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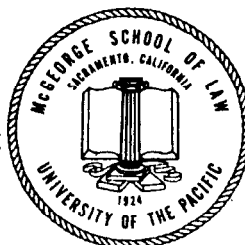
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Consumer Arbitration As Exceptional Consumer Law (With A  
Contractualist Reply to Carrington & Haagen)

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# Consumer Arbitration As Exceptional Consumer Law (With A Contractualist Reply To Carrington & Haagen)

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## INTRODUCTION

The United States Supreme Court has largely adopted the contractual approach to arbitration law.<sup>1</sup> This approach rests on the premise that arbitration law is a part of contract law so courts must enforce agreements to arbitrate unless contract law provides a ground for denying enforcement.<sup>2</sup> While the contractual approach to arbitration law has prevailed in the courts, it has many critics in the academy.<sup>3</sup> These critics' arguments, although made in the context of arbitration, sweep far

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1. See *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652 (1996); see also Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 137 n.275 (1996) [hereinafter *Employment Arbitration*] (citing cases).

2. I have articulated and defended the contractual approach to arbitration law in three previous articles: Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) [hereinafter *Arbitration & Unconscionability*]; *Employment Arbitration*, supra note 1, at 83; Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529 (1994).

3. A single case implementing the contractual approach, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), has generated a storm of criticism. See Ware, *Employment Arbitration*, supra note 1, at 104 nn.102-04 and accompanying text; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996). More comprehensive critiques of the contractual approach make arguments of two sorts. First, are those arguing that the public interest in certain disputes—typically those involving statutory claims—should preclude enforcement of agreements to arbitrate. See, e.g., Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157 (1989); *Employment Arbitration*, supra note 1, at 101-02 nn.92-93. Second, are those arguing that the contractual approach fails to protect “little guys” from those with “economic power.” See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996). For a sustained critique of the contractual approach, see TOM CARBONNEAU, *CASES AND MATERIALS ON COMMERCIAL ARBITRATION* ch. 6 (1997).

more broadly. They are arguments against allowing ordinary individuals to govern themselves by contract.

Ordinary individuals, now often called "consumers,"<sup>4</sup> do contract. They are, to some extent, governed by contract law. But the extent to which consumers are free to contract has shrunk dramatically this century. Much of the law now governing consumer transactions is anti-contract law.<sup>5</sup> The law governing consumer arbitration stands out as a noteworthy exception, an island of contract in a sea of anti-contract. This exceptional nature of consumer arbitration, I suggest, is the starting point for understanding debate about contemporary arbitration law. In short, debate about the contractual approach to arbitration law is best understood as part of a broader debate about the extent to which consumer law should be contract law.

The first Section of this Article will briefly summarize the contractual approach to arbitration law and criticism of that approach. It will defend the contractual approach from criticism by Paul Carrington. Section II will put consumer arbitration in the context of consumer law, generally. It will outline the spread of anti-contract law in consumer law and contrast it with the law governing consumer arbitration. The Article will conclude with a plea to keep anti-contract approaches out of arbitration law and, more broadly, to make contract the central principle throughout consumer law.

## I. THE CONTRACTUAL APPROACH AND ITS CRITICS

Over the last twenty years, the United States Supreme Court has drastically changed arbitration law. The changes have resulted in an arbitration law that is largely contractual. Many commentators describe these changes to arbitration law

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4. It might be preferable to use the term "consumer" to mean an individual who obtains goods and services for personal, family or household use. This would not, however, define the individuals that critics of the contractual approach are concerned about. For instance, critics of the contractual approach are concerned about employees and tenants of residential real estate. Also, critics of the contractual approach are probably not as concerned about billionaires as about people of ordinary means. Thus, I use the term "consumer" to mean ordinary individuals in whatever capacity: employee, tenant, buyer of goods, etc. This is consistent with the widespread use of the term "consumer bankruptcy" to describe individual bankruptcy. *See, e.g.*, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* pt. II (3d ed. 1996).

5. "Anti-contract" law comes in strong and mild forms. The strong form is explained at the start of Part II.A.1 and the mild form is explained at the start of Part II.B.1.a.

as the worst sort of judicial activism, Justices pursuing their policy preferences without regard for legislative intent or judicial precedent.<sup>6</sup> That may be true. The Court's arbitration decisions may be result-oriented, with the intended result being "conserv[ation] of scarce judicial resources."<sup>7</sup> I cannot, however, pretend to know the Justices' motivations. What I can do is defend their decisions. I have argued that, with one possible exception, the Court has faithfully applied the Federal Arbitration Act ("FAA"),<sup>8</sup> which itself explicitly enacted the contractual approach to arbitration law.<sup>9</sup> Whatever their motivations, the Justices are putting arbitration law right.

Whether or not the FAA compels the contractual approach to arbitration law, this approach has become the law of the land.<sup>10</sup> Arbitration cases are now being decided under the contractual approach. These decisions, in turn, are generating a storm of academic criticism.<sup>11</sup> Among the critics of the contractual approach to arbitration law is Paul Carrington. He and Paul Haagen recently published one of the most comprehensive, insightful and aggressive critiques of the contractual approach to arbitration law. That article, *Contract and Jurisdiction*,<sup>12</sup> deserves a reply.

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6. Carrington & Haagen, *supra* note 3, *passim*; IAN R. MACNEIL, AMERICAN ARBITRATION LAW chs. 10, 11 & 14 (1992) [hereinafter MACNEIL, AMERICAN ARBITRATION]; Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1383 (1996) [hereinafter Stempel, *Bootstrapping & Slouching*] ("arbitration zealots . . . including most of the Supreme Court" . . . "ride roughshod over individual rights and basic notions of fairness in the heat of pursuing a popular current goal.").

7. Carrington & Haagen, *supra* note 3, at 332. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 123.

8. 9 U.S.C.A. §§ 1-16 (1994). The one possible exception is the enormously important question of whether the FAA is a procedural statute governing only in federal court or substantive law governing in all courts and preempting inconsistent state law. Ian Macneil argues convincingly that the FAA was originally understood to be a procedural statute governing only in federal court. MACNEIL, AMERICAN ARBITRATION, *supra* note 6, chs. 9-11 & 14. So the debate is not about original understanding but whether the Supreme Court's changed interpretation of the FAA is proper in light of developments in the law after the FAA was enacted, namely *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). See Sternlight, *supra* note 3, at n.385; *Arbitration & Unconscionability*, *supra* note 2, at 1006-08.

9. See *Arbitration & Unconscionability*, *supra* note 2, at 1002-06.

10. See generally *Doctor's Assocs., Inc. v. Casarotto*, 116 S.Ct. 1652 (1996) (establishing the contractual approach).

11. See discussion *supra* note 3 and accompanying text (citing several critical analyses of the contractual approach to arbitration law). These results are also generating some criticism from politicians, particularly in the employment area. See *Employment Arbitration*, *supra* note 1, at nn.105-06 and accompanying text.

12. Carrington & Haagen, *supra* note 3, at 331.

A. *Pre-Dispute Arbitration Agreements*

Carrington and Haagen, like other critics of the contractual approach to arbitration law, focus on *pre-dispute* arbitration agreements.<sup>13</sup> A *pre-dispute* arbitration agreement is any contract containing a clause obligating the parties to arbitrate, rather than litigate, disputes arising out of or relating to the contract. In contrast, there has been little criticism of the contractual approach to *post-dispute* arbitration agreements, *i.e.*, contracts to arbitrate a particular dispute that has already arisen between the parties.

Their discomfort with enforcement of *pre-dispute* arbitration agreements makes Carrington and Haagen reactionaries; they sympathize with the way the law used to be. Prior to enactment of the FAA and other modern arbitration statutes in the 1920's, *pre-dispute* arbitration agreements were unenforceable.<sup>14</sup> Carrington and Haagen explain the refusal of pre-1920's courts to enforce *pre-dispute* arbitration agreements:

It was . . . perceived by at least some courts that the existence of genuine mutual assent was suspect when parties agreed to arbitrate a future dispute, and that a dispute resolution clause could be a trap for the unwary. As one court put it: "[b]y first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy." This view of commercial reality . . . led to the opinion that the best way to assure true assent to arbitration was to afford a party having promised to arbitrate a future dispute an opportunity to withdraw assent when a real dispute has arisen and the revoking party is at last likely to be attentive to the hazards of dispute resolution and well-advised.<sup>15</sup>

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13. See, e.g., Schwartz, *supra* note 7, at 116-19.

14. Prior to the 1920's, an agreement to arbitrate a future dispute was generally enforceable only by the remedy of nominal money damages, not by the remedy of specific enforcement. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 4.3.2.2 (1994) [hereinafter MACNEIL, FEDERAL ARBITRATION]. The lack of specific enforcement was crucial because the damages remedy was "largely ineffective." MACNEIL, AMERICAN ARBITRATION, *supra* note 6, at 20.

Alabama is one of a few states still precluding enforcement of *pre-dispute* arbitration agreements, although this state law is preempted by the FAA. *Allied Bruce Terminix Cos., Inc. v. Dobson*, 115 S.Ct. 834 (1995). Carrington & Haagen cite Alabama law as the model. "The most effective way to assure that the arbitration is fair to both parties is the traditional way that Alabama followed, making the arbitration clause revocable and thus renegotiable by the parties at a time when the dimensions of their dispute are known and both have consulted counsel." Carrington & Haagen, *supra* note 3, at 385.

15. Carrington & Haagen, *supra* note 3, at 340 (quoting *Parsons v. Ambos*, 48 S.E. 696 (Ga. 1904)).

Carrington and Haagen make at least two points here. First, is the concern about "genuine" mutual assent. When a consumer signs a form contract containing an arbitration clause, has the consumer "genuinely" assented to arbitration? No, is often the answer, suggest Carrington and Haagen. They contrast the pre-dispute scenario with *post*-dispute arbitration agreements, which typically are the product of "genuine" assent because parties forming such agreements are likely to be attentive to the hazards of dispute-resolution and likely to be well-advised.

As a generalization, it seems uncontroversial that those signing pre-dispute arbitration agreements tend to be less "attentive" to dispute-resolution than are those signing post-dispute arbitration agreements. This inattention is understandable because the arbitration clause is just one of many clauses in the pre-dispute arbitration agreement. That agreement might be for the sale of a car, to open a bank account, or an employment agreement, to give just three examples. The consumer is probably less attentive to the arbitration clause than to other contract terms, such as the price of the car, the fees on the bank account or the wages for employment. In contrast, the post-dispute arbitration agreement is a contract about dispute-resolution only, so the consumer signing it is aware that she is obligating herself to arbitrate. Furthermore, the consumer signing a post-dispute arbitration agreement is likely advised by a lawyer. The same can rarely be said of the consumer signing a pre-dispute arbitration agreement.

The second point made by Carrington and Haagen is that—by substituting private, for government, adjudicators—arbitration agreements allow "the strong [to] oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy."<sup>16</sup> Carrington and Haagen seem to think this point applies only to *pre*-dispute agreements, but I do not agree that it is so limited. After all, arbitration pursuant to a *post*-dispute agreement could also result in enforcement of illegal contracts.<sup>17</sup> The implicit assumption Carrington and Haagen seem to make is that consumers signing post-dispute agreements do not agree to "bad" arbitration because they are advised by lawyers who will tell them to choose litigation instead. In contrast, Carrington and Haagen assume, consumers signing pre-dispute agreements do not know any better than to agree to "bad" arbitration. Consumers signing pre-dispute agreements may not know any better, but their ignorance stems from their inattention to the hazards of

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16. *Id.*

17. The reason arbitration can result in enforcement of illegal contracts is that courts do not closely review arbitration awards to ensure that arbitrators have correctly applied the law. MACNEIL, FEDERAL ARBITRATION, *supra* note 14, at § 40.7; Carrington & Haagen, *supra* note 3, at 344-48. Judicial review of awards arising out of post-dispute arbitration agreements is no more deferential than review of awards arising out of pre-dispute agreements.

dispute-resolution and lack of counsel, which is Carrington and Haagen's first point. Thus, the two points collapse into one. The case for denying enforcement to pre-dispute arbitration agreements rests on the belief that consumers signing such agreements do not "genuinely" assent because they are inattentive to the hazards of dispute resolution and are unlikely to be well-advised.

These points apply well beyond arbitration agreements. They apply to most, maybe all, consumer contracts. Consider, as examples, consumer contracts to buy a new car, to open a bank account, to buy insurance or to lease an apartment. In all of these contracts, the consumer is unlikely to be "attentive" to more than a few of the clauses.<sup>18</sup> Most of the "boilerplate" language on the form contract is unlikely to receive significant attention from the consumer. An arbitration clause is not unusual in this respect. It is typical. The unusual clause is the one that does receive attention from the consumer. The arbitration clause is also a typical contract clause in that the consumer is not apprised about it. The consumer is unlikely to have been well-advised about any of the other terms in the form contract either. Apparently then, arguments against the contractual approach to arbitration are actually arguments against enforcing most of the terms in consumer form contracts.

#### B. Duress, Unconscionability and Contract Interpretation

Like many critics of the contractual approach to arbitration law, Carrington and Haagen contend that "contracts of adhesion . . . lack the characteristics traditionally providing the moral justification for enforcing the promises they contain."<sup>19</sup> As an example, they cite a bill of lading exempting the carrier from liability for negligence:

The Court noted that the term was not the product of free exercise of the right to make enforceable promises; to the contrary, a shipper "prefers to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases, he has no alternative but to do this, or to abandon his business." When a contract is imposed in this fictive manner, the Court held, it should be enforced only if its terms are "just and reasonable."<sup>20</sup>

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18. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

19. Carrington & Haagen, *supra* note 3, at 335. See also Stempel, *Bootstrapping & Slouching*, *supra* note 6, at n.8 and accompanying text; Sternlight, *supra* note 3, at 676 ("While the pure freedom of contract rationale has some appeal as applied to two entities engaging in an arm's length transaction, it cannot realistically be used to justify imposing binding arbitration through contracts of adhesion on unwitting consumers.").

20. Carrington & Haagen, *supra* note 3, at 335 (quoting *Liverpool & G.W. Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 441 (1889)).

Carrington and Haagen argue that, in accepting this contract, the shipper was not "free," *i.e.*, it had "no alternative;" this contract was "imposed."<sup>21</sup> Carrington and Haagen appear to make this charge against all form contracts, at least all those presented "take-it-or-leave-it."<sup>22</sup> So when a form contract containing an arbitration clause is presented to a consumer, the consumer has "no alternative" but to sign it; the duty to arbitrate is "imposed" on the consumer.

That is wrong. The consumer is free to put the pen down without signing the form. There is no duress in the typical "adhesion" contract. A consumer who contracts in such circumstances does so voluntarily.<sup>23</sup> The form may contain boilerplate terms which are unenforceable, but that does not make the contract any less voluntary.<sup>24</sup>

While Carrington and Haagen seek to bloody form contracts—by impugning their voluntariness—they do not seek to kill them. Carrington and Haagen "distinguish contracts of adhesion from real contracts,"<sup>25</sup> but they tolerate the former as a necessary evil.<sup>26</sup> They do, however, seek to minimize that evil. Accordingly, they laud contract doctrines that "permit[] courts to respond flexibly to the social realities underlying imposed [sic] contracts."<sup>27</sup>

The doctrines to which Carrington and Haagen refer are the contractual approach's way of addressing the concern cited by its critics, consumer inattention to arbitration clauses in form contracts. Contract law recognizes that consumers are inattentive to many terms in form contracts. The RESTATEMENT (SECOND) OF CONTRACTS explicitly acknowledges that:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms . . . . Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted

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21. *Id.*

22. Carrington & Haagen, *supra* note 3, at 334 ("[T]he term 'contract of adhesion' . . . applied to agreements that are not the result of bargaining.").

23. Contracting in the absence of duress is contracting voluntarily. *See Employment Arbitration, supra* note 1, at 111 & 120-28.

24. *Id.* The grounds for denying enforcement to certain boilerplate terms might include contract interpretation doctrines or unconscionability, both of which are discussed below. The point here is that these doctrines, unlike duress, do not address voluntariness. Unconscionability, in particular, should not be confused with involuntariness or coercion. *See id.* at 126-28.

25. *Id.* at 338.

26. *Id.* at 336.

27. *Id.*



regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.<sup>28</sup>

What are these limitations? An important limitation is found in the Restatement section corresponding to the comment just quoted. Section 211(3) states that the consumer does not assent to a form contract term if the "other party has reason to believe that the [consumer] would not have accepted the agreement if he had known that the agreement contained the particular term."<sup>29</sup> This reasoning protects consumers from much of the risk posed by form contracts.<sup>30</sup> The consumer does not need to worry that the boilerplate on the form contains a term which:

- is "bizarre or oppressive,"
- "eviscerates the non-standard terms explicitly agreed to," or
- "eliminates the dominant purpose of the transaction,"

because such terms are not part of the contract.<sup>31</sup>

Related contract law doctrines addressing consumer inattention to form contracts include the rule of interpretation against the drafter<sup>32</sup> and the unconscionability doctrine. Unconscionability is often thought of as coming in two forms: substantive unconscionability and procedural unconscionability. Substantive unconscionability refers simply to contract terms that are "unreasonably favorable" to one side.<sup>33</sup> Procedural unconscionability deals with the process of contract formation, encompassing "not only the employment of sharp practices and the use of

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28. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

29. *Id.* § 211 cmt. f.

30. Section 211(3) is quite similar to the formulation of Karl Llewellyn, cited with approval by Carrington & Haagen, *supra* note 3, at 336. Llewellyn said there was "specific" assent to the "few dickered terms" and "blanket" assent "to any not unreasonable or indecent term the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms." KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

31. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981). In this way, contract law distinguishes between the form's enforceable terms and its unenforceable ones. For example, regarding form contracts accompanying a computer or software, it would distinguish between an arbitration clause and a clause obligating the buyer "to spend the rest of [his] life as a towel boy in Bill Gates's new mansion." Scott Adams, *Dilbert*, TALLAHASSEE DEMOCRAT, Jan. 14, 1997, at C7, *quoted in* Stempel, *Bootstrapping & Slouching*, *supra* note 6, at 1384 n.8.

Jeffrey Stempel cites the *Dilbert* cartoon to ridicule cases enforcing arbitration clauses in form contracts accompanying a computer or software, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7th Cir. 1996), presumably because the consumer does not even receive the form until she receives (and probably pays for) the product. There is no reason, though, why one cannot manifest assent to terms she has not seen. Purchasers of insurance, for example, have long done just that. *See* JEFFREY W. STEMPEL, *INTERPRETATION OF INSURANCE CONTRACTS* ch.8 (1994 & Supp. 1996).

32. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

33. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28 (2d ed. 1990).

fine print and convoluted language, but a lack of understanding and an inequality of bargaining power."<sup>34</sup>

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.<sup>35</sup>

The unconscionability doctrine, and the contract interpretation doctrines discussed above, do apply to arbitration agreements.<sup>36</sup> An arbitration clause running afoul of these doctrines will not be enforceable under current arbitration law. Yet, this does not satisfy critics of the contractual approach. They prefer an anti-contract approach. The anti-contract approach would, in its strong form, deny enforcement to all pre-dispute arbitration agreements involving consumers,<sup>37</sup> or, in its mild form, enforce some such agreements, but not as many as the contractual approach enforces.<sup>38</sup> The next Section of this Article will contrast the strong and mild forms of the anti-contract approach with the contractual approach. First, though, it is necessary to respond to an argument that the anti-contract approach, even in its strong form, is actually consistent with contract law.

Carrington and Haagen praise the strong anti-contract approach of denying enforcement to all pre-dispute arbitration agreements involving consumers,<sup>39</sup> not just those running afoul of contract law doctrines. In other words, they praise a blanket rule precluding enforcement of arbitration clauses against consumers and attack the contractual approach of case-by-case application of contract doctrines. Strangely, they assert that disregarding contract doctrines in favor of a blanket rule against enforcement is itself an application of contract doctrine. They argue that denying enforcement to all pre-dispute arbitration agreements is "justifiable as an

34. *Id.* See generally RESTATEMENT (SECOND) OF CONTRACTS § 208 including comment.

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

36. Unconscionability's application to arbitration is addressed at length in one of my previous articles. See *Arbitration & Unconscionability*, *supra* note 2, *passim*.

37. See Schwartz, *supra* note 7, at 125 (opposing enforcement of "adhesive pre-dispute arbitration contracts").

38. See *infra* notes 114-24 and accompanying text (discussing the "knowing and voluntary" standard).

39. They never come right out and say this. They make the "genuine assent" argument (quoted above) against enforcement of pre-dispute arbitration agreements. Carrington & Haagen, *supra* note 3, at 340. Then they acknowledge the virtues of enforceability to "foster interstate commerce." *Id.* Then they argue that statutes, like the FAA, making arbitration agreements enforceable were intended to apply only to agreements between businesses, or "parties of reasonably equal strength and sophistication." *Id.* at 340-42. It appears, therefore, that Carrington and Haagen may tolerate enforcement of pre-dispute arbitration agreements between businesses, but oppose enforcement in consumer cases. Accord Schwartz, *supra* note 7, at 75-81 (citing legislative history of FAA).

application of elementary contract doctrine requiring comprehending mutual assent."<sup>40</sup> There is, however, no contract doctrine requiring "comprehending" mutual assent. There is not even a contract doctrine requiring mutual assent.

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 saying certain words—that would lead a reasonable person to believe that they have assented to the terms of the contract. In other words, contract formation technically requires, not mutual assent, but mutual manifestations of assent. 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."<sup>41</sup>

Just as the inescapable need to rely on appearances requires objective rules for contract formation, it similarly requires objective rules for contract interpretation. Those rules include the one in § 211(3) providing that a consumer does not assent to a form contract term if the "the other party has reason to believe that the [consumer] would not have accepted the agreement if he had known that the agreement contained the particular term."<sup>42</sup> This rule, it should be emphasized, requires courts to assess what the drafting party has "reason to believe." The consumer's actual subjective assent, or lack thereof, is irrelevant.

On this point, Carrington and Haagen make arguments that sweep far beyond the context of arbitration. Their arguments rest on the subjective theory of contract and cannot be accepted without undermining the prevailing objective theory of contract.<sup>43</sup> As noted above, Carrington and Haagen worry that there is not "genuine" assent to an arbitration clause in a typical form contract.<sup>44</sup> On the same page of their article, they yearn for "true" assent, and "comprehending" assent.<sup>45</sup> They are so attached to the subjective theory of contract that they even refer to "true contracts embodying a meeting of minds."<sup>46</sup> Even if minds exist,<sup>47</sup> they do not have to meet to form a contract. Contract law does not call for inquiry into whether assent is

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40. Carrington & Haagen, *supra* note 3, at 340.

41. Ware, *Employment Arbitration*, *supra* note 1, at 113-14 (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 301 (1986)).

42. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

43. "By the end of the nineteenth century, the objective theory had become ascendant and courts generally accept it today." FARNSWORTH, *supra* note 33, § 3.6.

44. Carrington & Haagen, *supra* note 3, at 340.

45. See Stempel, *Bootstrapping & Slouching*, *supra* note 6, at 1385 (demonstrating that courts enforce arbitration agreements "that appear to lack real consent").

46. Carrington & Haagen, *supra* note 3, at 336.

47. Compare, e.g., DANIEL DENNETT, *CONSCIOUSNESS EXPLAINED* (1991), with DAVID HODGSON, *THE MIND MATTERS: CONSCIOUSNESS AND CHOICE IN A QUANTUM WORLD* (1991).

“genuine,” “true,” or “comprehending.”<sup>48</sup> Courts cannot peer into consumers’ heads to determine whether these tests are met.<sup>49</sup> They can, however, ask whether a reasonable person in the drafting party’s position would perceive the consumer’s conduct to be a manifestation of assent to particular terms.<sup>50</sup> Carrington and Haagen, and other critics of current arbitration law, seem to reject that test.<sup>51</sup> To do so is to reject what has been a fundamental part of contract law for a century, the objective theory.

Once the objective theory of contract is accepted, one must reject the notion that denying enforcement to all pre-dispute consumer arbitration agreements is consistent with contract law.<sup>52</sup> Rather, it is the strong “anti-contract” approach to arbitration law.

## II. ARBITRATION LAW IN THE CONSUMER LAW CONTEXT

Arbitration law, including the arbitration law governing consumers, is largely contractual. Advocates of the anti-contract approach to arbitration law have not suc-

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48. An exception might be made for courts applying the unconscionability doctrine in a particularly aggressive way. These courts could be engaged in the metaphysically-dubious enterprise of trying to determine whether the consumer’s assent is “genuine,” “true,” or “comprehending.” Even this approach, however, because it is performed on a case-by-case analysis, differs from a blanket rule against enforcement of consumer arbitration agreements.

49. See, e.g., SAINT THOMAS AQUINAS ON LAW, MORALITY, AND POLITICS 23 (William P. Baumgarth & Richard J. Regan, S.J., eds., 1988) (SUMMA THEOLOGICA I-II, qu. 91, art. 4) (“[M]an can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements that are hidden but only of exterior acts which appear.”).

50. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

51. See, e.g., Stempel, *Bootstrapping & Slouching*, *supra* note 6, at 1384 n.8, 1387 (attacking the “unrealistic, formal and narrow view of contract consent and meaning demonstrated in recent cases” and their “wooden, Lochnerized version of contracting.”). These attacks seem to rest on a subjective theory of contract, with “formal” and “wooden” being derogatory equivalents of “objective.” See also Sternlight, *supra* note 3, at 675-77. Jean Sternlight quickly rejects a contractual argument on grounds relating to the absence of actual or knowledgeable assent by the consumer: “[O]ne cannot with a straight face justify enforcement of form arbitration agreements imposed [sic] by sellers on consumers on the ground that the consumers actually accepted the contract with knowledge of those terms.” *Id.* at 676-77. She does not address a contractual argument, like the one in this Article, based on the prevailing objective theory of contract. She does address arguments that, as compared to litigation, arbitration is more efficient under either the Paretian or Kaldor-Hicks standards. *Id.* at 677-93 (Paretian); *Id.* at 693-97 (Kaldor-Hicks). These are utilitarian arguments for arbitration, whether or not the parties have consented to it, rather than a contractualist argument which favors arbitration only when, and precisely because, the parties have consented to it.

52. Under the contractual approach, most such agreements are enforceable. The typical arbitration clause will survive an unconscionability challenge. See *Arbitration & Unconscionability*, *supra* note 2, *passim*. There will not be many cases in which section 211(3) will exclude the arbitration clause. Section 211(3) will only exclude the arbitration clause if the consumer can persuade a court that she would not have signed the contract had she known it contained the arbitration clause because that clause rarely

- is “bizarre or oppressive,” or
- “eviscerates the non-standard terms explicitly agreed to,” or
- “eliminates the dominant purpose of the transaction.”

ceeded in changing the law to their liking.<sup>53</sup> The picture is quite different elsewhere in the law governing consumers. Anti-contract approaches to consumer law have been enacted throughout this century, especially since the 1960's. Anti-contract law comes in two forms. The strong form disables contract altogether by making rights inalienable. The mild form hampers contract by adding barriers to enforcement of agreements beyond those found in contract law. Both forms of anti-contract law are widespread in consumer law, but neither appears in the arbitration law governing consumers.

A. *Inalienability, the Strong Form of Anti-Contract Law*

Contract is a process of alienating rights.<sup>54</sup> Consider, as two examples, my right to possess the watch on my wrist and my right not to be punched in the nose. Both of these rights are alienable; I can sell these rights through contract. I can make a contract to sell my watch and, when that contract is performed, I will no longer have a right to possess the watch.<sup>55</sup> I will have alienated that right. Similarly, I can make

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53. Much state arbitration law is anti-contract but that law is preempted by the FAA. *Arbitration & Unconscionability*, *supra* note 2, at 1011-12 & n.72.

54. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 31 (4th ed. 1992) (“[T]he law of contracts [is] concerned with facilitating the voluntary movement of property rights into the hands of those who value them most.”); *Employment Arbitration*, *supra* note 1 (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986), “Contract law concerns ways in which rights are transferred or alienated.”). This conception of contract is “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.* Accord Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL. STUD. 253 (1980).

[T]he function of the law is essentially threefold, where for each function there is an associated branch of the law. The first function is to determine the original property holdings of given individuals, including rights over one's own body. Such is governed by the law of property, especially with the rules for the acquisition of unowned things. The second is the law of contracts (including conveyancing) which governs cooperative efforts among individuals and exchanges of things that are already owned. The third is the protection of persons and property (and their methods of transfer) from the aggression of third parties; such is the traditional function of the law of torts.

*Id.* at 255. Accord POSNER, *supra*. Not only does conveyancing belong in the contract branch, but so do commercial devices, such as negotiable instruments and letters of credit, which are not, technically, contracts.

In conceiving of contract as a process of alienating rights, I choose the word “alienating” instead of “transferring” or “waiving.” Alienating rights usually means transferring them to someone but sometimes it means extinguishing them. See, e.g., Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69-70 (J. Roland Pennock & John W. Chapman, eds. 1980) (creation of trust extinguishes right to leave land idle). Waiver, in its broadest definition, is synonymous with alienation, “relinquishment of the right.” Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 484 (1981). But waiver is typically used with a narrower meaning. See *id.* at 522 (“There is no logical reason why an obligation created by contract cannot be described as waiver as well—the waiver of one's right to be free of such an obligation. This is not the common usage and Corbin counsels against it.”).

55. U.C.C. § 2-401 (1995).

a contract to enter a boxing match and I will no longer have the right to be free of a punch in the nose.<sup>56</sup> I will have alienated that right by contract.<sup>57</sup>

### 1. Consumer Law, Generally

While contract is a process of alienating rights, not all rights are alienable. Some rights cannot be contracted away.<sup>58</sup> Law rendering rights inalienable is strong "anti-contract" law because it completely disables contract as a process of alienating rights. It removes rights from the realm of contract by making them inalienable. Such law has assumed a major presence in the law governing consumers. Over the last century, and especially since the 1960's, consumers have been granted numerous inalienable rights.<sup>59</sup> These rights pertain to a wide range of consumer transactions including those for goods, real estate, credit, services, insurance, and employment.

#### a. Goods

Sales of goods to consumers are now governed by the tort law of "strict product liability." Consumers have a right that "products" not be "in a defective condition unreasonably dangerous to the user or consumer or to his property."<sup>60</sup> This right is inalienable; disclaimers of it will not be enforced.<sup>61</sup>

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56. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18 (5th ed. 1984 & Supp. 1988).

57. Contract law's fundamental doctrines relating to contract formation, interpretation and defenses to enforcement specify the process which must occur to alienate rights by contract.

58. Some rights may be alienated by one process, but not another. For example, some rights may be given away but not contracted away. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987).

59. DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW xxvi (1991).

60. RESTATEMENT (SECOND) OF TORTS § 402A (1975).

61. *Id.* cmt. m (stating that "[t]he consumer's cause of action . . . is not affected by any disclaimer or other agreement"). See KEETON, *supra* note 56, § 97. This inalienability is preserved in the proposed revision to the Restatement of Torts. See RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 18 (Proposed Final Draft, Apr. 1, 1997).

Other law governing sales of goods, rather than giving an inalienable right to consumers, gives no right at all to consumers. This law consists of the rules promulgated or enforced by administrative agencies such as the Consumer Product Safety Commission, 16 C.F.R. § 1000-61, the Food and Drug Administration, 21 C.F.R. § 1 et seq., and the National Highway Traffic Safety Administration. 49 C.F.R. § 500-94. These rules often prescribe standards for goods sold to consumers. Those manufacturing or selling sub-standard goods are typically subject to administrative penalties, rather than a private right of action by injured consumers. See, e.g., The Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204, 16 C.F.R. §§ 1608-1616. Thus the right to goods meeting the standards is a right of the administrative agency, not of the consumer.

b. Real Estate

Strict liability in tort has been extended beyond goods to real property when the land includes a building constructed by the seller.<sup>62</sup> Another inalienable right typically present in real property law is the residential tenant's right to "habitable" premises.<sup>63</sup>

c. Credit and Related Transactions

Just as the consumer's right to non-dangerous goods is inalienable, so is the consumer's right to non-dangerous credit. "[I]n the consumer market we have restricted the availability of certain products because it is thought that the only effective protection of the consumer is to ban the product completely. Credit—particularly high price, high risk credit—might be similarly viewed."<sup>64</sup> Usury laws, that is, interest rate ceilings, are "in effect, a ban on unsafe credit."<sup>65</sup> Other "unsafe" contract terms with respect to which the law prohibits alienability include: cross-collateral clauses,<sup>66</sup> confessions of judgment,<sup>67</sup> assignments of wages,<sup>68</sup> waivers of exemptions,<sup>69</sup> waivers of defenses,<sup>70</sup> and non-possessory, non-purchase-money security interests in household goods.<sup>71</sup>

d. Services

Consumers purchase many services. The consumer of services has, in addition to any contractual rights, a tort law right that the services be performed in a non-negligent manner.<sup>72</sup> This right is often inalienable.<sup>73</sup>

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62. KEETON, *supra* note 56, § 104A.

63. Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973) (providing that an "implied warranty . . . that the premises are fit for human occupation . . . cannot be waived by any provision in the lease or rental agreement.").

64. George J. Wallace, *The Uses of Usury: Low Rate Ceilings Reexamined*, 56 B.U. L. REV. 451, 458-59 (1976).

65. *Id.* at 497.

66. See MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS ch. 13 (2d ed. 1991).

67. *Id.*

68. *Id.*

69. *Id.* at 636.

70. *Id.* at 660-77.

71. 16 C.F.R. § 444.2(a)(4) (1997).

72. KEETON, *supra* note 56, § 92.

73. See, e.g., U.C.C. § 4-103 (1995) (providing "a bank's responsibility for its . . . failure to exercise ordinary care"); Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks Between Patients and Providers*, 49 LAW & CONTEMP. PROBS. 173, 184 (1986) (stating that "courts have been extremely hostile to" patients' releases of hospitals and physicians for future negligence).

*e. Insurance*

Insurance is purchased by large numbers of consumers. Just as some consumer rights regarding tangible products are inalienable, so are consumer rights regarding insurance. "In some states, statutes prescribe standard terms either for some types of insurance or for particular coverage provisions."<sup>74</sup> The policyholder rights granted by these prescribed policy terms are inalienable because the consumer could not buy insurance without these terms.

*f. Employment*

An employee's right to join a labor union is inalienable; so-called "yellow dog" contracts are unenforceable under federal labor law.<sup>75</sup> Also inalienable are employees' rights to be free of discrimination by race, sex, and so on.<sup>76</sup>

*2. Arbitration Law Governing Consumers*

In contrast to the inalienable rights so common in much of consumer law, arbitration law permits the consumer to alienate her rights. The contractual approach to arbitration law, like contract law generally, fosters alienability. The particular rights it makes alienable are those enforced in court, but not (necessarily) in arbitration. These include rights specified by rules of civil procedure and evidence, and the right to a *government-selected* adjudicator (judge or jury<sup>77</sup>) to decide questions of fact.<sup>78</sup> I shall refer to this set of rights as the "right to government adjudication."<sup>79</sup> An enforceable arbitration agreement alienates this right to government adjudication and creates, instead, a right to private adjudication. By enforcing such agreements, the contractual approach to arbitration law makes the right to government adjudication alienable. Strong critics of the contractual approach, like Carrington and Haagen, attack this alienability. They praise a rule which would make the right to government adjudication inalienable, at least

74. ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 2.8(b) (1988).

75. 29 U.S.C.A. § 103 (1994); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941). Thus, all of labor law, despite its pro-contract superstructure built around collective bargaining agreements, is based on an anti-contract substructure of inalienability.

76. MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 5.84 (1988).

77. Litigants, through their attorneys, often play some role in selecting which individuals will serve as jurors on their case, although the government drives this selection process by creating eligibility standards for jurors and encouraging potential jurors to actually serve. All this aside, the reason juries are *government-selected* adjudicators is that government law selects juries, if not always individual jurors, as the finders-of-fact in cases at law. In such cases, if the parties do not agree on a finder-of-fact, it will be a jury.

78. Questions of law are more complicated. See *infra* notes 126-33 and accompanying text (setting forth the knowing and voluntary legal approach).

79. Edward Rubin calls it "the right to judicial adjudication." Rubin, *supra* note 54, at 516.



when the holder of that right is a consumer.<sup>80</sup> That would be the effect of a blanket rule against enforcement of consumer arbitration agreements.

A clarification is now required. The rule praised by Carrington and Haagen would not make the consumer's right to government adjudication *permanently* inalienable. That rule would make it *temporarily* inalienable, inalienable unless and until there is a dispute.<sup>81</sup> In other words, Carrington and Haagen confine their anti-contract agenda to *pre*-dispute arbitration agreements. They have no objection to alienation of the right to government adjudication in a *post*-dispute arbitration agreement. Thus, there are three possibilities with regard to the right to government adjudication: (1) alienable (the contractual approach of current law); (2) inalienable unless and until a dispute arises (the approach of pre-1920's arbitration law); and (3) permanently inalienable (the approach of one who would deny enforcement even to post-dispute arbitration agreements<sup>82</sup>).

The alienability concept facilitates a comparison between the contractual approach to arbitration law and the strong anti-contract approach of denying enforcement to pre-dispute arbitration agreements. Carrington and Haagen commend the strong anti-contract approach precisely because it would make the consumer's right to government adjudication inalienable unless and until a dispute arises.<sup>83</sup> That inalienability would "protect" consumers who are inattentive to arbitration clauses in their contracts because those consumers would retain the right to government adjudication. To put it another way, those consumers would be able to avoid the duty to arbitrate without, as current law requires, having to satisfy any contract law doctrine.<sup>84</sup> While this sounds great for consumers, it is not. The interests of consumers as a group are better served by the contractual approach's pro-alienability rule that a consumer's pre-dispute arbitration agreement is enforceable absent a contract law defense.<sup>85</sup>

The great virtue of the contractual approach to arbitration law is the great virtue of contract generally: it permits the alienation of rights with, and only with, the voluntary consent of the rights-holder. It is easy to see why one would not want alienation of her rights to occur without her voluntary consent. It may be harder to

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80. See Carrington & Haagen, *supra* note 3, at 340 (noting that relevant parties would "never come right out and say this").

81. In this regard, the rule praised by Carrington and Haagen would treat the right to government adjudication like the right to alimony or maintenance upon divorce. The right to alimony or maintenance was, until quite recently, inalienable at the time of marriage, HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 6 (1988), but became alienable once a dispute arose. Courts increasingly are holding the right to alimony or maintenance alienable at the time of marriage. *Id.* at 7-8 (discussing *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970)).

82. This approach would also seem to preclude enforcement of settlement agreements and releases. Such documents purport to alienate the right to government adjudication.

83. See Carrington & Haagen, *supra* note 3, at 340.

84. See *supra* Part I.B (analyzing the contractual approach to arbitration).

85. Section 2 of 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." 9 U.S.C.A. § 2 (West 1994).

see the benefit of being able to alienate rights; we typically want, all other things being equal, to retain our rights. What is the benefit of being able to alienate rights? Perhaps a sufficient explanation is that it is essential to freedom or autonomy.<sup>86</sup> Alienable rights allow one the freedom to choose whether to retain, transfer or extinguish the right. Inalienable rights permit no such choice.<sup>87</sup>

Another benefit of being able to alienate rights by contract is that one obtains consideration, a *quid pro quo*, for those rights. Contract is a process of exchange. People contract, *i.e.*, voluntarily consent to alienation of some of their rights, to obtain other rights in exchange. This process of exchange is tremendously beneficial; it is what makes both parties to a contract better off than they were without the contract. Voluntary exchange creates value because each party is surrendering rights she values less than those she receives in exchange.<sup>88</sup> This value-creation is prohibited by inalienability rules.

Carrington and Haagen, like other critics of the contractual approach, do not see it that way. They denigrate those with a "simple faith in" or "blind commitment to" freedom of contract.<sup>89</sup> They assert that "Contract is not merely a source of economic power, but it is also a deployment of that power that can effect a transfer of wealth from the weak to the strong."<sup>90</sup> They see consumer contracts, and specifically consumer arbitration agreements, not as win-win exchanges, but as a means by which those with "economic power" prey on those lacking such power.<sup>91</sup> In short, they see contract as exploitation.

It is. Companies using arbitration clauses are *exploiting* consumers. Pre-dispute arbitration agreements are exploitation. But they are only in the sense that all contractual exchange is exploitation: *X* exploits *Y*'s desire for something *X* has in order to get something from *Y*, and *Y* does the converse. In an arbitration agreement, the

86. See, e.g., ALAN WERTHEIMER, COERCION 19 (1987) (citing Charles Fried, *Is Liberty Possible*, in TANNER LECTURES ON HUMAN VALUES (1982), for the proposition that "the ability to obligate oneself by creating a binding contract is an important aspect of our freedom").

87. "A person whose right is inalienable does not enjoy more prerogatives than a person whose right is alienable. On the contrary, he enjoys one fewer since he cannot get rid of those he has." DIANA T. MEYERS, INALIENABLE RIGHTS: A DEFENSE 7 (1985).

88. See, e.g., RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 76 (1995) ("[A]ll voluntary exchanges are *positive-sum* games for the participants. Exchange does not merely transfer physical or intangible assets. It increases human satisfaction by matching assets with the persons who value them most.").

89. Carrington & Kaagen, *supra* note 3, at 334. Along these lines, they ridicule the "dogma" of law and economics, and refer to it as "Darwinian law-and-economics." *Id.* at 338, 388.

90. *Id.* at 334. They cite no authority for the proposition that contract "can effect a transfer of wealth from the weak to the strong." However, they cite RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 29 (3d ed. 1986) for the proposition that contract is "a deployment of [economic] power." I do not see any basis in Posner's work for this citation. The only statement on the cited page relating to contracts states that "the law of contracts [is] concerned with facilitating the voluntary movement of property rights into the hands of those who value them most."

91. "Predation" might even be the theme of *Contract and Jurisdiction*. Carrington & Haagen use the words "prey," "predatory" and "predation" a total of six times in the article. Over and over again, the reader is presented with the image of evil, powerful monied interests *preying* on helpless, innocent consumers.

company is exploiting the consumer's desire for something the company has in order to get, among other things, a promise to arbitrate.<sup>92</sup> And the consumer is exploiting the company's desire for something the consumer has (typically money) in order to get something from the company. Exploitation, in this sense, is present in almost every contract. Contractualists usually call it "consideration," "bargain," or "exchange"—words with more positive connotations than "exploitation." Whatever one calls it, it is wonderful. Without it, we would be living in caves and eating only what we could kill.<sup>93</sup>

These general points about contracts apply to arbitration agreements in particular. Under the contractual approach to arbitration law, one retains the right to government adjudication unless one voluntarily consents to alienate it. The contractual approach provides the freedom to choose whether to retain or alienate this right. This empowers parties to make legally-binding promises to arbitrate, and that enables parties to obtain rights they might not otherwise be able to acquire.

For example, a consumer might be able to acquire rights to a fully-loaded Toyota Corolla for \$20,000 if the consumer makes a legally-binding promise to arbitrate any dispute relating to the sale. If the consumer could not alienate the right to government adjudication, that is, if pre-dispute arbitration agreements were unenforceable, the seller might not agree to sell the fully-loaded Corolla for \$20,000.<sup>94</sup> The seller might agree to sell that car for a higher price, or might agree to sell a lesser car for \$20,000, but these possibilities serve only to confirm that there may be a *quid pro quo* for a legally-binding promise to arbitrate.<sup>95</sup>

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92. Of course, the company is also getting money, or some other consideration, which it probably cares more about than arbitration. So the company is exploiting the consumer's desire for something the company has in order to get the purchase price, or some other consideration, at least as much as to get a promise to arbitrate.

93. Exchange is essential to the division of labor; we can live without producing all of our own food, clothing and shelter only if we can obtain those things from others. And it is this process, more than anything else, which is credited with raising living standards. See, e.g., JAMES D. GWARTNEY & RICHARD L. STROUP, *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 46 (7th ed. 1995) ("It is difficult to exaggerate the gains derived from specialization, division of labor, and exchange in accordance with the law of comparative advantage. These factors are the primary source of our modern standard of living.").

94. The seller might anticipate that its dispute-resolution costs will be lower if its disputes go to arbitration, not litigation. Whether a company's dispute-resolution costs will in fact be lower under arbitration would depend on: (1) Whether arbitration clauses affect the number of claims asserted by or against the company, (2) whether arbitration affects the outcomes (adjudications and settlements) of those claims actually asserted, and (3) whether arbitration affects the costs of getting to those results, e.g., legal fees. See, e.g., Sternlight, *supra* note 3, at 680-86.

95. Assuming that enforceable arbitration clauses lower sellers' dispute-resolution costs, not all of these savings will, economic theory predicts, be retained by sellers in the form of higher profits. Over time, competition will force sellers to pass on to consumers some of the savings in the form of lower prices or some other change favoring consumers. As two economists put it,

firms in a purely competitive industry must earn the normal rate of return, and only the normal rate, before long-run equilibrium can be attained. If economic profit is present, new firms will enter the industry, and the current producers will have an incentive to expand the scale of their operations. This will lead to an increase in supply, placing downward pressure on prices.

GWARTNEY & STROUP, *supra* note 93, at 541. Accord ARMEN ALCHIAN & WILLIAM R. ALLEN, *EXCHANGE & PRODUCTION* 215 (1983) (differences in profits eliminated by competition).

Under the contractual approach to arbitration law, consumers can make legally-binding, pre-dispute promises to arbitrate. In other words, the consumer's right to government adjudication is alienable. This empowers any and all consumers to get consideration for that right. If the consumer's right to government adjudication was inalienable unless and until a dispute occurred, then only those consumers with a dispute could get consideration for that right. The vast majority of consumers, those who never have a dispute relating to the contract, would lack the power to obtain consideration by making a legally-binding promise to arbitrate. Here then, is the case for the contractual approach. It empowers all consumers, not just those with a dispute, to get consideration for the right to government adjudication. It provides freedom of choice to all consumers, not just those with a dispute.

## B. Mild Forms of Anti-Contract Law

### 1. Mandatory Disclosure

#### a. Consumer Law, Generally

I have just contrasted the alienability fostered by the contractual approach to arbitration law with the inalienability so common elsewhere in consumer law. Arbitration law does not, however, contain the only alienable consumer rights. Consumers are free to alienate many of their rights.<sup>96</sup> Some of these rights are alienable by contract. Others are alienable only if some more elaborate process than contracting has occurred. This latter category, permitting alienation but requiring more than contract to effect it, is the mild form of "anti-contract" law.

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This argument does not rest on the assumption that consumers typically understand, or even notice, arbitration clauses. The argument assumes that firms are alert to economic profits, not that consumers are alert to the arbitration clauses which cause those profits. The increase in output attracted by economic profits is what lowers prices. As a result, consumers get a combination of lower prices and arbitration clauses. Would consumers prefer the only possible alternative combination—higher prices and no arbitration clauses—if they were more knowledgeable about arbitration clauses? See, e.g., Sternlight, *supra* note 3, at 689. Perhaps, but that is just speculation.

This speculation is central to the more sophisticated arguments against enforcement of form contract terms. The argument is essentially that "the parties will enter into the wrong contract." *Id.* The wrong contract will be too harsh to the consumer with respect to terms about which consumers are often ignorant, such as arbitration, and too favorable to the consumer with respect to those terms, such as price, about which consumers are typically knowledgeable. *Id.* Competition focuses too much on the former and not enough on the latter.

There are at least three counter-arguments. First, the "wrong contract" argument undermines the consensual foundation of contract. Contract law properly enforces the terms the parties did agree to, not the ones they "would have" agreed to under hypothetical circumstances. See generally Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992). Second, how does a court determine with any precision what terms the parties "would have" agreed to under those hypothetical circumstances? Finally, a justification is required for the goal of equalizing information. How is the case for equalization stronger with respect to information than with respect to other forms of property? If the drafting party has greater information about contract terms than the consumer, why should not the drafting party reap any benefits derived from that disparity?

96. As a generalization, it is probably safe to say that all rights which the law does not expressly make inalienable are alienable. For examples of alienable rights, see Rubin, *supra* note 54, at 521.

Anti-contract law requirements for alienating rights vary. A typical requirement is that the consumer be given certain information. These "mandatory disclosure" laws are themselves restrictions on alienability because they make inalienable the consumer's right to certain information.<sup>97</sup> But they are typically treated as a separate category of consumer "protection," as less severe restrictions on the consumer's freedom of choice than making rights (to things other than information) inalienable.<sup>98</sup>

Some mandatory disclosure law is tort law. The tort of deceit (fraud) has expanded beyond merely prohibiting misrepresentations to imposing affirmative duties to disclose information to consumers in many situations.<sup>99</sup> Similarly, a seller of goods may be liable in tort for negligently failing to warn the consumer about a risk or hazard related to the product.<sup>100</sup> Other mandatory disclosure law relating to goods is promulgated by the Federal Trade Commission,<sup>101</sup> by the States in their "little FTC acts,"<sup>102</sup> and by a host of other statutes.<sup>103</sup> A tremendous volume of mandatory disclosure law relates to securities,<sup>104</sup> credit,<sup>105</sup> and other financial matters.<sup>106</sup>

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97. All decisions are made with "incomplete" information because no one is omniscient. Thus, when making any choice—whether to buy a certain car, or marry a certain person—one must first choose what information to acquire before making the choice. Sometimes one regrets making a choice on "too little" information. Conversely, it is also possible to overinvest in the acquisition of information. More information is not always better because it comes at a cost of time or money and the additional information may not turn out to be worth that additional cost. Who is to say what information a consumer should acquire before making a decision? Contract law leaves that up to the consumer who can decide how much time and money to invest in the acquisition of information. Mandatory disclosure laws take that discretion away from the consumer. Far from fostering autonomy, mandatory disclosure laws are "parentalist" restrictions on autonomy.

Mandatory disclosure laws may appear to provide "free" information to the consumer by imposing the costs of disclosure on the other party to the transaction. Some of those costs will, however, be passed on to the consumer; how much depends on the elasticities of demand for, and supply of, the goods covered by the mandatory disclosure requirement. *See, e.g.,* GWARTNEY & STROUP, *supra* note 93, at 481-85.

98. *See, e.g.,* JOHN A. SPANOGLE ET AL., CONSUMER LAW CASES AND MATERIALS 2 ("A primary level of attack on any perceived pattern of consumer abuse . . . is to regulate the disclosure of information to consumers . . . . The problem-solver soon learns that disclosure does not eliminate all problems and that more direct regulation of abuses is necessary.").

99. KEETON, *supra* note 56, § 106.

100. *Id.* § 96(2).

101. The FTC has a statutory directive prevent to "unfair and deceptive acts or practices in or affecting commerce." 15 U.S.C.A. § 45 (1994). *See* 16 C.F.R. § 429 (1997) (Cooling-Off Period for Door-to-Door Sales); 16 C.F.R. § 444 (1997) (Credit Practices); 16 C.F.R. § 455 (1996) (Used Motor Vehicles).

102. *See* MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 107 (2d ed. 1991).

103. *See, e.g.,* Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. §§ 301-92; Fair Packaging and Labeling Act, 15 U.S.C.A. §§ 1451-61; Federal Meat Inspection Act, 21 U.S.C.A. §§ 601-95; Magnuson-Moss Consumer Warranty Act, 15 U.S.C. §§ 2301-12; Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1901-2012; Federal Hazardous Substances Act, 15 U.S.C.A. §§ 1261-78; Federal Cigarette Labeling and Advertising Act, 15 U.S.C.A. §§ 1331-41.

104. Securities Act of 1933, 15 U.S.C.A. § 77a-z (West 1997).

105. Truth In Lending Act, 15 U.S.C.A. §§ 1601-1681t (West 1998), Consumer Leasing, 12 C.F.R. § 213 (West 1997); Truth in Lending, 12 C.F.R. § 226 (West 1997).

106. *See, e.g.,* Electronic Fund Transfer Act, 15 U.S.C.A. § 1693; 12 C.F.R. Part 205 (1997) (Regulation E).

b. *Arbitration Law Governing Consumers*

While the law governing consumers has many disclosure requirements, no such requirement appears in the arbitration law governing consumers. The contractual approach to arbitration law, like contract law generally, requires no disclosure.

Mandatory disclosure in the arbitration context was the subject of a recent Supreme Court case, *Doctor's Associates, Inc. v. Casarotto*.<sup>107</sup> The case involved a franchise for a Subway restaurant in Montana. The franchisees, the Casarottos, sued the franchisor, DAI. DAI successfully moved the trial court for a stay of the suit based on the franchise agreement's arbitration clause.<sup>108</sup> The Supreme Court of Montana overturned the stay. It did so in reliance on the following Montana statute: "Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."<sup>109</sup> The franchise agreement did not comply with this statute because the arbitration clause was on page nine and in ordinary type.<sup>110</sup>

The Montana statute is a modest disclosure requirement. It merely requires a notice on the first page of the contract. It does not require that the consumer receive any explanation of what "arbitration" means, nor does it require the consumer to separately sign or initial the arbitration clause. Nevertheless, the United States Supreme Court rightly held that the Montana statute is preempted by the FAA's command that arbitration agreements be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>111</sup> The Montana statute "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."<sup>112</sup> In other words, the Montana statute is preempted because it creates a ground for the revocation of an arbitration agreement—failure to include a capitalized, underlined page one notice—that does not "exist at law or in equity for the revocation of any contract."<sup>113</sup>

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107. 517 U.S. 681 (1996).

108. *Casarotto v. Lombardi*, 886 P.2d 931, 933 (Mont. 1994), *rev'd sub nom.*; *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652 (1996).

109. MONT. CODE ANN. § 27-5-114(4) (1995) (repealed 1997). This statute was repealed by the Montana legislature after the Supreme Court held that it was preempted by the FAA.

110. *Doctor's Assocs.*, 116 S. Ct. at 1653.

111. 9 U.S.C.A. § 2 (West 1990).

112. *Doctor's Assocs.*, 116 S. Ct. at 1656.

113. 9 U.S.C.A. § 2 (West 1970).

2. "Knowing and Voluntary"

a. The Proposals

*Doctor's Associates* establishes that disclosure requirements and other mild anti-contract law will not become part of arbitration law unless Congress amends the FAA. Calls for such an amendment have begun. These proposals would allow consumers to alienate the right to government adjudication, but only if some more elaborate process than contracting has occurred. The details of this process vary depending upon who is proposing it. In general, the process would seek to ensure that the consumer "knowingly and voluntarily" agrees to arbitrate. For instance, Jean Sternlight states:

The position taken by the Montana Supreme Court in *Doctor's Associates* with respect to preemption under the FAA was correct, and it ought to have been affirmed by the Supreme Court. Now that the Court has taken the extreme position of voiding all protective state legislation, Congress should amend the FAA to effectively reverse the Court's ruling, protect weaker parties, and ensure the Constitutionality of the FAA. Specifically, while states should not be permitted to prohibit pre-dispute arbitration agreements altogether, they should be allowed to enact legislation designed to ensure that agreements are entered knowingly and voluntarily.<sup>114</sup>

Other commentators have proposed a similar standard.<sup>115</sup> Some suggest that a "knowing and voluntary" standard is constitutionally required because it is the standard for waiver of all constitutional rights and an arbitration agreement waives the right to a jury trial.<sup>116</sup> This constitutional argument has not yet been directly

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114. Sternlight, *supra* note 3, at 707. See also Carrington & Haagen, *supra* note 3, at 389-90 (suggesting avenues for states confined by *Doctor's Associates*).

115. See Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 652 (1995) ("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.").

See also Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1434-35 (1991) [hereinafter Stempel, *A Better Approach*]. Stempel's five proposed grounds for avoiding arbitration agreements (Blameless Ignorance, Dirty-Dealing, Inescapable Adhesion, Substantive Unconscionability, and Defective Agency) seem to put his approach in the "knowing and voluntary" camp. *Id.* at 1434-35.

116. See Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1352 n.63 (1996) ("Outside of the arbitration context, courts require a 'knowing and intentional' waiver of the right to a jury trial. Relevant factors include the clarity and prominence with which the language is expressed, the sophistication of the parties, whether they are represented by counsel, and their relative bargaining power."); Stempel, *Bootstrapping & Slouching*, *supra* note 6, at 1389-92. See generally Rubin, *supra* note 54, at 545 ("the contract standard cannot be used to justify those waivers that involve constitutional rights since such rights necessarily take precedence over the contract policy of honoring private agreements"). See also Jean Sternlight,

addressed by the Supreme Court but acceptance of the argument would require reversal of *Casarotto* and other cases implementing the contractual approach. It would require a holding that the FAA is unconstitutional insofar as it requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>117</sup>

What exactly a "knowing and voluntary" standard requires in the arbitration context would have to emerge from decisions in individual cases.<sup>118</sup> The "knowing" portion appears to require more emphatic, less ambiguous, manifestations of assent than contract law requires. What makes an agreement "knowing" might be mandatory disclosure of the sort involved in *Doctor's Associates*, more extensive mandatory disclosure such as a thorough written and oral explanation of what "arbitration" means,<sup>119</sup> a separate signature line for the arbitration clause, a "mandatory cooling-off period" in which the consumer could revoke the agreement, or even a requirement that the consumer consult a lawyer before signing. The "knowing and voluntary" standard also appears to have a far narrower definition of "voluntary" than the one embodied in the contract law defense of duress. The "voluntariness" test seems to resemble an overgrown unconscionability doctrine, with much sensitivity to disparities in "bargaining power."<sup>120</sup>

The Ninth Circuit apparently adopted a "knowing and voluntary" standard for arbitration in *Prudential Insurance Co. v. Lai*.<sup>121</sup> It refused to enforce employees' agreements to arbitrate Title VII claims because they did not "knowingly contract."<sup>122</sup> The Ninth Circuit's emphasis on "knowing" agreement appears to be

*Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 TUL. L. REV. 1 (1997).

117. 9 U.S.C.A. § 2 (West 1970 & Supp. 1997).

118. The "knowing and voluntary" standard is widely used in criminal law as the process for alienating rights, while civil law generally uses contract as that process. Rubin, *supra* note 54, at 491 ("In criminal law, courts rely on a conceptual framework derived from the *Johnson v. Zerbst*, 304 U.S. 458 (1938), rule that a waiver is an 'intentional relinquishment of a known right.' In civil law, courts generally employ contract terminology in judging the validity of waivers."). On the use of the terms "waiver" and "alienation," see *supra* note 54.

119. See *Securities Indus. Assoc. v. Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989) (citing MASS. REGS. CODE tit. 950, § 12.204(G)(1)(a)-(c) (1988)).

120. See Schwartz, *supra* note 7, at 108 ("voluntariness is often presumed on the theory that the adherent is free to shop for better terms. But that is only true if shopping is feasible; if all the firms in the market impose the same terms, shopping is impossible."); *id.* at 128 ("The compulsion to earn a living is almost universal, and to do so it is typically necessary to work for someone else for pay."); Stempel, *Bootstrapping & Slouching*, *supra* note 6, at 1411 ("a free market ceases to exist, at least as to dispute resolution, unless the customer or the employee has some meaningful alternatives."); Stempel, *A Better Approach*, *supra* note 115, at 1434-35. Stempel's five proposed grounds for avoiding arbitration agreements (Blameless Ignorance, Dirty-Dealing, Inescapable Adhesion, Substantive Unconscionability, and Defective Agency) seem to put his approach in the "knowing and voluntary" camp. *Id.*

121. 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995). The Ninth Circuit reaffirmed *Lai* in *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997). Judge Rymer's dissenting opinion in *Nelson* explicitly argued for the contractual approach. *Id.* at 763-64.

122. *Prudential Insurance Co.*, 42 F.3d at 1305.



a subjective test of the sort criticized previously in this article.<sup>123</sup> The Ninth Circuit's reasoning in *Lai*, and any of the proposed "knowing and voluntary" standards, are inconsistent with *Doctor's Associates* and other Supreme Court cases adopting the contractual approach.<sup>124</sup> They are, in short, bad law. But they might become good law, either through amendment of the FAA or reconsideration by the Court, perhaps in light of the constitutional argument raised above. So it is worth briefly considering the relative merits of the "knowing and voluntary" approach and the contractual approach.

*b. The Merits*

The preceding discussion outlines the virtue of the contractual approach: it permits the alienation of rights with, and only with, the voluntary consent of the rights-holder, thus providing freedom of choice to consumers (and others) and empowering them to get consideration for the right to government adjudication. The "knowing and voluntary" approach may appear to have these same virtues,<sup>125</sup> but there are two caveats.

First, some forms of the "knowing and voluntary" approach mandate disclosure, restricting freedom by prohibiting the consumer from alienating her right to certain information.<sup>126</sup> Second, the "knowing and voluntary" approach may bar certain people from alienating the right to government adjudication. The "knowing and voluntary" approach seems to place great emphasis on the status of the party in question. If a party is deemed an unsophisticated, "weak" consumer with low "bargaining power" then that person may be incapable of alienating her right to government adjudication. She may contract, and those contracts may have arbitration clauses, but it may not be possible to make those clauses enforceable under a "knowing and voluntary" standard. If the "knowing and voluntary" standard were to have this effect then it would be operating like an inalienability rule for

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123. See discussion *supra* Part I.B. It is not clear what result would have been reached under the contractual approach. Courts split on whether the language involved in *Lai* covers employment disputes. Compare *Farrand v. Lutheran Bhd.*, 993 F.2d 1253 (7th Cir. 1993), with *Kidd v. Equitable Life Assurance Soc'y*, 32 F.3d 516 (11th Cir. 1994). And it is possible that a contract law defense to enforcement was present in *Lai*. But the Ninth Circuit did not use this analysis. It rested its decision on its belief that the employees "could not have understood . . . they were agreeing to arbitrate sexual discrimination" claims because their contract "did not . . . describe the types of disputes that were to be subject to arbitration." *Prudential Insurance Co.*, 42 F.3d at 1305.

124. The Ninth Circuit purports to derive this "knowingly" requirement from the legislative history of Title VII. 42 F.3d at 1304-05. It is unlikely, however, that the Supreme Court will read Title VII as requiring an exception to the rule that "when 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 v. Kaplan*, 115 S. Ct. 1920, 1924 (1995). See also 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, 923 (1995) (asserting that *Lai* "is clearly not in line with *Gilmer* and its progeny").

125. See Rubin, *supra* note 54, at 534 ("Both the voluntary and knowing framework and the contractual framework are based on the concept of consent.").

126. See *supra* notes 114-24 and accompanying text (discussing this standard).

some parties.<sup>127</sup> It would discriminate among people, recognizing in some, but not others, the capacity to contract.

Leaving aside the foregoing two caveats, the major difference between the "knowing and voluntary" and contractual approaches can be characterized as a difference about what constitutes "voluntary consent." The "knowing and voluntary" approach has a more stringent view of "voluntary consent." Thus, it is harder to alienate one's right to government adjudication under the "knowing and voluntary" approach than it is under the contractual approach.<sup>128</sup> These additional obstacles to alienating that right will be characterized as "safeguards" by advocates of the "knowing and voluntary" approach. They guard the rights-holder from herself; from manifesting assent to something about which she has had insufficient information or time to reflect.

This could be an argument for replacing all of contract law with the more exacting "knowing and voluntary" standard.<sup>129</sup> Doing so would present additional obstacles (or safeguards) to the alienation of all rights. The more common argument though, seems to be that the right to government adjudication should be subject to the "knowing and voluntary" standard while other rights remain subject to contract law.<sup>130</sup> So alienation of the right to government adjudication requires overcoming obstacles (or safeguards) not applicable to other rights. This position seems to rest on the premise that the right to government adjudication is more important than other rights,<sup>131</sup> or that people are more likely to undervalue this right than they are to undervalue other rights.<sup>132</sup>

Is the right to government adjudication more important than other rights? Perhaps not, if the right to government adjudication is merely procedural. If an arbitration agreement merely substitutes private procedures for government procedures, while leaving substantive rights unaffected, then it may not be particularly important whether or not one has alienated the right to government adjudication.

An arbitration agreement, however, may alienate substantive, as well as procedural, rights. In fact, it may alienate *all* substantive rights because, if the arbitrator's decision does not correctly apply the law creating the rights, that decision

127. The same point may be made about the unconscionability doctrine. It is categorized as part of contract law but can, when applied aggressively, become an (anti-contract) inalienability rule.

128. To put this another way, the transaction costs of alienating the right to government adjudication are greater under the "knowing and voluntary" approach. These increased costs would presumably result in fewer arbitration agreements than under the contractual approach.

129. See Stempel, *Bootstrapping & Slouching*, *supra* note 6, at 1393 n.30 ("The *Lai* approach should be the norm for policing all contracts, not only arbitration agreements.").

130. See *id.* ("[C]ourts should impose a more searching standard of inquiry where the right allegedly waived potentially implicates the party's ability to enforce a host of other rights.").

131. *Id.* at 1395 ("[T]he arbitration contract . . . touches more closely on fundamental values of civic rights and access to the courts than does the average contract.").

132. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 453 (1996); Schwartz, *supra* note 7, at 57 ("In her ignorant position, the adherent is most likely to undervalue the right to a judicial forum.").

is likely to be enforced anyhow.<sup>133</sup> In such a case, one might argue that the parties, by alienating the right to government adjudication, thereby alienated all other rights as well.<sup>134</sup> Under this view, the right to government adjudication is as important as all other rights combined because it includes them.

The Supreme Court rejects this view. The Court flatly denies that arbitration agreements alienate all substantive rights. The Court maintains that "by agreeing to arbitrate . . . , a party does not forgo [certain] substantive rights. . . ; it only submits to their resolution in an arbitral rather than judicial forum."<sup>135</sup> Whether the Court is correct about this is a fundamental issue of arbitration law.<sup>136</sup> If the Court is wrong, then the right to government adjudication is singularly important because it encompasses all other rights. That would not, however, strengthen the case for the "knowing and voluntary" approach. Rather, it would strengthen the case for a revived doctrine of substantive arbitrability. That is, pre-dispute arbitration agreements would remain enforceable, under contract law standards, to the extent they cover claims regarding alienable rights. But they would not be enforced, regardless of how "knowing and voluntary" they are, to the extent they cover claims regarding rights which cannot be alienated prior to a dispute. This approach would sharply reverse two decades of case law in which the Court has made virtually all claims arbitrable. Thus, the issue is tremendously important but not, as just noted, supportive of the "knowing and voluntary" approach.

If the Court is correct that the right to government adjudication is merely procedural then the other premise underlying the "knowing and voluntary" approach is implicated. That premise is that people are likely to undervalue the procedural rights lost by substituting arbitration for litigation. People will alienate these procedural rights too easily because people do not appreciate their value.

The problem with this argument is that people differ in the value they place on various rights. As Thomas Hobbes noted centuries ago, "The value of all things contracted for is measured by the appetite of the contractors; and therefore the just

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133. Courts do not closely review arbitration awards to ensure that arbitrators have correctly applied the law. MACNEIL, *FEDERAL ARBITRATION*, *supra* note 14, at § 40.7; Carrington & Haagen, *supra* note 3, at 344-48; Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 85-120 (1997). For an intriguing suggestion that Supreme Court opinions require courts to review arbitration awards to ensure that arbitrators have correctly applied at least some substantive law, see Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 *BROOK. L. REV.* 1459, 1473-75 (1996).

134. See Schwartz, *supra* note 7, at 110-25. As Carrington and Haagen put it, enforcing arbitration agreements allows parties "to contract out of effective private enforcement of regulations adverse to their interests." Carrington & Haagen, *supra* note 3, at 338. In other words, arbitration clauses are, not only choice-of-forum clauses, but choice-of-law clauses as well. On this point, Carrington and Haagen deserve great credit for putting arbitration agreements in the context of other contracts respecting jurisdiction. *Id.* at 350-61.

135. The Court has made this statement only about statutory rights. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act); *Rodriguez de Quijas*, 490 U.S. at 481 (Securities Act); *Shearson/American Express, Inc.*, 482 U.S. at 229-30 (Securities Exchange Act & Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp.*, 473 U.S. at 628 (Sherman Act).

136. See Stephen J. Ware, *Privatizing Substantive Law Through Arbitration* (forthcoming).

value is that which they be contented to give."<sup>137</sup> In other words, there is no objective measure of the value of the right to government adjudication or any other right; value is in the eye of the beholder.

There are undoubtedly those who place a high value on the procedural rights lost by substituting arbitration for litigation. This group, I suspect, contains a disproportionately large number of lawyers. Lawyers, I suggest, tend to emphasize the virtues, and downplay the vices, of the procedures present in litigation but not, typically, in arbitration. After all, many lawyers think they have a financial interest in discouraging arbitration, and some actually do have such an interest. Furthermore, even lawyers whose motives are non-pecuniary may be inclined, simply because they are accustomed to litigation, to value its procedures. Others in society undoubtedly place less value on government adjudication. Lawyers ought to react to that by improving litigation procedure so people will value it more highly, not by changing the law to make it harder for people to opt out of it.

### III. CONCLUSION

Arbitration law, including the arbitration law governing consumers, largely rests on the contractual approach of alienability and voluntary disclosure. In contrast, much of the rest of consumer law reflects an anti-contract approach of inalienability and mandatory disclosure. This contrast, I contend, is the starting point for understanding debate about contemporary arbitration law. Critics of the prevailing contractual approach to arbitration law seek to bring inalienability and/or mandatory disclosure into the arbitration law governing consumers. These critics, to the extent their criticism focuses on consumer arbitration, seek to make arbitration law more like a lot of the other law governing consumers. That is, they seek to make it anti-contract law. Those of us defending the contractual approach to arbitration law must distinguish arbitration law from other areas of consumer law or, as this Article has done, make the case for contract as the central principle of consumer law.

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137. THOMAS HOBBS, *LEVIATHAN* 93 (1651) (Nelle Fuller ed., 1952).