel has taken the position that employers who insist on an arbitration agreement as a condition of employment have committed an unfair labor practice in violation of 27 U.S.C. § 158. See Jerry M. Hunter, *ADR, the NLRB and Non-Union Workers*, DISP. RESOL. J., Fall 1995, at 18.

107. See *supra* note 106; see also 140 CONG. REC. E1753 (daily ed. Aug. 17, 1994) (statement of Rep. Markey). Rep. Markey stated that "[the Civil Rights Procedures Protection Act of 1994] would prevent employers from forcing their employees to give up their right to pursue employment discrimination and sexual harassment claims in courts of law." *Id.* Rep. Schroeder asserted that "[t]he practice of mandatory arbitration, which is already in widespread use in the securities industry, is growing in popularity among many individual corporations especially in the construction, insurance, banking, and information technology industries." *Id.*

108. See, e.g., Margaret A. Jacobs, *NASD Panel to Study Reforms in Arbitration Process*, WALL ST. J., Aug. 18, 1994, at C1 (describing legislation introduced "to make arbitration in all employment-discrimination cases voluntary, rather than mandatory, as is now generally the case").

arbitrate, her claim on the ground that such arbitration is "mandatory."¹⁰⁹ While courts have consistently maintained that no one has a duty to arbitrate unless she has voluntarily consented to do so,¹¹⁰ these legislators and agencies apparently believe courts are abandoning this principle in cases like *Employee's*. These legislators and agencies, like the commentators discussed above, contend that consent to employment arbitration is voluntary only when the employer and the employee agree to arbitrate a dispute that has already arisen.¹¹¹ They contend that employment arbitration pursuant to post-dispute arbitration agreements can be voluntary, but arbitration pursuant to pre-dispute arbitration agreements cannot.¹¹²

These commentators, legislators, and agencies are rightly concerned about ensuring that employment arbitration is voluntary. But the proposed remedy, denying enforcement of pre-dispute employment arbitration agreements, is grossly overinclusive. Contrary to what these commentators, legislators, and agencies say, employment arbitration pursuant to pre-dispute arbitration agreements *can* be voluntary. A pre-dispute arbitration agreement is a contract. The essence of contract law is the enforcement of a promise to do something, i.e., to "perform," at a later time.¹¹³ While contract law enforces promises that the promisor no longer wants to perform, that fact does not deprive contract law of its

109. See Hoffman, *supra* note 53, at 149-52. The following statement most clearly exemplifies the use of the terms "mandatory" and "voluntary" as equivalents of "pre-dispute" and "post-dispute":

It is the intent of this legislation to halt the further erosion of workers' civil rights, and to reverse the widening application of mandatory arbitration requirements to resolve employment discrimination cases. I emphasize mandatory arbitration because I want to be clear that this legislation is in no way intended to bar the use of voluntary arbitration, conciliation, medication [sic], or other informal quasi-judicial methods of dispute resolution.

140 CONG. REC. S4266 (daily ed. Apr. 13, 1994) (statement of Sen. Feingold).

EEOC Chairman Gilbert F. Casellas "ordered the commission's Office of Legal Counsel . . . to prepare a proposed EEOC statement backing employers' efforts to develop voluntary internal ADR programs but opposing plans that require employees to agree to submit employment discrimination disputes to binding arbitration as a condition of employment." *Justice Hires: the EEOC Embraces ADR*, NAT'L L.J., May 15, 1995, at A12; see also Richard C. Reuben, *Two Agencies Review Forced Arbitration*, A.B.A. J., Aug. 1995, at 26 (discussing agency reaction to the growing use of mandatory arbitration by employers for workplace disputes).

110. See, e.g., *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986).

111. See *supra* notes 105-09 and accompanying text.

112. See *supra* notes 105-09 and accompanying text.

113. See E. ALLAN FARNSWORTH, *CONTRACTS* § 1.1 (2d ed. 1990).

basis in voluntary consent.¹¹⁴ Voluntary consent occurs prior to performance, at the time of contract formation.¹¹⁵ Pre-dispute arbitration agreements are like any other contract in this respect. An employee's voluntary consent to arbitrate occurs at the time such an agreement is formed.

One should not use the terms "mandatory" and "voluntary" arbitration as shorthand for arbitration arising out of "pre-dispute" and "post-dispute" agreements.

This term ["mandatory"] is sometimes used to describe arbitration resulting from agreements to arbitrate future disputes, since once an enforceable agreement has been made, arbitration is "mandatory." This is extremely confusing language because it ignores altogether the consensual element in contracts. . . . [I]ts usage resolves linguistically the issues of the reality of consent and the effect to be given to consent by fiat, rather than by analysis revealing the nature of the issues.¹¹⁶

While arbitration arising out of pre-dispute arbitration agreements can be voluntary, it is not necessarily voluntary. To assure oneself of this, one need only think of a pre-dispute arbitration agreement signed at gunpoint.¹¹⁷ Therefore, arbitration arising out of pre-dispute arbitration agreements is sometimes, but not always, voluntary. Sometimes, but not always, an employee relegated to arbitration because she executed a pre-dispute arbitration agreement has voluntarily consented to be so relegated.

I now propose a conceptual framework for ensuring that employment disputes are resolved by arbitration only when the parties have voluntarily consented to that. I begin by defining terms. The three terms that will do most of the work are "consent," "voluntary," and "coerced." The verb "consent" is used to mean "to agree" and the noun "consent" to mean "agreement."¹¹⁸ If you agree to hand your wallet to a mugger holding a gun to your head then you have "consented," as I use the term,

114. *See id.*

115. *See id.*

116. 1 MACNEIL ET AL., *supra* note 13, § 2.5, at 2:36 n.5 (citation omitted); *see also* 2 *id.* § 17.1.2.

117. *See infra* note 120 (explaining that "voluntary" is used in this Article to mean more than just "volitional").

118. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 299 n.121 (1986) (quoting WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 302 (2d ed. 1970)).

to the delivery of the wallet.¹¹⁹ The term "voluntary" is used like it is used by the commentators discussed above, to describe agreements entered into *freely*.¹²⁰ For the opposite of "voluntary," I use "coerced"—rather than "forced," "mandatory," or "compulsory." As I use the terms, one's consent must be either voluntary or coerced; it cannot be both.¹²¹

119. Others use the term consent to refer only to agreements made under certain circumstances. See, e.g., DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 226-27 (1989) (stating that "you aren't consenting" when you hand your wallet to the gunman). Herzog sometimes uses the terms "consent" and "voluntary" action interchangeably. *Id.* at 215-47; see also JULES STEINBERG, LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT 14 (Bernard K. Johnpoll ed., 1978) ("An act of consent is an act by which an individual voluntarily agrees to do something . . .").

120. One could use the term "voluntary" to describe all willful acts, i.e., as a synonym for "volitional." "In the strict sense, an agent acts involuntarily if he fails to satisfy some necessary condition of free agency. Where this is so, his act cannot be construed as an authentic expression of his will in his situation." Michael Philips, *Are Coerced Agreements Involuntary?*, 3 *LAW & PHIL.* 133, 133 (1984). When you deliver your wallet to the mugger holding a gun to your head, you have done so "voluntarily" in this strict sense. Using the term "voluntary" in this way has its virtues. For one, it distinguishes the victim who *chooses* to hand her wallet to the mugger from a victim who chooses not to, but is physically overpowered by the mugger who then takes the wallet. In the former case, the victim exercises volition, in the latter case she does not.

The distinction between volitional and non-volitional acts is not, however, important to this Article because the act discussed in this Article, consenting to arbitrate, is virtually always volitional. One can imagine, however, the rare case in which "A grasps B's hand and compels B by physical force to write his name" to the signature line of an arbitration agreement. *RESTATEMENT (SECOND) OF CONTRACTS* § 174 cmt. a, illus. 1 (1979). That would be an example of non-volitional "consent" to arbitration.

The unimportance of the distinction between volitional and non-volitional acts extends beyond consent to arbitrate to other acts of legal significance. Rarely does the actor claim her act was "involuntary" in the strict sense of non-volitional. Generally, she concedes that her act was volitional but claims that it was "involuntary" in the broader sense of "coerced."

In most legal contexts, a coercion claim involves an agent who is confronted with unwanted alternatives and makes an arguably rational choice among them—a choice which he may regret having to make (because of his circumstances) but which he will not regret having made (under the circumstances). . . . [D]ecisions under [such] circumstances of constrained volition are not involuntary in the *same way* as in cases of nonvolition.

ALAN WERTHEIMER, *COERCION* 171-72 (1987). As cases of nonvolition are beyond the scope of this Article, the term "involuntary" will be used in the broad sense of "coerced." For additional discussion on this issue see Michael D. Bayles, *A Concept of Coercion*, in *XIV NOMOS: COERCION* 16, 18 (J. Roland Pennock & John W. Chapman eds., 1972) ("A man who is physically forced to squeeze the trigger of a gun does not do it voluntarily in any sense. But a man who fires a gun due to a threat does in one sense act voluntarily although he does not in another.").

121. For legal scholarship using the terms "voluntary" and "coercion" this way, see, for example, ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 433 (2d ed. 1993); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* ch. 4 (1993); Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 *CORNELL L. REV.* 680, 682-84 (1982); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 477-80 (1980); Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its*

Identifying what constitutes consent has long challenged political philosophers.¹²² Likewise, distinguishing coercion from voluntariness is also "a central problem [of] political philosophy."¹²³ This Article does not address these problems. It does not discuss consent, coercion, and voluntariness as a matter of philosophy. Rather, it discusses them as a matter of positive law. It examines what *does* constitute consent in the law, not what *should* constitute it; and examines how the law *does* distinguish coercion and voluntariness, not how it *should* distinguish them.¹²⁴

The body of law that, more than any other, involves issues of consent is contract law.¹²⁵ Likewise, contract law, more than any other area of law, distinguishes between coercion and voluntariness.¹²⁶ Courts have developed doctrines that operate to ensure that contract law enforces only those duties which have been assumed through voluntary consent.¹²⁷

Proof of consent is required to make out a prima facie case of contractual obligation.¹²⁸ Mutual assent is an element of contract formation; a contract cannot be formed unless the parties manifest assent

Persistent Survival, 47 ALA. L. REV. 387, 405, 455 (1996). *But see* HERZOG, *supra* note 119, at 227 (rejecting the dichotomy between "voluntary" and "coerced").

122. *See, e.g.*, STEINBERG, *supra* note 119, at 14.

123. WERTHEIMER, *supra* note 120, at xii.

124. *See* Philips, *supra* note 120, at 143 (stating that "there is no reason to suppose that immoral compulsion or coercion is coextensive with illegal compulsion or coercion").

125. *See, e.g.*, Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994) ("Consent is the master concept that defines the law of Contracts in the United States."). Randy Barnett has argued persuasively that consent is the central principle of contract law. *See generally* Barnett, *supra* note 118. This consent theory of contract views "contract law as part of a more general theory of individual [rights] that specifies how resources may be rightly acquired (property law), used (tort law), and transferred (contract law)." *Id.* at 292. Under this approach, resources that have been rightly acquired by one person may only be transferred to another person with the original owner's consent. *See id.* at 319. As contract law governs that process of transfer, contract law's primary function is to ensure that the transfer is consensual and that consent is given under circumstances in which it retains its moral significance. *See id.*

126. Contract law "provides the most fully developed account of coercion in the law." WERTHEIMER, *supra* note 120, at 15.

127. I state that these doctrines "operate" to ensure that contract law enforces only voluntarily assumed duties, rather than stating that these doctrines *are designed to* ensure that contract law enforces only consensually assumed duties. I do so because common law doctrine is the product of spontaneous evolution rather than the product of conscious design. The decisions of many judges contributed (and continue to contribute) to the development of contract law doctrines. While there may be as many rationales for these doctrines as there are judges who contributed to them, I do believe that the primary rationale is to ensure that contract law enforces only duties which have been assumed through voluntary consent.

128. *See* Barnett, *supra* note 118, at 318.

to its terms.¹²⁹ The requirement of mutual assent operates to ensure that contract law imposes liability only on those who manifested assent to, i.e., consented to, assume a duty.¹³⁰

While the doctrine of mutual assent ensures consent, it does not distinguish between consent that is voluntary and consent that is coerced. That distinction is made by one of contract law's defenses to enforcement, duress.¹³¹ Contract law's defenses describe circumstances that deprive consent "of its normal moral, and therefore legal, significance."¹³² The duress defense describes circumstances in which consent was coerced, as opposed to voluntary,¹³³ and therefore lacks its normal significance.¹³⁴

129. See FARNSWORTH, *supra* note 113, §§ 3.1-2.

130. See *infra* Part III.B.1.

131. See *infra* Part III.B.2.

132. Barnett, *supra* note 118, at 318. Barnett goes on to discuss contract defenses as follows:

The first group of defenses—duress, misrepresentation, and (possibly) unconscionability—describes circumstances where the manifestation of an intention to be legally bound has been obtained improperly by the promisee. The manifestation of assent either was improperly coerced by the promisee or was based on misinformation for which the promisee was responsible. The second group—incapacity, infancy, and intoxication—describes attributes of the promisor that indicate a lack of ability to assert meaningful assent. The third group—mistake, impracticability, and frustration—stem from the inability to fully express in any agreement all possible contingencies that might affect performance. Each describes those types of events (a) whose nonoccurrence was arguably a real, but tacit assumption upon which consent was based, and (b) for which the promisee should bear the risk of occurrence. Each type of defense thus is distinguished by the way it undermines the normal, presumed significance of consent.

Id. (footnotes omitted).

133. "The common law courts developed the doctrine of duress to deal with coercive behavior." FARNSWORTH, *supra* note 113, § 4.9. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-2 (3d ed. 1987) (equating duress and coercion); CHARLES FRIED, *CONTRACT AS PROMISE* 93-103 (1981); SCOTT & LESLIE, *supra* note 121; Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 615-16 (1943); Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1, 82 (1989); see also *United States v. Stump Home Specialties Mfg., Inc.*, 905 F.2d 1117, 1122 (7th Cir. 1990) (Posner, J.) (enforcing contract modifications and relying on the defense of duress to render "[a]ll coercive modifications" unenforceable). See generally Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79 (1981) (discussing the impact of the psychological concepts of coercion and duress on difficult decisions).

134. "Our moral and legal responses to individual behavior are typically based on . . . the voluntariness principle. The general assumption is that promises are binding . . . if, but only if, the relevant actions are voluntary." WERTHEIMER, *supra* note 120, at 4. "[F]acilitating the exercise of voluntary choice is the central normative justification for contractual enforcement." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1919 (1992). "The libertarian theory of contract law is premised upon the belief that individuals have a moral right to make whatever voluntary agreements they wish for the exchange of their own property, so long as the rights of third parties are not violated as a result." Kronman, *supra* note 121, at 475.

The duress defense, then, combines with the requirement of mutual assent to ensure that contract law enforces only duties assumed by voluntary consent, not duties assumed under coercion.¹³⁵ The contract law doctrines of mutual assent and duress embody the accumulated wisdom of countless courts presented with issues of what constitutes consent and how to distinguish voluntary from coerced consent. There is no more reason to abandon these doctrines when the contract in question happens to be an arbitration agreement.¹³⁶ Because the problem of determining consent in arbitration law is merely an application of that problem in contract law,¹³⁷ courts can and should ensure that arbitration is consensual by applying the requirement of mutual assent to arbitration agreements in the same way it is applied to contracts in general. Likewise, because the problem of distinguishing voluntariness and coercion in arbitration law is merely an application of that problem in contract law, courts can and should ensure that consent to arbitration is voluntary by applying the duress defense to arbitration agreements in the same way that defense is applied to contracts generally.¹³⁸ The follow-

135. "[A] fundamental problem of contract law is to specify the conditions under which individuals can voluntarily undertake mutual obligations that they otherwise would not have." WERTHEIMER, *supra* note 120, at 19. As this Article explains in Part IV, contract law does not do this on its own. Contract law's distinction between voluntarily-assumed duties and coercively-assumed duties presupposes a baseline of rights specified by non-contract law. See *infra* Part IV.A.

136. FAA Section Two "establishes that a duty to arbitrate cannot be imposed upon anyone under the FAA without agreement. It thus reflects the 'basic principle that arbitration is a creature of contract.'" 2 MACNEIL ET AL., *supra* note 13, § 17.1.1 (quoting *HRH Constr. Corp. v. Bethlehem Steel Corp.*, 384 N.E.2d 1289, 1292 (N.Y. 1978)). "This principle is fundamental also to collective bargaining arbitration." 2 *id.* § 17.1.1 n.1 (citing *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986)).

137. "Consent and, to a lesser extent, formality requirements pervade the general law of contracts and hence arbitration Since arbitration law is a specialized branch of contract law, almost any issue that can arise in contract law generally can arise in an arbitration context." 2 MACNEIL ET AL., *supra* note 13, § 17.1.4. As a general matter, "[c]onsent to arbitration is governed by general contract law." 2 *id.* § 17.2.1.

138. While Jeffrey Stempel generally agrees with the contractual approach to arbitration law, he proposes five defenses to arbitration contracts: blameless ignorance; dirty-dealing; inescapable adhesion; substantive unconscionability; and defective agency. See Stempel, *supra* note 95, at 1427. He says the first four "are to some extent an effort to recapture the paradigm of voluntarism and consent in this corner of contract law." *Id.* at 1447. This Article rejects Stempel's proposal to develop new doctrinal categories to ensure voluntary consent to arbitration agreements. Contract law has already developed doctrines to do that. Arbitration agreements *are* contracts. The doctrines that ensure voluntary consent to contracts generally can and should be used to ensure voluntary consent to arbitration. Why reinvent the wheel?

In discussing courts' treatment of arbitration agreements, Stempel states that [c]ase reports teem with general language in which courts state that arbitration clauses may be set aside on standard common-law contract grounds. But courts so seldom find

ing section of this Article discusses how mutual assent and the duress defense apply to employment arbitration agreements.

B. *Contract Law Doctrines and Employment Arbitration*

1. Mutual Assent

The requirement of mutual assent to form a contract may be the most underappreciated aspect of contract law. Many contract law casebooks highlight bases for enforcing promises (i.e., consideration and reliance) and/or remedies for breach as the core principles at the beginning of the book, before turning to mutual assent ("offer and acceptance") as an afterthought.¹³⁹ But the importance of mutual assent to contract law—distinguishing consensual from nonconsensual transfers—is huge.¹⁴⁰ As Allan Farnsworth puts it, the requirement of mutual assent "is implicit in the principle that contractual liability is consensual."¹⁴¹

This principle that contractual liability is consensual refers not to subjective consent, but to objective consent.¹⁴² The requirement to form a contract is not that parties *actually* assent to its terms. The requirement is that they take actions—such as signing their names on a document or

these grounds or give them serious discussion that one must inevitably conclude that courts generally treat the arbitration text as the irrefutable embodiment of agreement.

Id. at 1389-90 (footnote omitted). If courts are doing this, perhaps they can be more easily persuaded to apply the traditional contract doctrines they routinely apply in contract cases to arbitration agreements rather than devise entirely new doctrines for arbitration agreements.

139. See, e.g., RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 71 (1995); JOHN P. DAWSON ET AL., *CASES AND COMMENT ON CONTRACTS* (6th ed. 1993); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* (5th ed. 1995); DANIEL WM. FESSLER & PIERRE R. LOISEAUX, *CONTRACTS* (1982); LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* (5th ed. 1990); ROBERT W. HAMILTON ET AL., *CASES AND MATERIALS ON CONTRACTS* (2d ed. 1992); EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* (4th ed. 1991); ARTHUR ROSETT, *CONTRACT LAW AND ITS APPLICATION* (5th ed. 1994); SCOTT & LESLIE, *supra* note 121; ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* (2d ed. 1992).

This organization may lead students studying contract law to think that the central principle of contract law is promise (if consideration/reliance is taught first) or expectation/reliance/restoration interests (if remedies are taught first). Leading off with mutual assent may lead students to think that the central principle of contract law is consent. Students may also find the course more accessible when topics are placed in the chronological order of a contract dispute: formation, interpretation, performance/breach, and remedies.

140. Barnett devotes the bulk of his article outlining the consent theory of contract to the topic of manifestations of assent. See generally Barnett, *supra* note 118.

141. FARNSWORTH, *supra* note 113, § 3.1.

142. See *id.* §§ 3.6, 3.9.

saying certain words—that would lead a reasonable person to believe that they have assented to the terms of the contract.¹⁴³ In other words, contract formation technically requires, not mutual assent, but mutual manifestations of assent.¹⁴⁴ Contract law does this to satisfy “the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances—to rely on an individual’s behavior that apparently manifests their assent to a transfer of entitlements.”¹⁴⁵

Throughout this Article, I use the term “consent” rather than the more cumbersome term “manifests assent.”¹⁴⁶ As stated above, I use the term “consent” to mean “agree” without implying that the agreement is voluntary.¹⁴⁷

Issues of consent have arisen in a number of employment arbitration cases arising out of the securities industry. These issues arise because of the particular documents signed by securities employees as a condition of employment in that industry. To comply with regulations governing the securities industry,¹⁴⁸ securities firms must belong to one or more Self Regulatory Organizations¹⁴⁹ (“SROs”). These SROs include the National Association of Securities Dealers (“NASD”), and the major securities exchanges, such as the New York Stock Exchange (“NYSE”).¹⁵⁰ The rules of each SRO require that certain employees of each of its members register with the SRO.¹⁵¹ I use the term “securities

143. *See id.* § 3.6.

144.

According to the objectivists, a party’s mental assent was not necessary to make a contract. If a party’s actions, judged by a standard of reasonableness, manifested an intention to agree, the real but unexpressed state of the party’s mind was irrelevant By the end of the nineteenth century, the objective theory had become ascendant and courts generally accept it today.

Id.

145. Barnett, *supra* note 118, at 301 (footnote omitted).

146. The reader should recognize, however, that most contracts cases and scholars use the term “manifests assent.”

147. *See supra* text accompanying notes 118-21.

148. *See infra* Part IV.

149. 15 U.S.C. § 78o(a)-(b) (1994).

150. *See* THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 385 (2d ed. 1990).

151. *See, e.g.*, 2 N.Y.S.E. Guide (CCH) ¶ 2345 (1984) [hereinafter *NYSE Rules*]. The NYSE Rules provide:

(a) No member or member organization shall permit any natural person to perform regularly the duties customarily performed by (i) a registered representative, (ii) a securities lending representative, (iii) a securities trader or (iv) a direct supervisor of (i), (ii) or (iii) above, unless such person shall have been registered with, qualified by and is acceptable to the Exchange.

employees" to refer to those employees required (by SRO rules) to register with the SRO.¹⁵²

A number of cases raise the issue of whether a securities employee registering with an SRO thereby consents to arbitrate employment disputes. For instance, in *Chan v. Drexel Burnham Lambert, Inc.*,¹⁵³ Chan worked as a securities employee for Drexel, a member of the NYSE.¹⁵⁴ Chan's signed application, known as Form U-4, to register with the NYSE and other SROs required that Chan agree to abide by the rules of the SROs to which she was applying.¹⁵⁵ One of the NYSE rules, Rule 347, provided for arbitration of all employment disputes.¹⁵⁶ When Chan brought a wrongful discharge suit against Drexel, Drexel sought a court order relegating Chan's claim to arbitration.¹⁵⁷ The court refused to issue such an order.¹⁵⁸

Drexel's argument that Chan consented to an arbitration agreement was based on the concept of incorporation by reference.¹⁵⁹ According to Drexel, by signing her U-4, Chan consented to the NYSE rules, as well as to the terms contained in the U-4, thereby incorporating by reference NYSE Rule 347 into her contract.¹⁶⁰

The *Chan* court conceded that "parties may incorporate by reference into their contract the terms of some other document" but went on to state that

(b) No member or member organization shall permit any natural person, other than a member or allied member, to assume the duties of an officer with the power to legally bind such member or member organization unless such member or member organization has filed an application with and received the approval of the Exchange.

Id.; see also Am. Stock Ex. Guide (CCH) ¶ 9391 (1995) [hereinafter *AMEX Rules*] (requiring approval of registered employees and officers of members or member organizations by the Exchange before they can perform their duties).

152. Some commentators use the term "registered representative" to describe these employees. See, e.g., SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. 113 (Jan. 1996); 1994 GAO REPORT, *supra* note 99, at 7-8. Technically, however, registered representatives are a subset of the employees required to arbitrate by SRO rules. See *supra* note 151.

153. 223 Cal. Rptr. 838 (Cl. App. 1986).

154. See *id.* at 839.

155. See *id.* at 840.

156. NYSE Rules, *supra* note 151, ¶ 2347.

157. See *Chan*, 223 Cal. Rptr. at 840.

158. See *id.*

159. "Incorporation by reference is a particularly important consensual concept. It is, however, simply a way of consenting to a term in a contract without actually repeating in the contract what is being incorporated. As such it is indistinguishable from other methods of manifesting consent."

2 MACNEIL ET AL., *supra* note 13, § 17.3.2.1 (footnote omitted).

160. See *Chan*, 223 Cal. Rptr. at 843-46.

[f]or the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.¹⁶¹

These requirements ensure that a document is incorporated by reference into a contract only if the parties consent to such incorporation. The *Chan* court held that these requirements were not met; therefore, Chan's U-4 did not incorporate by reference NYSE Rule 347. The U-4 did not identify any document by title although the rules of an organization, like the NYSE, "may be found in a plethora of sources, including its constitution, statutes, bylaws, manuals, and memoranda."¹⁶² The court found that "[o]ne who reads [the U-4] would not even know which body of rules to consult to find the elusive arbitration language."¹⁶³ In short, the *Chan* court held that Chan did not consent to NYSE Rule 347, and, therefore, did not consent to arbitration of her employment disputes.¹⁶⁴

In contrast to Chan's U-4, other SRO application forms expressly state that the employee is agreeing to arbitrate. Securities employees who have signed such forms have had less success arguing that they did not consent to arbitration.¹⁶⁵ In *Spellman v. Securities, Annuities and*

161. *Id.* at 843 (emphasis omitted) (quoting *Williams Constr. Co. v. Standard-Pacific Corp.*, 61 Cal. Rptr. 912, 920 (Ct. App. 1967)).

162. *Id.* at 845. "The constitution alone of the NYSE 'is a formidable document of some 70 pages.'" *Id.*

163. *Id.*

164. *See id.* at 845-46; accord *In re Drachman & Co.*, 195 N.Y.S.2d 399, 401 (Sup. Ct. 1959) (holding that "[a]bsent any reference to arbitration in the application or in the employment agreement, it is not established that [the securities employee] in undertaking the employment gave his assent to any provision for arbitration of disputes").

165. For instance, the predecessor to Form U-4, Form RE-1, signed by the employee in *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 97 Cal. Rptr. 811 (Ct. App. 1971), provided for arbitration of "any controversy between [a securities employee] and any [employer] or member organization arising out of . . . employment or the termination of . . . employment." *Id.* at 813. The employee "contend[ed] that the agreement to arbitrate was unenforceable because there was no mutual assent to that provision. Specifically he contend[ed] that he was unaware of the clause because he did not read it." *Id.* The *Frame* court rejected the employee's argument. *See id.*

In a virtually identical case, *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 100 Cal. Rptr. 791 (Ct. App. 1972), *cert. granted*, 410 U.S. 908, and *aff'd*, 414 U.S. 117 (1973), the court likewise rejected a securities employee's argument with the following reasoning:

A reasonable person seeking employment in an industry as highly regulated as the securities exchange with knowledge of a registration requirement cannot escape the binding effect of arbitration rules referred to and expressly set forth in the RE-1 form, which he has signed, by claiming lack of knowledge of the rules integrated into the form.

Insurance Services, Inc.,¹⁶⁶ for instance, Spellman signed a U-4 stating: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register"¹⁶⁷ Spellman registered with the NASD, whose rules require arbitration of employment disputes.¹⁶⁸ Spellman also signed an employment contract in which he promised to "strictly adhere to the Rules of Fair Practice of the National Association of Securities Dealers, Inc. . . . as set forth in the NASD Manual."¹⁶⁹ In short, Spellman signed documents that provided for arbitration more openly than the documents Chan signed. The *Spellman* court relied on these differences to distinguish *Chan* and to order arbitration of Spellman's claim.¹⁷⁰ Spellman's argument that he did not consent to arbitration was weaker than Chan's because the documents Spellman signed openly and clearly provided for arbitration.

These cases illustrate the important role contract doctrine can and should play in ensuring that employment arbitration is consensual. When an employee signs a document, such as a U-4, the employee is plainly consenting to something. Under a subjective theory of contract, a court would ask: "What did the employee think she was consenting to?" Under the prevailing objective theory of contract, however, the legal question is: "What would a reasonable person in the employer's position think the employee was consenting to?"¹⁷¹ If the answer to this question does not

Id. at 795.

166. 10 Cal. Rptr. 2d 427 (Ct. App. 1992).

167. *Id.* at 430.

168. *See id.* at 429.

Part II, section 8(a) of the NASD Code of Arbitration Procedure also requires arbitration of "[a]ny dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s)"

Id.

169. *Id.*

170. *See id.* at 430-31.

171. Commentators have advocated a departure from the objective theory of contract in employment arbitration cases in favor of an inquiry focusing on the employee's subjective beliefs.

Because the employee—as a cost of securing efficient resolution of claims—is typically required to forgo such statutory rights as jury trial (and possibly also expansive statutory remedies), the courts should apply the usual standard for enforcing waivers of statutory rights: the waiver must be explicit, knowing, and voluntary.

Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 652; *see also* Buse, *supra* note 103, at 1518-24 (1995) (proposing a totality of the circumstances approach in determining the validity of arbitration agreements).

include "the arbitration clause" then contract law precludes relegating the employee's claim to arbitration.

What would a reasonable person in the employer's position think an employee like Chan or Spellman was consenting to? Judge Learned Hand may have answered: "All the terms on the document the employee signed and all the rules of the SRO."¹⁷² Judge Hand may have dissented from *Chan* on the ground that a reasonable person in the position of Chan's employer would have believed that, because of her signature on the U-4, Chan consented to all NYSE rules, even though these rules were spread out over many documents, some totalling well over seventy pages.¹⁷³

While reasonable people in Judge Hand's day may have believed that a signature on a document constitutes consent to all the document's terms, reasonable people today may no longer believe that. Today, people routinely sign long standardized documents presented to them on a take-it-or-leave-it basis. Standardized agreements are commonly drafted by one party.¹⁷⁴ The non-drafting party often does not read the standardized agreement in full.¹⁷⁵ The non-drafting party, according to the Restatement (Second) of Contracts, does not assent to a term if the other party has reason to believe that the [non-drafting] party would not have

Apparently, some courts are beginning to stray from the objective theory of contract in employment arbitration cases as well. In *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995), the Ninth Circuit appears to have departed from the objective theory of contract in focusing on what the employees subjectively believed. The court characterized the issue as whether the employees "knowingly" agreed to arbitrate. *See id.* at 1305. The court purports to derive this "knowingly" requirement from the legislative history of Title VII. *See id.* at 1304-05. It is unlikely, however, that the Supreme Court will read Title VII as requiring an exception to the rule that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995); *see also* Resnick, *supra* note 87, at 923 (concluding that *Lai* "is clearly not in line with *Gilmer* and its progeny").

Lai makes the right to litigate, rather than arbitrate, employment disputes *less alienable* than other rights. Most rights are freely alienable, i.e., they can be alienated by contract. Some rights are inalienable. And there is an intermediate category of rights which are alienable, but it takes more than contract to alienate them. *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 443-45 (1993). *Lai* strays from Supreme Court precedent by placing the right to litigate employment disputes in this intermediate category. *See infra* Part IV.C.3.

172. "A man must indeed read what he signs, and he is charged, if he does not . . ." Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947).

173. *See* Chan v. Drexel Burnham Lambert, Inc., 223 Cal. Rptr. 838, 845 (Cl. App. 1986).

174. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (1979).

175. *See id.* § 211 cmt. b.

accepted the agreement if he had known that the agreement contained the particular term."¹⁷⁶

While few non-lawyers would be able to cite authority for this rule, most people conduct themselves as if they believe it exists. In other words, most people routinely sign documents they have not carefully read because they correctly assume courts will not hold them to the terms if those terms are "bizarre or oppressive or eviscerate[] the non-standard terms explicitly agreed to."¹⁷⁷ This rule is, therefore, consistent with the objective theory of contract. When a non-drafting party signs a standardized agreement, a reasonable drafting party understands that the non-drafting party is not necessarily consenting to all the terms of that agreement.¹⁷⁸

In this regard, an employment agreement is like any other contract. Many employment agreements, such as those that incorporate by reference the rules of an SRO or an employee handbook, are standardized agreements. Under the Restatement (Second) of Contracts, whether an employee signing such an agreement consents to arbitration will vary depending on the facts of the case.¹⁷⁹ If, as in *Spellman*, the duty to arbitrate is prominently displayed near the signature line of the standard-

176. *Id.* § 211 cmt. f; see also *id.* § 211(3) (providing that "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement"); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 889-90 (1992) (stating that in form contracts, "unless the presence of a clause that deviates from commonsense expectations is brought to the attention of the other party . . . the drafting party has no reason to believe that the other party consented to it).

177. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1979). "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation." *Id.*

178. This rule is consistent with the objective theory of contract, because it relies on "reasonableness," which has evolution built within it. That which is reasonable changes over time and from place to place.

This also shows that the objective theory of contract has a built-in circularity problem. Whether it is reasonable for a non-drafting party to sign a standardized agreement without reading and understanding it depends on whether courts are likely to hold that the non-drafting party's signature constitutes consent to all the terms of that agreement. But whether courts hold that the non-drafting party's signature constitutes consent to all the terms of the agreement depends on whether it is reasonable to sign the agreement without reading it. A reasonableness standard is circular, as Richard Epstein notes in another context, "because the level of expectation said to determine the rule rests in large measure upon what the rule is. . . . Rules determine expectations as much as expectations determine rules." Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 204 (1974).

179. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

ized agreement,¹⁸⁰ the employee probably consents to arbitrate.¹⁸¹ If, as in *Chan*, the duty to arbitrate is buried among many pages of fine print,¹⁸² then the employee probably does not consent to arbitrate. Other relevant factors will certainly include how widespread employment arbitration is in the particular industry or location. Employment arbitration involving securities employees has become so widespread¹⁸³ that a reasonable employer in that industry might now believe that everyone signing a U-4 consents to arbitration even if, like *Chan's* U-4, it makes no overt reference to arbitration.

2. Duress

The requirement of mutual manifestations of assent to form a contract ensures that contract law enforces only consensually-assumed duties but it does not ensure that the consent will be voluntary. The duress defense does that. It describes circumstances in which a manifestation of assent is coerced, as opposed to voluntary.¹⁸⁴ It operates to ensure that contract law enforces only duties that have been assumed by *voluntary* consent. A party consenting to a contract does not voluntarily consent to it if that consent was given under duress.¹⁸⁵

Duress is present when consent is "induced by an improper threat by the other party that leaves the victim no reasonable alternative" but to consent.¹⁸⁶ What threats are improper?¹⁸⁷ Threats to commit a

180. See *Spellman v. Securities, Annuities and Ins. Servs., Inc.*, 10 Cal. Rptr. 2d 427, 430 (Ct. App. 1992).

181. Likewise, if an arbitration clause is separately initialed by the employee, the employee almost certainly consents to it.

182. See *Chan v. Drexel Burnham Lambert, Inc.*, 223 Cal. Rptr. 838, 845-46 (Ct. App. 1986).

183. See Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN THE FEDERAL COURTS* 965, 997 (A.L.I.-A.B.A. 1993).

184. See *supra* note 133 and accompanying text.

185. See FARNSWORTH, *supra* note 113, § 4.16.

186. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979).

187. The Restatement provides:

(1) A threat is improper if

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

crime or tort, such as the mugger's threat to shoot unless the victim agrees to deliver her wallet, have long been held improper¹⁸⁸ because the person making the threat has a duty not to do the threatened act. Or, to put it another way, the victim of the threat has a right to be free of the threatened act. Importantly, the victim also has a right to whatever she must now forgo—such as the wallet—to avoid the threatened act. The threat requires the victim to abandon one of these two rights (possession of the wallet or bodily integrity) in order to protect the other.¹⁸⁹ The choice between two rights is the essence of “traditional” duress. That consent is coerced in such cases seems noncontroversial. They are the easy cases, such as the employee who signs an employment arbitration agreement with a gun to her head.

The doctrine of duress, however, “has expanded well beyond these traditional situations and . . . a threat may be improper even though the one who makes it has a legal right to do the threatened act.”¹⁹⁰ This expansion of duress “under developing notions of ‘economic duress’ or ‘business compulsion’”¹⁹¹ must be limited to prevent all offers from being deemed “improper” threats.¹⁹² “The problem then becomes one of distinguishing impermissible threats from legitimate offers.”¹⁹³ Courts attempting to do this often focus on the fairness of the contract.¹⁹⁴ This case-by-case fairness inquiry makes it difficult to generalize about what sort of threats constitute “economic” duress,¹⁹⁵ and may explain the “vagueness of the concept of economic duress.”¹⁹⁶ With

- (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
 (c) what is threatened is otherwise a use of power for illegitimate ends.

Id. § 176.

188. *See id.* § 176 cmt. b.

189. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 295 (1975).

190. FARNSWORTH, *supra* note 113, § 4.17, at 275.

191. RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a.

192. An offer to form a contract differs from a promise to make a gift in that the contract offeror threatens to withhold that which he offers unless the offeree performs or makes a (legally binding) promise to perform. “Because all consent in contract occurs in part because another party has power over the consentor, it is impossible to define duress as simply using power to cause another to consent without rendering all contracts unenforceable.” 2 MACNEIL-ET AL., *supra* note 13, § 19.2.3.1.

193. FARNSWORTH, *supra* note 113, § 4.16, at 273.

194. “The fairness of the resulting exchange is often a critical factor in cases involving [such] threats.” RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a.

195. *See* FARNSWORTH, *supra* note 113, § 4.16.

196. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 629 (1983).

that caution in mind, however, it is possible to consider the sort of threats that might raise an "economic" duress issue in the employment arbitration context.¹⁹⁷

Two sorts of threats seem likely to recur. The first is where the employer refuses to hire a job applicant unless that applicant signs an arbitration agreement, making the arbitration clause a non-negotiable term of the employment contract. In this situation, the employer's threat is: "I will not hire you unless you sign the arbitration agreement." The second recurring threat involves an at-will employee¹⁹⁸ who has been employed for some time but has not signed an arbitration agreement. The employer may threaten that the employee will be fired unless he or she signs an arbitration agreement.

In neither of these cases is there "traditional" duress because in both cases the employer has a right to take the threatened action. That is, the employer has a right to refrain from hiring and a right to fire an at-will employee.¹⁹⁹ Or, to put it another way, in neither case does the employee have a right to be free of the threatened act. The threats may, however, constitute "economic" duress even though the employer has a right to do the threatened act.²⁰⁰ Again, this raises the problem of distinguishing impermissible threats from legitimate offers. This problem is addressed with respect to the two sorts of threats discussed above in *Rust v. Drexel Firestone, Inc.*,²⁰¹ and *Standard Coffee Service Co. v. Babin*.²⁰²

Rust involved an arbitration clause as a non-negotiable condition of

197. See 2 MACNEIL ET AL., *supra* note 13, § 19.2.3 (stating that "[t]o date, there are no significant judicial opinions elaborating and applying the principles of duress and undue influence respecting the enforcement of arbitration agreements").

198. See *supra* note 55 and accompanying text for a discussion of the employment at-will rule.

199. Regarding the employer's right to fire an at-will employee, Sharon Hoffman states that continued employment should not be deemed to constitute consideration for an employee's agreement to sign a separate compulsory arbitration policy. The position was already promised to the employee at the commencement of his or her employment and, assuming that an employment contract exists, the employer has a legal duty to allow the employee to retain his or her job for the contract period barring justifiable reasons for termination.

Hoffman, *supra* note 53, at 154. This statement of the employer's "legal duty" is inapplicable to the at-will employee, i.e., the vast majority of employees. Employment at will has no "contract period" and the employer does not need a reason for termination. See Morris, *supra* note 55, at 680.

200. In other words, the employer may have a duty to refrain from threatening the act although the employer has a right to do the act. See FARNSWORTH, *supra* note 113, § 4.17.

201. 352 F. Supp. 715 (S.D.N.Y. 1972).

202. 472 So. 2d 124 (La. Ct. App. 1985).

employment.²⁰³ Drexel was a member of the NYSE.²⁰⁴ As discussed above, the rules of the NYSE require its members to hire as securities employees only those people who have registered with the NYSE.²⁰⁵ Accordingly, Drexel would not employ Rust until he completed an application to register with the NYSE.²⁰⁶ The registration application contained a clause providing for arbitration of disputes arising out of Rust's employment.²⁰⁷ Rust later sued Drexel, which moved to stay the action pending arbitration.²⁰⁸

The court addressed the question of whether Rust had signed the arbitration agreement under duress in the following manner:

The contract was one of employment, the essence of which centered about compensation, commission and other prerequisites. There is no suggestion that these were not bargained for at arms length between [Rust] and [Drexel]. This aspect of their negotiations was not on a "take it or leave it basis." [Drexel] was neither a monopolist nor a public utility. [Rust], if dissatisfied with the compensation offered or other conditions pertaining to his work, was free to seek employment with another investment banker. Although it is true that he would still be required to accept the arbitration clause, such a provision was relatively of minor significance as against the terms of compensation and commission.²⁰⁹

The court concluded that "[u]nder all the circumstances, it cannot be said that the arbitration requirement as a condition of employment constitutes duress."²¹⁰ The court's conclusion seems right.²¹¹ The contrary holding would find economic duress when the employer's offer contains a single non-negotiable term. While it is troubling that each employer in

203. See *Rust*, 352 F. Supp. at 716.

204. See *id.*

205. See *supra* notes 148-52 and accompanying text.

206. See *Rust*, 352 F. Supp. at 716.

207. See *id.*

208. See *id.*

209. *Id.* at 717.

210. *Id.* at 718.

211.

There is no duress here unless the signature was induced "by an improper threat" by the party insisting on the arbitration clause that leaves the other party with "no reasonable alternative." It is hardly improper to threaten to refuse to deal without an arbitration agreement. Furthermore, it is unlikely the prospect of a simple refusal to deal is "sufficiently grave to justify the victim's assent." The threatened party probably has a reasonable alternative: leaving the prospective bargain and seeking an alternative elsewhere, perhaps without arbitration.

2 MACNEIL ET AL., *supra* note 13, § 19.2.3.1 (footnotes omitted).

the industry makes that same term non-negotiable, discussion on this issue is deferred until Part IV of this Article.

The harder duress case involves situations where an employer threatens to fire an at-will employee unless she signs an arbitration agreement. In *Standard Coffee*, for instance, Babin was employed by Standard as a sales representative.²¹² Babin had apparently been employed pursuant to a written contract that did not contain an arbitration clause.²¹³ He then received a message to appear at Standard's sales office for the purpose of signing a new employment contract.²¹⁴ Babin contended that he signed the new contract in response to threats that he would be fired if he refused.²¹⁵ He further contended that he was not permitted to review the contract with counsel before signing it.²¹⁶ While Standard denied threatening to fire Babin, the court of appeals accepted the trial court's determination that Babin was presented with the choice to "either sign or be fired."²¹⁷ The court of appeals held that a contract signed under such circumstances is voidable on the ground of duress.²¹⁸

One's first reaction to this case may be that the court of appeals surely reached the correct decision. If Babin is like most employed people, his job and the income it provided was very important to him. The threat to his job and income may have shaken him and filled him with fear.²¹⁹ To call such a threat "duress" seems natural.

On the other hand, we ought to be more detached in our analysis. Suppose Standard had never mentioned a new contract with an arbitration clause, but had simply fired Babin. Then, a few months later, Babin asked for his job back. If Standard agreed to rehire Babin only if Babin signed an employment arbitration agreement, would there be duress? Not if *Rust* is the precedent to follow. In this hypothetical, Standard has done just what Drexel did. It makes one term of the employment contract, the arbitration clause, non-negotiable.

But how is the hypothetical different from the *Standard Coffee* case?

212. 472 So. 2d at 125.

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *Id.* at 127.

218. *See id.*

219. "[P]eople want to eat first and consider legal and philosophical implications later. The average worker in need of a job is unlikely at the outset to balk at an arbitration clause." Stempel, *supra* note 95, at 1387.

The only difference is the amount of time between the employer exercising its right to terminate at-will employment and its right to offer a new employment agreement with an arbitration clause. To hold that duress is present if the amount of time is short, but not if the amount of time is long, is baffling.

The issue may be easier to see if we substitute another term of the employment contract for the arbitration clause. Suppose Babin had been entitled to three weeks of vacation per year as an at-will employee with Standard. Further, suppose that Standard then told him that the new company policy was only two weeks of vacation per year. Babin might protest and Standard might persist by saying, in effect, "accept the new terms or you're fired." Would the new employment agreement be voidable due to duress? I do not think many courts would reach such a holding. To do so would be to render unenforceable countless employment contracts in which the terms of at-will employment were changed in a way that made them less favorable to the employee than they previously had been. The terms might relate to vacation, as in the above example, or to salary, benefits and even working conditions such as office space, secretarial support, or coffee breaks. The crucial point here is that an arbitration clause is a term of employment just like these other matters.²²⁰ With respect to duress, like other contract doctrines, arbitration clauses ought to be treated like any other term of the employment contract.²²¹ In sum, *Standard Coffee's* finding of duress is questionable

220. Some will object that the right to litigate employment disputes is a far weightier matter than the right to a coffee break. Therefore, the argument goes, the legal standard governing an employee's relinquishment of her right to litigate employment disputes should be more exacting than the standard governing her relinquishment of her right to a coffee break. This seems to have been the Ninth Circuit's reasoning in *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), discussed *supra* note 171. This reasoning is inconsistent with the FAA as presently interpreted by the Supreme Court. See Gorman, *supra* note 171, at 652-53; *infra* Part IV.C.3.

221. If anything, the case for duress is weaker when the employer insists on an arbitration clause than when it insists, for example, on reducing vacation time. Both changes reduce the costs to the employer of obtaining the at-will employee's labor. This cost-reduction to the employer is plainly a benefit-reduction to the employee with respect to a reduction in vacation time. That is not necessarily true, however, in the case of the arbitration clause. Many employees might benefit from an arbitration clause because it will likely reduce the costs of bringing a claim against the employer. See PETER SIVIGLIA, EXERCISES IN COMMERCIAL TRANSACTIONS 87 (1993) (stating that "[a]s a general rule 'shallow pockets' prefer arbitration and 'deep pockets', especially when contracting with 'shallow pockets', prefer the courts"); see also William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have to? Do You Really Want to?*, 43 DRAKE L. REV. 255, 289 (1994) (concluding that lawyers who represent employees turn down cases for financial reasons; they would take some of those cases if the forum was arbitration where the costs of getting to a decision are lower); William M. Howard, *Arbitrating Employment Discrimination Claims: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Fall 1995, at 40 (stating that

and courts ought not to presume duress whenever an at-will employee is told that continued employment requires an arbitration agreement.²²²

3. Other Contract Defenses

Duress is, of course, not the only defense to contract enforcement. All the contract law defenses apply to arbitration agreements like they apply to other contracts.²²³ For example, unconscionability applies to arbitration agreements.²²⁴ Courts may refuse to enforce some employment arbitration agreements on the ground that they are unconscionable, i.e., the terms are "unreasonably favorable" to one side.²²⁵ This would

average employees' lawyer's requirements for taking a discrimination claim "included minimum probable damages of \$60,000 to \$65,000, a required retainer of \$3000 to \$3500, and a 35% contingent fee"; Piskorski & Ross, *supra* note 29, at 210 (finding that one of the disadvantages of arbitration is that "[t]he comparative convenience and lower cost of arbitration may encourage some employees to pursue questionable claims they would not take to court").

Christine Godsil Cooper states categorically that "management wants arbitration but employees do not." Cooper, *supra* note 53, at 238. That may be an accurate generalization when viewed ex post; once a dispute has arisen, employees, more often than employers, may seek to litigate, rather than arbitrate. But the ex post perspective fails to capture whether employees, as a group, benefit from the enforcement of pre-dispute arbitration agreements. The ex post perspective only captures whether those employees involved in disputes benefit from it. What about all those employees who never get involved in disputes with their employers? The benefits to these employees of enforceable arbitration agreements must be included in any cost/benefit analysis. See *infra* note 361 and accompanying text.

With the ex ante perspective, it appears that enforcing arbitration agreements hurts, not employees, but employees' lawyers.

As the newspaper stories of multimillion-dollar jury awards become more frequent, the organized plaintiff community will be less and less inclined to give up access to juries which they believe to be sympathetic to employees and more likely to award substantial damages. Yet for most employees bringing charges of employment discrimination, a major jury award is an uncertain, distant, and costly remedy to seek.

Eastman & Rothenstein, *supra* note 52, at 605; see also Cooper, *supra* note 53, at 240 (stating that a possible explanation for the battle over *Gilmer* "is the speculation on results, with plaintiffs' lawyers loving and defendants' lawyers loathing juries").

222. *But see* Cooper, *supra* note 53, at 242 (concluding that "no arbitration system should be unilaterally imposed into a workplace by an employer. The only exception to this rule should be where the arbitration program offers additional substantive rights to employees."); Hoffinan, *supra* note 53, at 153 (stating that "[e]mployees who are threatened with termination if they fail to agree prospectively to the arbitration of all claims against their employer, face an improper threat in light of the FAA's section 1 exemption and the legislative history of civil rights legislation").

223. See *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1656 (1996); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

224. See *Doctor's Assocs.*, 116 S. Ct. at 1656; 2 MACNEIL ET AL., *supra* note 13, § 19.3.1.1; see also Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. (forthcoming 1996).

225. See FARNSWORTH, *supra* note 113, § 4.28, at 332. This is the essence of "substantive" unconscionability. In contrast, "procedural" unconscionability deals with the process of contract formation and, therefore, relates to the doctrine of mutual assent. Procedural unconscionability can

not be a holding that the agreements lack voluntary consent, rather, it would be a holding that they should not be enforced even though they are the product of voluntary consent.²²⁶ Advocates of the unconscionability doctrine seek, not to ensure voluntary consent, but to subordinate it to other values. This may be the real agenda of those who incorrectly

be applied to cases in which there has been "no consent by a party to certain terms contained in standard form agreements." Epstein, *supra* note 189, at 302 n.28. Procedural unconscionability, however, goes beyond mutual assent "to encompass not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power." FARNSWORTH, *supra* note 113, § 4.28, at 332-33 (footnotes omitted). To the extent procedural unconscionability goes beyond the doctrine of mutual assent, it, like substantive unconscionability, denies enforcement to duties assumed through voluntary consent.

Most statements of the law of unconscionability now hold that both procedural and substantive unconscionability are required before courts will grant relief from a challenged term. Judicial decisions have not consistently followed this principle, however, and some courts have suggested a vaguely mathematical metaphor in which a large amount of one type of unconscionability can make up for only a small amount of the other.

Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17 (1993).

226. HERZOG, *supra* note 119, at 237.

[P]eople can and do make horrible decisions, with good information, time to deliberate, and all the rest. It's a mistake to massage the concept of voluntariness so that it does the work a theory of paternalism should. Instead of saying, "This choice is so bad that it wasn't voluntary," we should say, "This choice is so bad that we don't care if it was voluntary."

Id. But see Lawrence Kalevitch, *Contract, Will & Social Practice*, 3 J.L. & POL'Y 379, 386-87 n.11, 393, 411 (1995) (lumping duress and unconscionability together as both relating to voluntariness and fairness).

A related contract defense, undue influence, also denies enforcement of agreements resulting from voluntary consent. "Undue influence is *unfair* persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (1979) (emphasis added). Because of this element of unfairness, "undue influence, though not always so classified, falls under the general rubric of unconscionability." Epstein, *supra* note 189, at 303; see also FARNSWORTH, *supra* note 113, § 4.27, at 323 (characterizing undue influence as an exception to the common law's general lack of "concern with substantive unfairness"); *id.* § 4.20, at 285 (providing that an important factor in showing undue influence "is imbalance in the resulting bargain").

Other contract defenses come closer than unconscionability and undue influence in relating to voluntariness. Misrepresentation might be so characterized. See Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 466 (1978) (stating that "false words . . . undermine the voluntariness of the individual's conduct"); see also FARNSWORTH, *supra* note 113, § 4.9, at 246 (referring to misrepresentation as "misleading" conduct).

The defenses of infancy, insanity and intoxication describe persons who lack the capacity to contract. They describe persons whose voluntary consent is not afforded the same legal significance as the voluntary consent of other people. They "attempt to identify broad classes of individuals who in general are not able to protect their own interests in negotiation." Epstein, *supra* note 189, at 300.

characterize pre-dispute employment arbitration agreements as "involuntary."²²⁷ That possibility is pursued in Part IV.C.

C. Separability

Courts can and should use the contract law doctrines of mutual assent and duress to ensure that arbitration is based on voluntary consent. Doing so raises an additional issue. Who determines whether there has been mutual assent or duress in a particular case?

Suppose, for instance, Employee sues Employer for an employment-related incident. Employer moves to dismiss on the ground that Employee agreed to arbitrate all employment-related disputes. Employee argues that she did not consent to arbitration, i.e., she did not manifest assent to an arbitration agreement. The court could do one of two things. One, it could decide the issue raised by Employee and relegate Employee's claim to arbitration only if the court decides that Employee consented to arbitrate. Two, it could immediately relegate Employee's claim to arbitration with an order stating that if *the arbitrator* decides that Employee did not consent to arbitration then the court will allow Employee to bring her claim in court. The former procedure is required by courts to ensure that arbitration is consensual.

To ensure that Employee's claim will not be relegated to arbitration without her consent, a court must conclude that she consented to arbitrate before dismissing her claim. If a court sends the issue of consent to arbitration, the court has relegated Employee's claim to arbitration whether Employee consented to it or not. Unfortunately, courts may do just this.²²⁸ The ground for doing so is the "separability" doctrine adopted by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*²²⁹

227. For instance, one United States senator believes "[i]t is simply unfair to require an employee to waive, in advance, his or her statutory right to seek redress in a court of law in exchange for employment or a promotion." 140 CONG. REC. S4266, S4267 (daily ed. Apr. 13, 1994) (statement of Sen. Feingold); see also 140 CONG. REC. E1753 (daily ed. Aug. 17, 1994) (statement of Rep. Schroeder) ("Mandatory arbitration represents a disturbing trend in employment law, one that forces many workers to choose between a job or promotion and their civil rights. This is a choice no one should be forced to make.").

228. See *infra* note 241.

229. 388 U.S. 395 (1967).

1. *Prima Paint*

In *Prima Paint*, Flood & Conklin Manufacturing Co. ("F & C") sold a list of F & C's customers to Prima Paint Corporation and promised not to sell paint to those customers for six years.²³⁰ F & C also promised to act as a consultant to Prima Paint during these six years.²³¹ This consulting agreement included an arbitration clause which relegated any controversies or claims arising out of the agreement to arbitration.²³² Prima Paint did not make the payments provided for in the consulting agreement. Prima Paint raised the defense of misrepresentation²³³ contending "that F & C had fraudulently represented that it was solvent and able to perform its contractual obligations," while in fact it was insolvent and intended to file for bankruptcy.²³⁴

F & C served upon Prima Paint a "notice of intention to arbitrate."²³⁵ Prima Paint filed suit, seeking rescission of the consulting agreement (due to the alleged misrepresentation) and an order enjoining F & C from proceeding with arbitration.²³⁶ F & C cross-moved to stay Prima Paint's suit pending arbitration.²³⁷ The Supreme Court affirmed a lower court's order granting F & C's motion, thus staying Prima Paint's suit pending arbitration.²³⁸ The Court concluded that

arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.²³⁹

This separability doctrine has been applied beyond misrepresentation to

230. *See id.* at 397.

231. *See id.*

232. *See id.* at 398.

233. *See id.*

234. *Id.*

235. *Id.*

236. *See id.* at 398-99.

237. *See id.* at 399.

238. *See id.* at 406-07.

239. *Id.* at 402. According to the Court, if a party seeking to litigate, rather than arbitrate, argues fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [of Section Four] does not permit the federal court to consider claims [like Prima Paint's] of fraud in the inducement of the contract generally.

Id. at 403-04 (footnote omitted).

other contract defenses, including duress.²⁴⁰ It has even been applied to mutual assent.²⁴¹

In *Prima Paint*, the Court sent to arbitration the issue of whether Prima Paint's consent to the consulting agreement was fraudulently induced by F & C.²⁴² As consent to the consulting agreement includes consent to the arbitration clause in that agreement, the Court sent to arbitration the issue of whether Prima Paint's agreement to arbitrate was fraudulently induced.²⁴³ Similarly, a case applying *Prima Paint*'s separability doctrine to duress sends to arbitration the issue of whether a party's consent to arbitration is induced by duress.²⁴⁴ In other words, it sends to arbitration the issue of whether a party's consent to arbitration was voluntary. It relegates a dispute to arbitration without first determining that the parties had voluntarily consented to arbitration. Applying separability to duress then, prevents courts from ensuring that arbitration proceeds only through voluntary consent. Applying separability to mutual assent goes even further. It prevents courts from ensuring that arbitration is consensual at all.

The *Prima Paint* Court claimed that its result was compelled by Section Four of the FAA, which reads in pertinent part:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.²⁴⁵

240. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 & n.11 (5th Cir. 1981); 2 MACNEIL ET AL., *supra* note 13, § 15.3.2.

241. See *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476-77 (9th Cir. 1991); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1990).

242. See *Prima Paint*, 388 U.S. at 404.

243. See *id.* at 403-04.

244. See, e.g., *Hickman v. Paine Webber, Inc.*, No. 1:96-4CV-0273, 1996 WL 515276, at *1, *4 (E.D. Tex. Sept. 3, 1996).

245. 9 U.S.C. § 4 (1994). As the Court in *Prima Paint* recognized:

Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court.

388 U.S. at 404. Motions, like F & C's, for a stay pending arbitration are brought under Section Three of the FAA which provides that a court shall grant such a stay "upon being satisfied that the issue involved in [the] suit or proceeding is referable to arbitration under [a written agreement]." 9 U.S.C. § 3.

The Court correctly read Section Four's use of the terms "agreement for arbitration" and "arbitration agreement" to refer only to the arbitration clause in isolation and not to the contract containing the clause (the "container contract").²⁴⁶ This reading, however, does not compel the Court's conclusion that courts should hear only challenges to the arbitration clause in isolation and not challenges to the container contract as a whole. "[N]othing would have prevented the [C]ourt in *Prima Paint* from holding that the making of an arbitration clause is in issue whenever the making of the agreement containing it is in issue."²⁴⁷ This is what the Court should have held, because the making of an arbitration clause is in issue whenever the making of the container contract is in issue. If *Prima Paint's* consent to the consulting agreement was fraudulently induced then its consent to the arbitration clause, and every other clause, in that agreement was fraudulently induced.

The separability doctrine is a legal fiction pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts. In addition to the contract really alleged to have been formed, the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms. Enforcing this fictional contract deprives arbitration of its basis in voluntary consent, because the fictional contract lacks a basis in voluntary consent. Had a contract consisting of just the arbitration clause been presented to the parties, they might have given their voluntary consent to it. But, that is just speculation. And imposing duties based on speculations about what the parties would have voluntarily consented to is profoundly different from imposing duties based on what the parties did, in fact, voluntarily consent to. The former has no place in contract law while the latter is the essence of contract law.²⁴⁸

246. If these statutory terms referred to the container contract, the first provision in the above-quoted portion of Section Four could never apply because every breach of the container contract would constitute a "failure to comply therewith," i.e., with the container contract. 2 MACNEIL ET AL., *supra* note 13, § 15.2, at 15:23 n.13. "For example, an alleged breach of warranty would be such a failure." *Id.* Thus, no case would ever be ordered to arbitration. The second provision in the above-quoted portion of Section Four would always apply because every breach of the container contract would constitute "failure, neglect, or refusal to perform the same," i.e., the container contract. *Id.* "Hence every dispute would be tried summarily by the court. The arbitration clause would be nullified in every case, and the FAA would have been a nullity." *Id.*

247. *Id.*

248. Contract law's "gap-filling" of incomplete contracts might be understood as enforcing speculation about what parties would have voluntarily consented to. Randy Barnett refutes this posi-

Reconsider Employee, who argues that she should be allowed to assert her claim in court because she did not consent to arbitration. Suppose that Employer contends that the arbitration clause is contained in an employment contract including terms regarding salary, benefits, and vacation, in addition to the arbitration clause. Under the separability doctrine, if Employee argues that she did not consent to the container contract, i.e., the employment contract, the court will dismiss Employee's claim and send the consent issue to arbitration. Only if Employee argues that she did consent to the container contract, but did not consent to the arbitration clause, will the court decide the consent issue itself. This is simply ludicrous.

2. Departures from *Prima Paint*

The separability doctrine of *Prima Paint* "continues to thrive."²⁴⁹ On the other hand, there are "a wide range of cases where *Prima Paint*: issues were in fact present, but where the courts have refused to apply them or simply ignored their presence."²⁵⁰ Many courts have simply been unwilling to follow *Prima Paint*.²⁵¹

An example of such a case is *Jolley v. Welch*.²⁵² In *Jolley*, investors sued their securities broker, Paine Webber, which sought to relegate the claims to arbitration on the ground that there were arbitration clauses in the broker-customer agreements the investors had signed.²⁵³ The district court granted Paine Webber's motion, staying the claims, with respect to all the investors except one.²⁵⁴ The district court allowed the one investor, Mills, to pursue her claim in court because Paine Webber failed to introduce into evidence an agreement to arbitrate executed by Mills.²⁵⁵

On appeal, Paine Webber argued that the district court erred in deciding the consent issue, rather than sending it to arbitration.²⁵⁶ Paine Webber's position was solidly supported by *Prima Paint*'s separability

tion and explains that parties do, in fact, often consent to default rules. See generally Barnett, *supra* note 176. Consent to be legally bound is "a necessary element of a prima facie contractual obligation," *id.* at 864, and is, in most circumstances, best interpreted to include consent to the default rules of whatever court has jurisdiction of the dispute. See *id.* at 864-67.

249. 2 MACNEIL ET AL., *supra* note 13, § 15.3.1.

250. 2 *id.* § 15.3.2.

251. See 2 *id.* § 15.3.3.2 n.38.

252. 904 F.2d 988 (5th Cir. 1990).

253. See *id.* at 990.

254. See *id.*

255. See *id.* at 993.

256. See *id.* at 993-94.

doctrine. *Prima Paint* allows courts to hear arguments going to the making of the arbitration clause itself, but not to the contract generally.²⁵⁷ Mills argued that she did not consent to the contract generally.²⁵⁸ Her argument that she did not sign the broker-customer agreement pertains to the arbitration clause no more than to any other term in that agreement. The Fifth Circuit, however, affirmed the district court's decision holding that Mills' claim could not be relegated to arbitration unless and until a court determined that Mills had, in fact, consented to arbitration.²⁵⁹

Can *Jolley* and similar cases be reconciled with *Prima Paint*?²⁶⁰ One distinction between *Prima Paint* on one hand, and *Jolley* and the Employee hypothetical on the other, is that *Prima Paint* applied the separability doctrine to a defense to enforcement, i.e., an argument that a contract was formed but was voidable due to a misrepresentation.²⁶¹ *Jolley* and the Employee hypothetical apply separability to mutual assent, i.e., an argument that no contract was formed at all.²⁶² The separability doctrine could be confined so that it does not apply to arguments disputing formation of a contract.²⁶³ If the doctrine were narrowed this way, a court would—before relegating a dispute to arbitration—hear, not only arguments denying mutual assent, but also arguments that the parties' agreement is not a "contract" because it is void.²⁶⁴ As Lord Chancellor Simon put it:

If the dispute is as to whether the contract which contains the [arbitration] clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in

257. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

258. See *Jolley*, 904 F.2d at 993-94.

259. See *id.* at 994.

260. This question is considered and answered "no" in 2 MACNEIL ET AL., *supra* note 13, § 15.3.3.2. There is no principle that "will sort out the cases into a meaningful pattern. The law is a hodgepodge in search of a currently nonexistent order." 2 *id.* § 15.3.3.3.

261. See *Prima Paint Corp.*, 388 U.S. at 403-04.

262. See *Jolley*, 904 F.2d at 993.

263. See, e.g., W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 5.04 (2d ed. 1990) (stating that "a distinction must be recognized with respect to claims that the entire contract does not even exist. Such claims are for courts to resolve, because the party denying that it ever entered into contract also denies that it ever agreed to arbitration"); see also 2 MACNEIL ET AL., *supra* note 13, § 15.3.3.2 n.38 (citing cases making the above distinction).

264. A "void contract" is a contradiction in terms. Arguments that the parties' agreement is not a contract include arguments based on illegality, (e.g., the contract is one for prostitution), incapacity (e.g., one party was three years old), and certain forms of duress (duress by physical compulsion) and misrepresentation (fraud in the factum). See, e.g., 2 MACNEIL ET AL., *supra* note 13, § 15.3.3.2.

the submission [to arbitration]. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.²⁶⁵

This narrowed separability doctrine would only preclude courts from hearing arguments that the contract is voidable.²⁶⁶

Narrowing *Prima Paint's* separability doctrine so that it only applies to voidable-contract arguments would be an improvement, but why stop there? Why distinguish between no-contract arguments and voidable-contract arguments? A practical reason not to preserve the separability doctrine for voidable-contract arguments is that it is often difficult to distinguish no-contract arguments from voidable-contract arguments.²⁶⁷ More importantly, preserving the separability doctrine for voidable-contract arguments undermines what the contract law defenses protect.²⁶⁸ An example of a voidable contract is an arbitration agreement Employee signs with a gun to her head.²⁶⁹ Preserving the separability doctrine for voidable-contract arguments imposes upon Employee a duty to arbitrate whether a gun was in fact used as alleged. Imposing such a duty violates a fundamental principle of contract law. It enforces a duty

265. *Heyman v. Darwins, Ltd.*, 1 All E.R. 337, 343 (H.L. 1942).

266. This Article refers to this as a "narrowed" separability doctrine because the current separability doctrine makes no distinction between no-contract arguments and voidable-contract arguments.

Once it is established, as it was in *Prima Paint*, that "agreement for arbitration" in FAA § 4 means "arbitration clause" rather than "agreement containing an arbitration clause," the court is concerned only about the "making" of the arbitration clause. We must add to that the *Prima Paint* conclusion that an issue going to the making of the entire contract, rather than one going to the making of the arbitration clause itself treated separately, is *not* an issue concerned only with the making of the arbitration clause.

With the foregoing combination, nothing in the language of the FAA or of *Prima Paint* logically permits distinguishing any of the no-contract-was-made [cases] from fraud in the inducement or the many other bases which have been held to be under the *Prima Paint* rule.

2 MACNEIL ET AL., *supra* note 13, § 15.3.3.1. The court in *Unionmutual Stock Life Insurance Co. of America v. Beneficial Life Insurance Co.*, 774 F.2d 524 (1st Cir. 1985) stated that

[t]he teaching of *Prima Paint* is that a federal court must not remove from the arbitrators consideration of a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself. The basis of the underlying challenge to the contract does not alter the severability principle.

Id. at 529.

267. See 2 MACNEIL ET AL., *supra* note 13, § 15.3.3.2.

268. See 2 *id.*

269. See 2 *id.* § 15.3.4 n.74 (discussing ramifications of the *Prima Paint* holding with respect to duress imposed by a buyer on a seller to sign a draft contract with an arbitration clause when the seller did not want to otherwise sign contract due to disagreement over price to be paid).

assumed through coerced, not voluntary, consent.²⁷⁰

As *Prima Paint's* separability doctrine is not compelled by FAA Section Four, the Supreme Court should overrule it. If the Supreme Court does not do so, the FAA should be amended to do so.²⁷¹ When one party contends that the arbitration clause in a container contract requires a claim to be arbitrated, but the other party contends that an enforceable container contract was never formed, courts should decide whether the container contract has been formed and if so, whether there is a defense to its enforcement.²⁷² Only if courts conclude that an enforceable

270. The separability doctrine could be further narrowed to apply only to some voidable-contract arguments. For instance, the separability doctrine could be confined to apply to arguments, like *Prima Paint's*, based on misrepresentation, but not those based on duress. Again, this would be an improvement, but why distinguish among defenses? Are some defenses more important than others? To say the separability doctrine should preclude courts from hearing arguments based on misrepresentation, but not duress, denigrates the misrepresentation defense. In effect, it says "you consented, and you will be bound by that consent even though it may have been induced by a misrepresentation." This negates the misrepresentation defense which operates to ensure that contract law enforces only duties assumed through consent not induced by misrepresentation. Applying the separability doctrine to misrepresentation arguments imposes the duty to arbitrate on some whose consent was induced by a misrepresentation.

The failure to sharply distinguish consent induced by misrepresentation from consent-not-so-induced is responsible for the mistaken conception of the separability doctrine as a default rule. See, e.g., JOHN S. MURRAY, ALAN SCOTT RAU, & EDWARD F. SHERMAN, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 615 (2d ed. 1996). A default rule is a rule the parties can avoid by forming an enforceable contract. See Barnett, *supra* note 176, at 825. In contrast, a mandatory rule is one that trumps an otherwise enforceable contract. FARNSWORTH, *supra* note 113, § 1.10. Therefore, the concept of a default rule presupposes rules on what constitutes an "enforceable contract." And the separability doctrine is such a rule. It, along with other law, specifies what constitutes an enforceable contract to avoid the default rule that disputes are resolved by litigation, not arbitration.

Cases purporting to treat the separability doctrine as a default rule compel arbitration "only after indulging in mock deference to the parties' presumed 'intention' to entrust to the arbitrator the question whether the overall agreement had been induced by fraud." MURRAY, RAU, & SHERMAN, *supra*, at 615. The error here is deferring to what the parties consented to without previously determining whether that consent is significant, i.e., whether it was given in the absence of a contract defense. These errors can be traced to *Prima Paint* itself, which said its separability doctrine applies "where there is no evidence that the contracting parties intended to withhold [the misrepresentation] issue from arbitration." 388 U.S. 395, 406 (1967).

271. Repealing the separability doctrine in United States law would not prevent its applicability to international arbitration governed by foreign law. Separability, often called "autonomy" of the arbitration clause, is "a conceptual cornerstone of international arbitration." CRAIG ET AL., *supra* note 263, § 5.04; see also GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 193-94 (1994).

272. As Jeffrey Stempel puts it:

[W]hen the party resisting arbitration raises one of the . . . consent-based defenses going to the issue of contract formation—the very existence of the contract—the court should adjudicate these defenses. . . .

. . . If the contract was never formed due to lack of consent, the arbitration

container contract has been formed, i.e., that the parties have consented to the container contract in circumstances in which consent is significant, should the parties be relegated to arbitration.

This procedure—a court resolving disputes over whether the parties have formed an enforceable container contract before an arbitrator resolves the merits of the claims—would make arbitration a slower and costlier means of resolving disputes than it is under the separability doctrine.²⁷³ It would also entail a court resolving issues that will often be

agreement contained within this "noncontract" must be equally lacking in force and cannot justify allowing the arbitrator to adjudicate the defense.

Stempel, *supra* note 95, at 1457-58 (footnote omitted). This is correct in substance although, technically, most defenses do not preclude contract formation. Rather, they make a contract voidable at the party's option.

Stempel proposes his own version of the separability doctrine. Stempel believes that contract defenses to arbitration agreements should usually be decided by courts, but he makes an exception for cases in which proof of the defense would be "ineffective to undermine the resisting party's consent to arbitration." *Id.* at 1456. As an example of such a case, Stempel cites *Prima Paint* itself, in which *Prima Paint* alleged that it had been induced to enter into a consulting agreement by F & C's misrepresentations of financial solvency. Stempel argues that the Court properly relegated *Prima Paint* to arbitration without first determining whether its consent had been induced by misrepresentation. In support of his argument, Stempel claims

it is doubtful that *Prima Paint* could have introduced evidence to show that, as a commercial company that probably had agreed to hundreds of contracts providing for arbitration, it really would not have consented to the arbitration provision had it been better apprised of F&C's financial problems. Rather, *Prima Paint* was really alleging that it would not have consented to do business with F&C had it known all the facts.

Id. Stempel relies on his speculation that *Prima Paint* "would have" consented to the arbitration clause whether or not F & C made a misrepresentation. Even if Stempel speculates correctly, his proposal negates the misrepresentation defense which operates to ensure that contract law enforces only duties assumed through consent not induced by misrepresentation. To avoid enforcing other duties, courts should not speculate about what a party "would have" consented to in the absence of misrepresentation. That the party argues it did not, in fact, consent in the absence of misrepresentation is what matters. If *Prima Paint* did not consent in the absence of misrepresentation to arbitrate disputes arising out of the consulting agreement with F & C, it should not be relegated to arbitration, even if every contract it has ever entered into contains an arbitration clause. If *Prima Paint* did not form an enforceable consulting agreement with F & C then it should not be compelled to arbitrate disputes arising out of such an agreement.

Furthermore, Stempel's proposal would add another difficult issue to arbitration disputes. Imagine the arguments. The party resisting arbitration argues that its consent to the container contract was induced by misrepresentation or that another defense to enforcement applies. The party seeking arbitration cannot just deny that these defenses are present; it must also assert that even if the defense is present, the resisting party "would have" consented to arbitration had it not been present.

273. *Prima Paint* gave two reasons for adopting the separability doctrine. The Court stated that separability "honor[s] the plain meaning of the statute [and] the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404. Since the meaning of the statute does not compel the adoption of the separability doctrine, it is plausible that the justices were primarily motivated by concerns about delay and cost.

be intimately intertwined with the merits that will go to the arbitrator if the court finds that the parties have formed an enforceable container contract.²⁷⁴ For example, in *Prima Paint*, if a court had sent Prima Paint's claim to arbitration only after determining that Prima Paint's consent to the consulting agreement was not induced by misrepresentation, the court would have already decided much of the dispute it was sending to arbitration. In short, overruling *Prima Paint* will come at a price to both disputants and adjudicators. That price, however, must be paid to make the law well-suited to ensure that arbitration is based on significant consent.

Is the Supreme Court willing to pay that price? Maybe so. After all, the Court's arbitration decisions over the last twenty years have been remarkably faithful to the principle that courts should relegate claims to arbitration when, and only when, contract law analysis would call for that.²⁷⁵ Overruling *Prima Paint* is the last major step needed to bring arbitration law in conformity with this principle. If the Court overrules *Prima Paint* it will have completed its twenty-year project of making arbitration law a branch of contract law.

While the Court's strongly pro-arbitration decisions of the last twenty years are remarkably consistent with a contractual theory of arbitration, they are also largely consistent with a "docket-clearing"

274. See 2 MACNEIL ET AL., *supra* note 13, § 15.3.3.3.

275. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995) (stating that if contracting parties agree to include punitive damages, the FAA ensures that their agreement will be enforced); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 836 (1995) (enforcing agreement to arbitrate consumer claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (enforcing agreement to arbitrate employment discrimination claim); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-77 (1989) (FAA does not preempt California arbitration law when parties choose California law in choice-of-law clause); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (state law precluding enforcement of agreement to arbitrate California Labor Code claim is preempted by FAA); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (enforcing, in domestic context, agreement to arbitrate securities claim); *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (enforcing, in an international context, agreement to arbitrate antitrust claim); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223-24 (1985) (stating that where only some claims are arbitrable, agreement to arbitrate will be enforced with respect to those claims); *Southland Corp. v. Keating*, 465 U.S. 1, 8 (1984) (holding that a state law making a claim non-arbitrable is preempted by FAA); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (FAA is substantive, not procedural, law governing in federal and state courts); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) (enforcing, in international context, agreement to arbitrate securities claim).

theory of arbitration. That is, they are largely consistent with the view that courts favor arbitration as a way to reduce their caseloads whether or not parties have contracted for it.²⁷⁶ The Supreme Court can demonstrate that it, like the FAA,²⁷⁷ is concerned with contract enforcement,²⁷⁸ not docket-clearing, by reversing *Prima Paint's* separability doctrine. Until then, the arbitration boom fostered by the Supreme Court will remain vulnerable to charges that it is more about clearing dockets than enforcing contracts.

IV. THE INSUFFICIENCY OF VOLUNTARY CONSENT

In Part III of this Article, I argued that contemporary arbitration law, with the exception of the separability doctrine, is well-suited to ensure that disputes are resolved by arbitration only when the disputants have voluntarily consented to that. The argument was that contract law enforces only duties assumed through voluntary consent and that arbitration law is essentially a branch of contract law. Therefore, arbitration law, with full use of the contract doctrines of mutual assent and duress, enforces the duty to arbitrate only when the party resisting arbitration has voluntarily consented to arbitrate. This Part argues, however, that legal analysis ought to consider more than whether the duty to arbitrate was assumed through voluntary consent. It also ought to consider the baseline rights underlying the determination that consent is voluntary.

276. As Ian Macneil has observed:

One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple. That is, the Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system. If this means overriding the consent principle of the [FAA], so be it

MACNEIL, *supra* note 15, at 172.

277. The Court has stated that

[t]he FAA was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," and to place such agreements "upon the same footing as other contracts." While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."

Volt, 489 U.S. at 478 (citations omitted).

278. "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement An arbitration agreement is placed upon the same footing as other contracts, where it belongs." H.R. REP. NO. 68-96, at 1 (1924).

A. Voluntariness, Coercion, and Baselines

Part III distinguishes cases in which an employee's consent to arbitration is voluntary from those in which her consent is coerced. It does so on the premises that (1) contract law routinely distinguishes voluntarily-assumed duties from coercively-assumed duties and (2) contract law's method of making this distinction—application of the duress defense—is the best method for arbitration cases.²⁷⁹ While the duress defense routinely distinguishes voluntarily-assumed duties from coercively-assumed duties, it does so against a baseline of rights established by non-contract law.²⁸⁰ Whether the assumption of a duty is voluntary or coerced will in some cases depend on which baseline is specified by non-contract law. To speak meaningfully about voluntariness and coercion requires that one have previously identified this baseline.²⁸¹

279. See *supra* Part III.A.

280. "Contract' analysis assumes that there is already a prior assignment of entitlements so that the parties to the contract have something to exchange." Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 2 (1989). "One's ability to participate in exchanges depends upon one's initial assignment of property rights: . . . [T]his initial assignment of property rights is not derived from the participants' consent. It antedates consensual transactions . . ." *Id.* at 18. "We need some independent criterion of justice (other than freedom of contract) to determine what the initial distribution of property rights should be." Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 649 (1988). "[E]very transaction takes place against a background of property rights." *Id.* at 651; see also Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 568 (1982) (discussing baseline changes in the "regime of freedom of contract").

281. See WERTHEIMER, *supra* note 120, at 217 ("[T]he structure of coercion discourse presupposes that A and B [(individuals)] have certain obligations and rights which establish a background against which A's proposals are understood."); *id.* at 222 ("[T]he coerciveness of proposals is all in the baseline."); see also RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 25 (1993) (stating there is widespread agreement that a discussion of coercion depends upon the proper identification of baselines, i.e., "the initial positions against which the propriety of subsequent individual or government action can be judged"); FRIED, *supra* note 133, at 97 ("A proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses. It is coercive if it proposes a wrong to the object of the proposal."); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 262 (1974) ("Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did."); Brilmayer, *supra* note 280, at 3 ("Consent is about making choices; the fairness of holding an individual to a choice made, however, depends on the legitimacy of limiting him or her to a particular set of choices.")

This view has not persuaded all philosophers. See, e.g., G.A. Cohen, *Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty*, in *JUSTICE AND ECONOMIC DISTRIBUTION* (John Arthur & William Shaw eds., 1978); XIV NOMOS: COERCION, *supra* note 120 (variety of philosophical views on coercion); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF.

Suppose, for example, Seller offered to deliver to Buyer an identified computer if Buyer promised to pay Seller \$1,000. If Buyer accepted the offer, was Buyer's assumption of a duty to pay \$1,000 voluntary or coerced? That depends on the baseline rights prior to Buyer's assumption of the duty to pay Seller. Perhaps shortly before their conversation Seller stole the computer from Buyer.²⁸² If so, according to the baseline rights specified by property law, Buyer owned the computer, i.e., Buyer had a right to it. The property law baseline in this case is that Buyer had a right to the computer and a right to the money. Seller did not have a right to either. Therefore, Buyer's assumption of the duty to pay the money to Seller for the computer was not voluntary. Buyer's consent to the transfer of \$1,000 from Buyer to Seller was coerced. If Seller delivered the computer to Buyer, Buyer refused to pay Seller, and Seller sued Buyer for breach of contract, Buyer would have a duress defense because Buyer's consent was induced by a threat to commit a crime or tort.²⁸³

This is an easy "duress of goods" case.²⁸⁴ Buyer's duress defense, however, rests on property law. If, according to property law, Seller owned the computer before Buyer consented to pay Seller for it, then Buyer's assumption of that duty was voluntary.²⁸⁵ Buyer had no duress defense because Seller's threat, to retain possession of the computer unless Buyer pays \$1,000, is neither a crime nor a tort²⁸⁶ It is neither a crime nor a tort because the property law baseline gave Seller the right to the computer. The same threat, in the same *factual* context, can be a crime/tort or not. Whether it is or not turns on the *legal* context, the baseline rights. Therefore, the duress defense turns on this baseline of rights specified by non-contract law. In other words, the distinction

121, 141-44 (1981). It does, however, "capture[] the theory of coercion that characterizes virtually the entire corpus of American law." WERTHEIMER, *supra* note 120, at 201.

282. Under these circumstances, our conversation might be characterized as Seller demanding a ransom payment for releasing the hostage computer.

283. See RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. b (1979) (stating that refusing to return stolen goods to their owner is both a crime and a tort).

284. Such cases can be found as far back as *Astley v. Reynolds*, 93 Eng. Rep. 939 (K.B. 1732). See RESTATEMENT OF CONTRACTS § 493(d) (1932); CALAMARI & PERILLO, *supra* note 133, § 9-5; John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 255-56 (1947).

285. The "baseline approach to coercion is fundamentally *neutral* with respect to the *content* of [an individual's] rights." WERTHEIMER, *supra* note 120, at 218; see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 23 (1987) (labeling this aspect of the baseline approach to coercion as "hopelessly confused").

286. Assume there were no other improper threats or physical compulsion. See RESTATEMENT (SECOND) OF CONTRACTS §§ 174-176 (1979).

between voluntarily-assumed duties and coercively-assumed duties turns on this baseline.

B. *Employment Arbitration*

Having determined that the distinction between voluntarily-assumed duties and coercively-assumed duties presupposes a baseline of rights specified by non-contract law, one can apply this insight to employment arbitration. Among my Article's goals in doing so is to suggest that many of the people who criticize the enforcement of pre-dispute employment arbitration agreements do so because they are dissatisfied with the non-contract law baselines underlying such agreements. These people miss the mark when they criticize these agreements as coerced. As Part III explains, these agreements, thanks to routine application of the duress defense, are voluntary.²⁸⁷ The problem is not voluntariness; it is the underlying baseline of rights specified by non-contract law. Discussion of employment arbitration, and other arbitration, should keep concerns about ensuring voluntariness, which are concerns endemic to all contracts, distinct from concerns about the non-contract law underlying arbitration agreements in particular.

In Part III, I address concerns about voluntariness, i.e., contract law. The remainder of this Part addresses the non-contract law baselines underlying employment arbitration. This discussion of these baselines is skeletal. Mostly, I identify baselines and then simply accept, with little argument, that they are good baselines. There is one baseline, however, that I criticize. That is the baseline specified by securities law; a baseline underlying employment arbitration in the securities industry, but not in other industries. To distinguish that baseline from the baselines underlying other employment arbitration, I use four hypotheticals.

First, suppose that Employer refuses to hire a job applicant ("Applicant") unless Applicant signs an arbitration agreement. The arbitration clause is a non-negotiable term of the employment contract. If Applicant consents to arbitration has she done so voluntarily or under coercion? That question, when asked as a matter of positive law rather than philosophy, is the same as asking whether Applicant has a duress defense.²⁸⁸ And that depends on whether or not Employer threatened

287. See *supra* Part III.B.2.

288. See *supra* Part III.B.2.

a crime or tort.²⁸⁹ Employer's communication to Applicant is, in substance: "If you don't agree to arbitration, I will refrain from hiring you." If Applicant consents to arbitration, her consent is induced by Employer's "threat" to refrain from hiring her.²⁹⁰

If refraining from hiring Applicant was a crime or tort then Applicant's consent would have been induced by duress. To put it another way, if the baseline rights specified by non-contract law gave Applicant a right to be hired by Employer then Applicant's consent would have been coerced. In fact, refraining from hiring Applicant is neither a crime nor a tort; the baseline rights specified by non-contract law do not give Applicant a right to a job offer from Employer. Therefore, Applicant's consent to the employment agreement with an arbitration clause was not induced by duress. Her consent was voluntary, not coerced.²⁹¹

For the second hypothetical, add to the first hypothetical an additional fact. Suppose that Applicant wants to work in, and is trained to work in, a particular industry and that Employer is one of a number of potential employers in that industry. Not only does Employer make the arbitration clause a non-negotiable condition of employment, all employers in this industry do likewise. They do so without agreement among themselves; each independently decides that it will not hire anyone who does not agree to arbitration. If Applicant consents to arbitration in a contract with an employer in this industry, has she done so voluntarily or under coercion? Again, that question is the same as asking whether she has a duress defense. And that depends on whether Employer threatened a crime or tort.

As in the first hypothetical, Employer's threat was to refrain from hiring Applicant. Refraining from hiring Applicant does not become a crime or tort simply because all other employers in the industry refuse

289. None of the other grounds for duress are present because no one "physically compelled" Applicant to sign the arbitration agreement. See RESTATEMENT (SECOND) OF CONTRACTS § 174 (1979). Nor did Employer threaten the Applicant with anything improper. See *id.* § 176. Assume that none of these other grounds exists in the hypotheticals to follow.

290. "In effect, with a mandatory arbitration provision, the employee gives up the right to settle a dispute with the employer in court in order to obtain or keep work." John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 118 (1992).

291. This goes a long way to answering the question, raised in a discussion of employment arbitration, why "'public pressure on choice [is called] coercion, [yet] private pressure is freedom?'" Cooper, *supra* note 53, at 221 (quoting Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 845 (1983) (book review)). The answer follows from the baseline rights.

to hire anyone who does not agree to arbitrate. In other words, the baseline rights specified by non-contract law do not give Applicant a right to a job offer without an arbitration clause from an employer in this industry. Therefore, Applicant's consent to the employment agreement with an arbitration clause was not induced by duress. Her consent was voluntary, not coerced.

For the third hypothetical, add to the second hypothetical an additional fact. Suppose again that all employers in this industry make the arbitration clause a non-negotiable condition of employment. But now suppose they do so through agreement among themselves. They form a trade association and the association's rules require each member employer to hire only employees who agree to arbitrate. If Applicant consents to arbitration in a contract with an employer in this industry has she done so voluntarily or under coercion? Again, this question is the same as asking whether she has a duress defense. And that depends on whether Employer threatened a crime or tort.

As in the previous hypotheticals, Employer's threat was to refrain from hiring Applicant. Refraining from hiring Applicant might be a crime or tort when combined with the sort of agreement formed by this industry's employers. Performance by Employer of an agreement among employers to refrain from hiring those who do not agree to arbitrate might violate the antitrust laws.²⁹² If so, Applicant's consent to the

292. An agreement among employers (outside the context of collective-bargaining) to fix wages would likely be an antitrust violation. In *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970), Judge Mansfield denied a motion to dismiss a complaint by securities employees that their employers had agreed among themselves to reduce the commissions to be paid to their employees.

There can be little doubt about the fact that if a group of employers, as the complaint here alleges, were allowed, not as part of a collective bargaining agreement, to agree together to reduce the commissions paid to their respective employees, they would have the same power to restrain competition as is inherent in a price-fixing agreement.

Id. at 606-07; accord *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 95 (S.D.N.Y. 1974) ("[C]ollective employer action to regulate employee compensation, outside the context of a collective bargaining situation, would constitute price fixing."), *aff'd*, 520 F.2d 1231 (2d Cir. 1975).

The agreement to hire only those who agree to arbitrate might be analogous, although agreement among employers on this one term of the employment contract leaves all other terms (including wages) to be determined competitively. "[A]n agreement among competitors to insist on an arbitration clause in contracts with a category of employees is [not] a per se violation of the antitrust laws." *Drayer v. Krasner*, 572 F.2d 348, 355 (2d Cir. 1978). The Second Circuit held that such an agreement among securities firms was "within the rule of reason, quite apart from the effect of the Securities Exchange Act." *Id.* The court went on to state, however, that "we need not rest our decision solely on this ground in light of" precedent holding that the Exchange Act requires antitrust laws to be applied more forgivingly to the securities industry. *Id.* at 356; accord *Dickstein v. duPont*, 443 F.2d 783, 785-88 (1st Cir. 1971); see also *Altomose Constr. Co. v. Building and Constr. Trades*

employment contract with the arbitration clause was induced by duress. Her consent was coerced. If, on the other hand, Employer's threatened action does not violate the antitrust laws, Applicant's consent was not induced by duress. It was voluntary.

The fourth and final hypothetical is the same as the third, with an additional fact. There is a law prohibiting any employer from entering this industry without joining the trade association, the rules of which require each of its members to hire only employees who agree to arbitrate. If Applicant consents to arbitration in a contract with Employer in this industry, she has not done so under duress because Employer did not threaten a crime or tort. While refraining from hiring Applicant might be a crime or tort when combined with the sort of agreement considered in the third hypothetical, it is clearly not a crime or tort in the circumstances of the fourth hypothetical. This crucial difference between the third and fourth hypotheticals exists even though the situation Applicant faces is the same in each hypothetical: she cannot work in the industry unless she agrees to arbitrate. In the third hypothetical, Applicant's predicament might have been caused by a violation of her rights. In the fourth hypothetical, her predicament was clearly not caused by a violation of her rights.

In the fourth hypothetical, Applicant's rights are not violated by Employer's refusal to hire her without an arbitration clause even though every employer in the industry makes a similar refusal. What the employers are doing is neither a crime nor a tort. In fact, it would be a crime to hire Applicant *without* an arbitration clause. Not only does the law permit Employer to hire Applicant with an arbitration clause, it prohibits Employer from hiring Applicant without one. In other words, the baseline rights specified by non-contract law do not give Applicant a right to accept from an employer in this industry an employment offer without an arbitration clause. The law requiring employer membership

Council, 443 F. Supp. 492 (E.D. Pa. 1977) (holding that the adoption of multi-employer group insurance and pension plans, outside of a collective bargaining agreement, did not constitute a violation of antitrust laws).

[A] *per se* prohibition of all multi-employer combinations which have any attenuated or incidental impact on wages would be "such a sweeping statement" that it would "fail to anticipate every situation." We are not, in this case, concerned with the right of employers to "band together for joint action in fixing the wages to be paid by each employer"—the issue which plagued Judge Mansfield [in *Cordova*], when we review ABC's insurance and retirement plans. Rather, we are concerned with the right of employers to band together for joint action in establishing life, sickness, and disability insurance benefits

Id. at 502 (citations omitted).

in the trade association denies Applicant this right.

Here is a baseline that should be changed. Employers and employees who each consent to an employment contract without an arbitration clause should have the right to form such a contract regardless of the industry they are in.²⁹³ The baseline in the fourth hypothetical compels employees and employers to choose between their right to litigate employment disputes and their wish to pursue their livelihoods in a particular industry. They should not be put to that choice.

The freedom "to engage in any of the common occupations of life" is part of the "liberty" protected by the Fourteenth Amendment.²⁹⁴ It cannot, therefore, be deprived without due process of law.²⁹⁵ It is now routinely deprived, however, with due process of law, by occupational licensing laws. A law of the sort described in the fourth hypothetical is an occupational licensing law. It conditions a license to engage in the pertinent occupation on the relinquishment of one's right to litigate employment disputes.²⁹⁶ I contend that occupational licensing laws ought not to include, among the conditions for receiving a license, an agreement to arbitrate employment disputes.²⁹⁷

C. Securities Employment Arbitration

The fourth hypothetical depicts the current securities industry. Each employer in the securities industry makes the arbitration clause a non-negotiable term of employment.²⁹⁸ These employers are compelled to do so by law that requires them to hire only employees who agree to arbitrate.²⁹⁹ In other words, the securities laws constitute an occupational licensing system that conditions a license to be a securities employee on the relinquishment of one's right to litigate employment disputes. Two of the most highly esteemed judges of our era, Henry Friendly and Richard Posner, disagree with this characterization of the

293. See *infra* Part IV.C.3.

294. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). See generally J.R.R., II, Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973) (discussing due process limitations with regard to occupational licensing schemes).

295. *E.g.*, *Schwabe v. Board of Bar Exam'rs.*, 353 U.S. 232, 238-39 (1957).

296. See J.R.R., II, *supra* note 294, at 1098-99.

297. See *infra* Part IV.C.

298. "[E]ven if [a securities employee] were to have offers of employment from more than one firm, shopping around to find one that does not require arbitration would be to no avail: it is an industry-wide practice, with no opportunity for individual modification." 140 CONG. REC. E1753 (daily ed. August 17, 1994) (statement of Rep. Markey). See *infra* Part IV.C.1.

299. See 9 U.S.C. § 2 (1994).

securities laws as an occupational licensing scheme,³⁰⁰ so this Article goes into some detail in this subsection to support it.

1. The Securities Industry's Regulatory Environment

To see that securities employment arbitration arises out of an occupational licensing scheme, one must have a basic understanding of the regulations governing that industry.³⁰¹ There are two ways to trade a security: on a securities exchange³⁰² or in the "over-the-counter" market,³⁰³ which simply means trading off an exchange. Virtually all securities trades—on or off an exchange—are conducted by securities "brokers"³⁰⁴ or "dealers."³⁰⁵ These broker-dealers, ranging from large Wall Street investment banks to sole proprietorships, are the primary participants in the securities industry.

The Securities Exchange Act of 1934³⁰⁶ (the "Exchange Act") requires broker-dealers to register with the Securities and Exchange Commission ("SEC") as a condition of doing business.³⁰⁷ The SEC has

300. See *infra* notes 338-46 and accompanying text.

301. See generally HAZEN, *supra* note 150, § 10; SHELDON M. JAFFE, *BROKER-DEALERS AND SECURITIES MARKETS* (1977 & Supp. 1995); 1 MACNEIL ET AL., *supra* note 13, § 13.1.1.

302. As one commentator describes:

An exchange, as the name implies, provides a central clearing house for the trading of its listed securities. Originally all transactions took place physically on the floor of the exchange. While this in large part is still true today, there has been movement towards more of a national market system with automated quotations and a consolidated tape reflecting all transactions and volume whether or not the transactions are made on the exchange floor.

HAZEN, *supra* note 150, § 10.1, at 378.

303. *Id.*

304. "The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. § 78c(a)(4) (1994).

305.

The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

Id. § 78c(a)(5).

306. *Id.* §§ 78a-11.

307. The Exchange Act provides:

It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection

authority to regulate broker-dealers,³⁰⁸ but the bulk of the day-to-day regulation of broker-dealers is generally delegated to SROs by the SEC.³⁰⁹ The Exchange Act requires broker-dealers to register with, and submit to the rules of, an SRO as a condition of doing business.³¹⁰

The SROs that broker-dealers must join may be either "a securities association registered pursuant to [the Exchange Act]"³¹¹ or "a national securities exchange,"³¹² which means an exchange registered pursuant to the Exchange Act.³¹³ There is only one securities association registered under the Exchange Act, the National Association of Securities Dealers ("NASD").³¹⁴ There are eight national securities exchanges.³¹⁵ The only other SRO, the Municipal Securities Rulemaking Board ("MSRB"), is for municipal securities dealers.³¹⁶

While the NASD in some ways resembles a private trade association and the securities exchanges originated as private institutions, both the NASD and the exchanges have lost much of their private character.³¹⁷

(b) of this section.

Id. § 780(a)(1). "Since it was assumed that the exchange would establish careful high standards for entry and continuance in membership, [this provision] excluded from the registration requirements brokers who confine[] their activities solely to a registered securities exchange." JAFFE, *supra* note 301, § 2.04, at 19-20. And there are other exemptions from registration. See HAZEN, *supra* note 150, § 10.2.2, at 399-404.

308. See 15 U.S.C. § 780.

309. See HAZEN, *supra* note 150, § 10.2, at 380.

310. The Exchange Act provides:

It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or [sic] commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 780-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

15 U.S.C. § 780(b)(8) (footnote omitted). *But see* 17 C.F.R. 240.15b9-1 (1995) (creating exemptions from registration requirements of the Exchange Act).

311. 15 U.S.C. § 780(b)(8).

312. *Id.*

313. The rules governing national securities exchanges can be found in 15 U.S.C. § 78f.

314. HAZEN, *supra* note 150, § 10.2.

315. The eight include the three major securities exchanges (the New York Stock Exchange, American Stock Exchange, and Chicago Board Options Exchange) and five smaller exchanges (the Boston Stock Exchange, Cincinnati Stock Exchange, Midwest Stock Exchange, the Pacific Stock Exchange, and the Philadelphia Stock Exchange). See *id.*

316. For a discussion of municipal securities dealers and their interaction with the MSRB, see *id.* § 10.5.

317. The Supreme Court has stated:

The limited-entry feature of exchanges led historically to their being treated by the courts as private clubs, and to their being given great latitude by the courts in disciplining errant members. As exchanges became a more and more important element in our Nation's

The SROs now have many of the characteristics of government agencies. An SRO may not come into existence without SEC approval,³¹⁸ and the SEC has oversight responsibility with respect to the SROs.³¹⁹ The SRCs must file their proposed rule changes with the SEC,³²⁰ and no SRO rule change can take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act.³²¹ The SEC even has the power to "abrogate, add to, and delete from . . . the rules of a[n] [SRO]."³²² In fact, many changes in the SRO rules governing arbitration have been made "largely in response to" SEC initiatives.³²³

The rules of each SRO require that certain employees of each of its members register with the SRO.³²⁴ I use the term "securities employees" to refer to those employees required by SRO rules to register with the SRO.³²⁵ The SRO rules require securities employees to sign an arbitration agreement in order to register with the SRO.³²⁶

economic and financial system, however, the private-club analogy became increasingly inapposite and the ungoverned self-regulation became more and more obviously inadequate, with acceleratingly grave consequences. This impotency ultimately led to the enactment of the 1934 Act.

Thus arose the federally mandated duty of self-policing by exchanges. Instead of giving the Commission the power to curb specific instances of abuse, the Act placed in the exchanges a duty to register with the Commission, and decreed that registration could not be granted unless the exchange submitted copies of its rules, and unless such rules were "just and adequate to insure fair dealing and to protect investors."

Silver v. New York Stock Exch., 373 U.S. 341, 350-52 (1963) (citations omitted).

318. See 15 U.S.C. § 78f (governing registration as a national securities exchange); *id.* § 78o-3 (governing NASD).

319. See *id.* § 78o-3 (with respect to the NASD); *id.* § 78s (with respect to SROs).

320. See *id.* § 78s(b)(1).

321. See *id.* § 78s(b)(2).

322. See *id.* § 78s(c).

323. See 43 SEC Docket (CCH) 1250, 1251 (May 10, 1989).

324. See *supra* note 151.

325. See *supra* note 152 and accompanying text.

326. See, e.g., NYSE Rules, *supra* note 151, ¶ 345.12 (requiring signature of securities employees of Form U-4 which provides for arbitration of employment disputes); see also AMEX Rules, *supra* note 151, ¶ 9391 cm. .08.

The arbitration clause may appear on the document signed by the employee, see *id.*, or said document may provide that the employee shall abide by the rules of the SRO with which he or she is registering. The SRO rules, in turn, require arbitration of disputes between securities employees and their employers. See NYSE Rules, *supra* note 151, ¶ 2347.

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration

2. SROs as Private Associations or Occupational Licensors

My characterization of the securities laws as an occupational licensing scheme would be wrong if, when an SRO requires that member firms hire only employees who agree to arbitrate, it was engaged in private, rather than government action.³²⁷ If the SRO requirement was private action, then it might violate antitrust laws,³²⁸ but it would not be an occupational licensing scheme.³²⁹ On the other hand, if the SRO requirement is government action then the securities laws are, as this Article contends, an occupational licensing scheme. The federal government has delegated governmental powers, including the power to license entry into an occupation, to quasi-private organizations, the SROs.³³⁰

Courts have addressed the issue of whether SROs are government or private entities.³³¹ While some courts have broadly declared that

procedure prescribed elsewhere in these rules.

Id. With regards to the NYSE, present Form U-4, the document signed by securities employees, was previously Form RE-1. See *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 100 Cal. Rptr. 791 (Ct. App. 1972), *aff'd*, 414 U.S. 117 (1973). Form U-4's wording has changed over the years but invariably provides for arbitration of employment disputes. The Form U-4 at issue in *Moore v. Interacciones Global, Inc.*, No. 94 Civ. 4789(RWS), 1995 WL 33650 (S.D.N.Y. Jan. 27, 1995), provided:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 [in this ca. e. National Association of Securities Dealers] as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

Id. at *1. Form U-4 currently provides that the employee "agree[s] to abide by the Statute(s), Constitution(s), Rules and By-Laws as any of the foregoing are amended from time to time of the agency, jurisdiction or organization with or to which I am filing or submitting this application." 3 N.Y.S.E. Guide (CCH) ¶ 7110, at 7089-4 (1996).

327. See *infra* notes 331-51 and accompanying text.

328. See *supra* note 292 and accompanying text.

329. See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENTARY 329, 334-35 (1993) (listing "licensing of occupations" among "[e]xplicit government actions").

330. This delegation of licensing power should be familiar to those involved in legal education. Forty-three states have delegated the power to license law schools to a nominally private trade association, the American Bar Association. See Leonard J. Nelson, III, *Religious Discrimination, Christian Mission, and Legal Education: The Implications of the Oral Roberts University Accreditation Controversy*, 15 CUMB. L. REV. 663, 678 (1985).

331. See *infra* notes 332-51 and accompanying text. Courts have done so when presented with the argument that SRO action violates the United States Constitution. The Constitution restricts government, but not private, action. The only exception is the Thirteenth Amendment's prohibition against slavery. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688 (2d ed. 1988). Under this "state action" doctrine, therefore, SRO action can violate the Constitution only if that

SROs are "government" or "private," most courts have more carefully stated that SROs are "government" or "private" *with respect to the particular SRO action at issue in the case*.³³² For instance, courts have held that SROs are government actors when delisting a corporation's stock,³³³ but not when arbitrating disputes.³³⁴ The question here is whether SROs are engaged in private or government action when requiring member firms to hire only employees who agree to arbitrate.

No reported cases discuss this question. In fact, none discuss whether SROs are private or government actors when establishing any of their requirements for becoming a securities employee. There are,

action is fairly attributable to a government, but not otherwise. See Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 596-633 (1991) (categorizing distinct state action theories by which each of the following types of conduct may be considered state action: (1) overt actions of state employees, officers, and agencies; (2) creation and enforcement of substantive civil law; (3) state inaction: denial of judicial relief or other state intervention; (4) governmentally regulated private conduct; (5) joint participation between state officials and private entities; and (6) private entities assuming government functions or powers).

332. "[T]he exact status of the NASD is unsettled: it is granted governmental-type powers for some functions, while maintaining its private nature for others." *Ross v. Bolton*, 106 F.R.D. 315, 316 (S.D.N.Y. 1984) (citations omitted). In *Ross*, the defendants sought to compel the NASD, which was not a party to the case, to comply with a subpoena to produce transcripts of testimony given before it by individuals who were also not parties to the case. See *id.* at 315. The NASD argued "that its law enforcement duties [made] it a quasi-governmental agency and that, as a result, its investigative files are entitled to the same privilege against discovery as that afforded to a governmental investigative body." *Id.* at 315-16. The court denied the NASD a privilege from discovery of information NASD obtained from its members but left open the possibility that the NASD would have the privilege with respect to information obtained from the SEC or other government agency. See *id.* at 316 n.1.

333. In *Intercontinental Industries v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), the Fifth Circuit analyzed the procedure followed by the American Stock Exchange ("AMEX") and the SEC in delisting a corporation's stock from AMEX. The delisted corporation claimed that it was denied a full and fair hearing on the delisting motion with such denial constituting a violation of the Due Process Clause of the Fifth Amendment. See *id.* at 940. The Fifth Circuit rejected "the Exchange's position that constitutional due process is not required since the Exchange is not a governmental agency." *Id.* at 941. The court held that "[t]he intimate involvement of the Exchange with the Securities and Exchange Commission brings it within the purview of the Fifth Amendment controls over governmental due process." *Id.*; see also *Villani v. New York Stock Exch., Inc.*, 348 F. Supp. 1185, 1188 n.1 (S.D.N.Y. 1972) (recognizing that the law is well-settled that the Fifth Amendment due process requirements apply to hearings conducted by the Exchange), *order modified on other grounds*, 367 F. Supp. 1124 (S.D.N.Y.), *aff'd sub nom. Sloan v. New York Stock Exch., Inc.*, 489 F.2d 1 (2d Cir. 1973); *Crimmins v. American Stock Exch., Inc.*, 346 F. Supp. 1256, 1259 (S.D.N.Y. 1972) (holding that disciplinary proceedings by the Exchange are private in character and are therefore subject to due process requirements).

334. See *Glenmon v. Dean Witter Reynolds, Inc.*, No. 3-93-0847, 1994 WL 757709, at *13-14 (M.D. Tenn. Dec. 15, 1994) (holding that NASD arbitrators' award of punitive damages was not government action), *aff'd*, 83 F.3d 132 (6th Cir. 1996); *First Heritage Corp. v. National Ass'n of Sec. Dealers*, 785 F. Supp. 1250, 1251 (E.D. Mich. 1992) (holding that NASD arbitrators' award of fees to defray cost of arbitration proceeding was not government action).

however, a few cases discussing whether SROs are private or government actors when investigating whether securities employees have violated federal securities law and/or SRO rules.³³⁵ If the SRO concludes that such a violation has occurred, the SRO may revoke or suspend the violator's status as a securities employee or condition that status on payment of a fine (or some other action) by the violator.³³⁶ The few cases on point wrongly hold that SROs are private actors when engaged in disciplinary investigations of securities employees.³³⁷ The seminal

335. "The Exchange Act assigned the NASD and the other SROs the responsibility for conducting investigations and commencing disciplinary proceedings against member firms and their associated member representatives relating to compliance with the federal securities laws and regulations." *Datek Sec. Corp. v. National Ass'n of Sec. Dealers*, 875 F. Supp. 230, 232 (S.D.N.Y. 1995) (citing 15 U.S.C. § 78o-3(b)(7) (1994)). "The Exchange Act expressly provides that the SEC and the United States Courts of Appeals have the discretion to stay any sanctions imposed by the NASD pending review [by the SEC and Courts of Appeals]." *Id.* (citing 15 U.S.C. §§ 78s(d), 78y(c)).

336. Such SRO disciplinary orders "are subject to a full and independent review by the SEC as to the facts as well as the law." *Gold v. SEC*, 48 F.3d 987, 990 (7th Cir. 1995).

337. The most recent such case is *Datek Securities Corp. v. National Ass'n of Securities Dealers*, 875 F. Supp. 230 (S.D.N.Y. 1995). In *Datek*, the NASD had filed an administrative complaint against Datek Securities Corporation and certain of its present and former employees. *See id.* at 231-32. Datek's employees were associated members of the NASD. *See id.* at 232. Datek and its employees sued the NASD seeking injunctive relief restraining the NASD's administrative proceedings against them. *See id.* Datek and its employees argued, among other things, "that the NASD's disciplinary proceeding violates the Due Process Clause [of the Fifth Amendment]." *Id.* at 233. In rejecting this argument, Judge Motley held that "the NASD is a private corporation not subject to the strictures of the Constitution." *Id.*

For the proposition that "the NASD is a private, rather than a governmental, actor," Judge Motley cites four cases, *id.* at 234, only one of which supports this proposition. That one case is *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975), discussed in the text below. *See infra* text accompanying notes 338-46. The other three include another case presided over by Judge Motley, *Bruan, Gordon & Co. v. Hellmers*, 502 F. Supp. 897 (S.D.N.Y. 1980). Interestingly, the court in *Bruan* held that the NASD was a government actor. *See id.* at 901-02. *Bruan* involved a suit by a broker-dealer against the NASD and other defendants. *See id.* at 900. The broker-dealer alleged that the defendants engaged in an illegal conspiracy against the company and that the defendants "wrongfully caused NASD to . . . institute formal disciplinary proceedings against [the broker-dealer]." *Id.* The defendants removed the case to federal court, *see id.*, under the power of a federal statute which provided that an action may be removed to federal court if it is against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color [of law]." 28 U.S.C. § 1442(a)(1) (1994). The court held that "[w]ith respect to disciplinary proceedings, NASD should be considered as a 'person' acting under the SEC." 502 F. Supp. at 902. Because *Datek* addressed government action under the Fifth Amendment and *Bruan* addressed it under a removal statute, a distinction is available to reconcile the two cases. That distinction, however, may not explain the differing results in the two cases. Judge Motley switched from the correct view to the incorrect one.

The other two inapposite cases cited in *Datek* are a case applying the exhaustion doctrine to exhaustion of NASD remedies, *McLaughlin, Piven, Vogel, Inc. v. National Ass'n of Securities Dealers*, 733 F. Supp. 694, 696-97 (S.D.N.Y. 1990), and a case not addressing the government

case is *United States v. Solomon*.³³⁸

Solomon involved a broker-dealer who was a member of the NYSE.³³⁹ When the NYSE learned that its rules may have been violated by the broker-dealer, the NYSE summoned an officer of the broker-dealer, Solomon, to appear before the NYSE and testify about the matter.³⁴⁰ Solomon did so. He was subsequently convicted in criminal court for violating SEC regulations.³⁴¹ On appeal, he argued that his statements to the NYSE were inadmissible in his criminal trial because of the Fifth Amendment privilege against self-incrimination.³⁴² Writing for the Second Circuit, Judge Friendly explained that the Self-Incrimination Clause of the Fifth Amendment restricts government, but not private, action.³⁴³ He then rejected Solomon's contention that "interrogation by NYSE must be deemed the equivalent of interrogation by the United States because the Exchange has become in effect the arm of the Government in administering portions of the Securities Exchange Act."³⁴⁴ In short, *Solomon* held that the NYSE was a private, not government, actor when interrogating Solomon. Judge Friendly wrote that "[i]t is not enough to create an agency relationship [between the SEC and the NYSE] that Solomon's conduct violated both a rule of NYSE, thereby subjecting him to disciplinary action by that body, and federal law, with consequent liability to civil and criminal enforcement proceedings by the Government."³⁴⁵ This reasoning was adopted by Judge Posner nine years later in *Bernstein v. Lind-Waldock & Co.*³⁴⁶

action issue at all, *Maschler v. National Ass'n of Securities Dealers*, 827 F. Supp. 131 (E.D.N.Y. 1993). See *Datek*, 875 F. Supp. at 234.

Datek and *Solomon* virtually exhaust the case law on whether SROs are governmental or private entities when deciding what conduct results in loss of securities employee status. See *Sloan v. New York Stock Exch., Inc.*, 489 F.2d 1, 4 (2d Cir. 1973) ("[W]hen [plaintiffs] became members of the Exchange they consented, quite knowingly and intelligently to [the Exchange's] disciplinary procedures . . .").

338. 509 F.2d 863 (2d Cir. 1975).

339. See *id.* at 864.

340. See *id.* at 865. The NYSE Constitution provided that, if Solomon failed to testify, he would lose his license. See 2 N.Y.S.E. Guide (CCH) ¶ 1405 (1994).

341. See *Solomon*, 509 F.2d at 865. The regulations under which Solomon was indicted are 17 C.F.R. §§ 240.17a-3, -5 (1995).

342. See *Solomon*, 509 F.2d at 866. "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

343. See *Solomon*, 509 F.2d at 868.

344. *Id.*

345. *Id.* at 869.

346. 738 F.2d 179 (7th Cir. 1984). *Bernstein* sued the Chicago Mercantile Exchange alleging, among other things, that the Exchange's action of auctioning his seat on the Exchange violated his Fifth Amendment right to due process. Judge Posner responded:

Certainly, Judges Friendly and Posner are correct that a private trade association is not an agency of government merely because its own rules prohibit some of the same conduct the government prohibits. But there is far more of a connection between the SEC and the SROs than that. As stated above, the SROs control who may lawfully be a securities employee. Even if an employer wants to hire an applicant as a securities employee, and even if the applicant wants to work for the employer as a securities employee, the SROs can invoke the power of government (court orders) to stop it. The employer and applicant do not have the option of achieving their goal by "opting out" of the SROs. By law, the employer is required to maintain membership in an SRO to remain in the securities business. Therefore, becoming a securities employee is not just a matter of contract with the employer. It is also a matter of securing approval from an SRO. That is the essence of occupational licensing, a governmental power.³⁴⁷ No private trade association could invoke the

The argument for treating a securities or commodity exchange as an arm of the federal government is that federal law imposes on the exchange a duty of policing its members that makes the exchange in effect a law-enforcement agent of the government. But as Judge Friendly pointed out in the *Solomon* case, the agency analogy is upside down. The exchange is the principal rather than the agent; the purpose of the federal law is to strengthen the power and responsibility of the exchange in performing a policing function that preexisted [any] federal regulation.

Id. at 186 (citations omitted). Judge Posner misstates the argument for treating an exchange, or other SROs, as an arm of the federal government. The argument is not that law "imposes on the [SRO] a duty of policing its members." *Id.* The argument is that law requires membership in an SRO to get an occupational license.

347. The received wisdom among legal scholars is that the government/private distinction is merely a consequence of positive law, rather than a distinction that logically precedes positive law.

The doctrine of state action is an attempt to maintain a public/private distinction by attributing some conduct to the state and some to private actors. The doctrine seems, at least, less secure under constitutional positivism than under a natural law regime. The positivist cannot invoke the inherently private realm entailed by the very concept of natural rights. More fundamentally, since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every "private" action not prohibited by law.

Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1301 (1982); see also Kay, *supra* note 329, at 334 ("The overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private actions.")

This Article simply accepts the "government" and "private" categories as they are defined by current positive law. Occupational licensing is a government power. See Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 262-63 (1956); Henry J. Friendly, *Some Kind of a Hearing*, 123 U. PA. L. REV. 1267, 1297 (1975); Kay, *supra* note 329, at 334 (listing "licensing of occupations" among "[e]xplicit government actions"); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 656, 667 (1986) (licensing of racehorse

power of government to stop an employer from hiring a job applicant.³⁴⁸ Only the government can bar entry into an occupation.

Prior to the Exchange Act, the exchanges were private associations whose rules had the same legal effect as other contracts. The exchanges could not invoke government power to bar entry into an occupation. Those who wished to engage in the securities business had a right to do so with or without membership on an exchange. Those who did not become members of an exchange could hire securities employees without regard for exchange rules.

The Exchange Act changed that. Its system of "self-regulation" by the securities industry rests on a delegation of governmental power from the SEC to the exchanges and other SROs.³⁴⁹ The SROs have been

owners, trainers, and jockeys by The Jockey Club and licensing lawyers by the American Bar Association is government action); David B. Dellenbach, Note, *Barnard v. Utah State Bar and Public Access to Private Entities Which Carry Out Governmental Functions: Is This Bar a Private Club?*, 1992 UTAH L. REV. 1021, 1025 ("Bar disciplinary activities and admission processes are arguably public functions because state supreme courts delegate these functions to state bars."); Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 159-62 (1993) (discussing occupational licensing by state governments and stating that "[l]icensing decisions must meet the mandates of the Due Process Clause").

The American Bar Association exercises government power when it licenses (accredits) law schools. See Nelson, *supra* note 330, at 678 (citing *Oral Roberts Univ. v. American Bar Ass'n*, No. 81-C-3171 (N.D. Ill. July 17, 1981)). With respect to the agencies that accredit colleges, "[i]t seems likely that a court would find no 'state action' . . . simply based on the fact that accreditation is linked to the receipt of federal funds or government regulation. However, when accreditation is a substitute for state licensing . . . it is much more likely that 'state action' will be found." Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61, 74 (1994).

With regards to the procedures and actions of the National Collegiate Athletic Association ("NCAA"), contrary to Betty Chang, Note, *Coercion Theory and the State Action Doctrines Applied in NCAA v. Tarkanian and NCAA v. Miller*, 22 J.C. & U.L. 133 (1995), the NCAA does not exercise government power. It is not an occupational licensor because no law requires colleges to join the NCAA in order to have athletic programs.

348. A private trade association could invoke the power of government to enforce, as a contract, its own rules, including rules relating to hiring. But this does not stop an employer from hiring an applicant. It only makes the employer choose between membership in the trade association and hiring the applicant.

349. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963) (discussing "the type of partnership between government and private enterprise that marks the design of the Securities Exchange Act of 1934"); *id.* at 371 (Stewart, J., dissenting) (stating that "[t]he purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power").

"[I]n important respects, the self-regulatory body is an official arm or delegate of governmental power." SECURITIES AND EXCHANGE COMM'N, REPORT OF THE SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. NO. 95, (pt. 4) at 723 (1st Sess. 1963). "In effect, both Congress and the SEC believed that the NASD must exercise some delegated governmental power in order to perform its statutory responsibility of assisting in the enforcement of the federal securities

“delegated governmental power in order to enforce . . . compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements.”³⁵⁰ By requiring broker-dealers to join an SRO, the Exchange Act gave SROs the power to control entry into an occupation. Exercise of that power is government, not private, action.³⁵¹

3. The Wrong Baseline

For the reasons just discussed, securities employment arbitration is fundamentally different from other employment arbitration. Employment arbitration agreements in the securities industry are formed against a very different baseline of rights than the one underlying other employment arbitration agreements. Other employment arbitration agreements are formed against a baseline in which the government leaves arbitration, like most terms of employment, a matter of private contract.³⁵² In contrast,

laws . . .” Vincent L. Briccetti, Note, *Governmental Action and the National Association of Securities Dealers*, 47 *FORDHAM L. REV.* 585, 595 (1979).

The NASD itself states that it is exercising government powers in its role of licensing securities employees. See National Association of Securities Dealers, Notices to Members No. 94-95, available in 1994 NASD LEXIS 52, at *34-35 (“Federal law requires broker/dealers to be members of SRO’s, and as a result, to be subject to the SRO’s rules of arbitration . . . [The Federal Government] cannot compel membership in the NASD unless the NASD provides [due process] guarantees.”).

350. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Ass’n of Sec. Dealers*, 616 F.2d 1363, 1367 (5th Cir. 1980) (quoting S. REP. NO. 94-75, at 23 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 201). The Court in *Merrill Lynch* held that the doctrine requiring litigants to exhaust all administrative remedies before seeking judicial relief requires exhaustion of NASD remedies. *Id.* at 1370; accord *Touche Ross & Co. v. SEC*, 609 F.2d 570, 574 (2d Cir. 1979); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695-96 (3d Cir. 1979); *Bruan, Gordon & Co. v. Hellmers*, 502 F. Supp. 897, 905-06 (S.D.N.Y. 1980).

351. While *Solomon* and *Datek* hold that SROs are private actors when disciplining their members, the issue still seems to be open. In the context of a NYSE investigation of a securities employee, the Seventh Circuit was recently “faced with the question of whether the NYSE . . . is a governmental actor whose jurisdictional rules and enforcement actions are subject to due process analysis.” *Gold v. SEC*, 48 F.3d 987, 991 (7th Cir. 1995). Here, *Gold* argued that

he had a Fifth Amendment due process right to actual notice, rather than constructive notice, that the NYSE was exercising jurisdiction over him to investigate his conduct while employed by a member firm. *Gold* concede[d] that the NYSE followed its own rules in providing notice of its investigation, but he asserts that the constructive notice allowed by Rule 477 is constitutionally inadequate . . .

Id. at 990-91 (footnote omitted). While the Seventh Circuit did not decide this issue because it was waived on appeal, *id.* at 991, the fact that the court viewed it as an undecided issue may be significant. See also Briccetti, *supra* note 349, at 602 (concluding that “the NASD’s investigative and disciplinary activities meet the constitutional tests for governmental action”).

352. See, e.g., *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985).

the baseline underlying securities employment arbitration requires all broker-dealers and their employees to arbitrate employment disputes.³⁵³ I advocate repeal of that requirement.³⁵⁴

I do so because the freedom "to engage in [one] of the common occupations of life"³⁵⁵ should be conditioned on consent to arbitrate. I am a skeptic of occupational licensing in general, on the ground that it typically does more harm than good to consumers of the goods and services produced by those licensed.³⁵⁶ I am particularly skeptical of claims that investors benefit from a requirement that securities employees agree to arbitration in order to get an occupational license.³⁵⁷ Rather, I suspect that many broker-dealers thought they would benefit from the arbitration requirement and they persuaded the SROs to adopt it.³⁵⁸

Another reason to advocate repeal of the securities law requirement that all broker-dealers and their employees arbitrate employment disputes is that the requirement poses a threat to employment arbitration *outside* the securities industry. As stated above, most individual employment

353. See *supra* Part IV.C.1. See generally Dunphy, *supra* note 99 (discussing mandatory arbitration in the securities industry).

354. There is an attractive alternative to repealing the SRO requirement that member firms hire only those who agree to arbitrate. That is stripping the SROs of their governmental powers, including the occupational-licensing power to decide who may be a securities employee. Restoring the SROs to their former status as private associations and leaving government powers in the hands of the SEC would, however, require enormous changes to the securities laws.

355. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

356. See generally S. DAVID YOUNG, THE RULE OF EXPERTS (1987) (examining occupational licensing and its effect on consumers); Robert Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott"*, 39 VAND. L. REV. 1507, 1576-78 (1986) (summarizing economic arguments against occupational licensing and comparing occupational licensing with private agreements among members of an industry).

357. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), Merrill Lynch argued that the NYSE rule requiring arbitration of employment disputes "falls under the Exchange's mandate to protect the investing public and to insure just and equitable trade practices." *Id.* at 134. The Court summarized Merrill Lynch's contention as follows:

[C]onfidence in the industry and in the integrity and ability of its members has been jeopardized by failures of major brokerage houses with consequent substantial losses to the public. Investor confidence would be further undermined, it is said, by protracted litigation between member firms and their employees over disputes that arise out of employment relationships; public airing of every claim of this kind will erode confidence in the market; and arbitration, on the other hand, will internalize these disputes and provide an expeditious and economical method of resolution by arbitrators familiar with industry customs and practices.

Id. As the Court stated in *Merrill Lynch*, "the relationship between compulsory employer-employee arbitration and fair dealing and investor protection is 'extremely attenuated and peripheral, if it exists at all.'" *Id.* at 135 (citing Brief for the United States at 9).

358. That the SROs would act in the interest of the broker-dealers is not surprising because the membership of the SROs consists of broker-dealers.

arbitration cases to date have arisen from the securities industry, and these cases, particularly *Gilmer*, have generated strong opposition to the enforcement of pre-dispute employment arbitration agreements.³⁵⁹ There is a real possibility that, through legislative, administrative, or judicial action, pre-dispute employment arbitration agreements will become unenforceable.³⁶⁰ For the reasons given in Part III, that would be a substantial restriction on freedom of contract, i.e., the freedom to determine one's own duties through a process of voluntary consent. If this unfortunate outcome occurs, it may be because of a failure to distinguish between individual employment arbitration in and out of the securities industry.

Outside of the securities industry, if Employer makes arbitration a non-negotiable condition of employment, Applicant can go to other employers in the industry. One of them may offer Applicant a job without an arbitration clause. In such an industry, diversity and the freedom to choose among options reigns. Even if all the employers in the industry make arbitration a non-negotiable term, that should not be troubling. The reason is that if there is a competitive labor market in the industry, employees are receiving higher wages (or more of something else they value) than they would in the absence of the arbitration clause.³⁶¹ And most or all of the employees prefer the higher

359. See *supra* Part II.C.

360. See *supra* Part III.A.

361. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

The sinister explanation [for standardized contracts] is that the seller refuses to dicker separately with each purchaser because the buyer has no choice but to accept his terms. This assumes an absence of competition. If one seller offers unattractive terms, a competing seller, wanting sales for himself, will offer more attractive terms. The process will continue until the terms are optimal. All the firms in the industry may find it economical to use standard contracts and refuse to negotiate with purchasers. But what is important is not whether there is haggling in every transaction but whether competition forces sellers to incorporate in their standard contracts terms that protect the purchasers.

Id. at 114. What Posner says about sellers applies with equal force to employers. If one employer offers terms, such as an arbitration clause, that are unattractive to prospective employees, a competing employer acting in its own interest will offer more attractive terms. The process will continue until the terms are optimal. What is widely recognized about competition's effect on price applies to other contract terms as well.

Competition's effect on non-price terms may, however, be less than its effect on price. For example, an employer might present the employee with a form employment contract containing a number of terms including price/wages and arbitration. The employee may not know about the arbitration clause unless she reads and understands the contract. In contrast, the employee can likely learn how much she will be paid without reading and understanding the contract. In other words, the cost of acquiring and processing information on one contract term (the arbitration clause) is greater than for another contract term (wages). See Sternlight, *supra* note 103, at 687-88; see generally

wage/arbitration contract to the lower wage/no arbitration contract because if they did not, an employer would see the opportunity to attract employees by offering the latter terms.³⁶² So outside the securities industry, government has left arbitration, like most other terms of employment, a matter of private contract.

In the securities industry, by contrast Applicant cannot find any employer who might hire her without an arbitration clause. Even if an employer wished to, it could not. It would be a violation of the Exchange Act to do that and continue to operate as a broker-dealer.³⁶³ Thus, Applicant consents to arbitration in a circumstance which many feel gives her no other choice. That feeling, I believe, motivates many of the calls to make such agreements unenforceable.³⁶⁴ The commentators advocating this say that such agreements are coerced, rather than voluntary.³⁶⁵ This is wrong because the distinction between voluntariness and coercion turns on the baseline of rights specified by non-contract law.³⁶⁶ And, with respect to the securities industry, that baseline does not give Applicant and Employer the right to contract for an agreement without an arbitration clause.³⁶⁷ That baseline is the problem.³⁶⁸

Some will go further and argue that the baselines underlying all employment arbitration, in or out of the securities industry, should be changed. They could be changed to make the right to litigate employment disputes an inalienable right. However, that would make settlement agreements of employment disputes unenforceable. To avoid that result, some might argue that the right to litigate employment disputes should be inalienable until the dispute arises, at which time the right should be alienable. That is the argument many commentators are really making when they say arbitration arising out of pre-dispute employment

Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 484-85 (1974). This information concern is addressed somewhat by the doctrines of mutual assent and procedural unconscionability. See *supra* notes 139-83, 224-27 and accompanying text.

362. See POSNER, *supra* note 361, at 114; R. H. Coase, *The Choice of the Institutional Framework: A Comment*, 17 J.L. & ECON. 493, 494-95 (1974).

363. See *supra* Part IV.C.1.

364. See *supra* notes 102-12 and accompanying text.

365. See *supra* notes 102-04.

366. See *supra* Part IV.A.

367. See *supra* Part IV.C.1.

368. The problem is not that arbitration law fails to ensure that arbitration is voluntary. Arbitration law is, with the exception of the separability doctrine, well-suited to ensure voluntary consent. See *supra* Part III. The problem is the baseline underlying that consent in the industry that has generated most of the employment arbitration law. It is that baseline that should be changed.

agreements is coerced but arbitration arising out of post-dispute arbitration agreements is voluntary. They are arguing that the right to litigate employment claims is an important one and employees often do not realize how important it is until a dispute arises.³⁶⁹ Therefore, employees should not be free to alienate this right by entering into a pre-dispute arbitration agreement, even if the employee voluntarily consents to it.

This argument must be made to Congress, not the courts, unless the Supreme Court changes its interpretation of the FAA. Without such a change, this argument will fail in court because the FAA, as the Supreme Court has repeatedly interpreted it, requires courts "to place [arbitration] agreements 'upon the same footing as other contracts.'"³⁷⁰ The argument that the right to litigate should be less alienable than other rights defies this requirement.³⁷¹

V. CONCLUSION

Virtually everyone agrees that employment disputes should be resolved in arbitration only if the parties have voluntarily consented to do so.³⁷² Contrary to what many commentators, legislators, and agencies say, arbitration arising out of pre-dispute arbitration agreements can be based on voluntary consent. Ensuring that it is requires courts to apply

369. See, e.g., Sander & Fleming, *supra* note 103, at 15 (Congress should enact "protection against uninformed pre-dispute waivers of judicial remedies."). This argument is nicely made by Sarah Rudolph Cole:

One-shot players, such as employees, improperly value the inclusion of an arbitration agreement in their employment agreement. Employees suffer from judgmental bias as a result of their personal experiences. That is, they systematically ignore or deemphasize the likelihood that a low probability event will occur because the event has never affected them. In the employment context, this judgmental bias causes employees to misapprehend the risk that they will engage in litigation with their employer. This informational problem leads employees to demand lower wages and fewer benefits than they might if they were fully cognizant of the risks present in the proposed arbitral agreement.

Cole, *supra* note 18, at 453 (citing Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 465 (Daniel Kahneman and Amos Tversky eds., 1982)). This is an argument against contract enforcement, not only in the context of individual employment arbitration agreements, but in all contexts involving parties who "misapprehend the risk" that a pertinent event will occur. In short, it is an argument that freedom of contract should be confined to contexts in which both parties have adequate (however defined) information.

370. *Volk Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting H.R. REP. NO. 68-96, at 2 (1924)).

371. See *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995).

372. See *supra* notes 102-12.

the contract law doctrines of mutual assent and duress to arbitration agreements in the same manner courts apply them to other contracts.³⁷³ This, in turn, requires repeal of the separability doctrine. It does not, however, require any other change in the law.

In the absence of the separability doctrine, an employee resisting arbitration on the ground that she did not voluntarily consent to it would be in the same position as any party resisting judicial enforcement of any contract. The employee could make arguments based on the contract law doctrines that operate to ensure that contract law enforces only duties assumed through voluntary consent. If the court is persuaded by these arguments, the employee will have no duty to arbitrate. If, on the other hand, the court is unpersuaded by such arguments, the employee will have a duty to arbitrate. That duty, however, like all those enforced by contract law, will have been voluntarily assumed.

Overruling *Prima Paint's* separability doctrine is both a necessary and sufficient condition to making the law well-suited to ensure that arbitration occurs only through voluntary consent. Ensuring that, however, does not ensure much. The distinction between voluntarily-assumed duties and coercively-assumed duties presupposes a baseline of rights established by non-contract law prior to the assumption of the duty in question.³⁷⁴ Whether an assumption of a duty is voluntary or coerced depends on the content of the baseline.³⁷⁵ The baseline underlying securities employment arbitration compels the conclusion that such arbitration in the securities industry is often voluntary. That conclusion should lead us to change the particular baseline in the securities laws. It should not mislead us into changing the branch of contract law known as arbitration law that is, with the exception of the separability doctrine, well-suited to ensure that disputes are resolved by arbitration only when the parties have voluntarily consented to do so.

373. See *supra* Part III.B.1-2.

374. See *supra* Part IV.A.

375. See *supra* Part IV.A.