ARBITRATION AND UNCONSCIONABILITY AFTER *DOCTOR'S ASSOCIATES, INC. v. CASAROTTO*

*Stephen J. Ware**

In Doctor's Associates, Inc. v. Casarotto, *the Supreme Court again endorsed a contractual approach to arbitration law. In particular, the Court requires lower courts to apply contract law principles when determining whether arbitration agreements are unconscionable. However, the Court did not explain how the unconscionability doctrine would actually be applied to typical arbitration cases. The author here picks up where the Court left off and in so doing advocates the contractual approach over competing approaches to issues of unconscionability in arbitration.*

The Supreme Court delivered another ringing endorsement of the contractual approach to arbitration law in *Doctor's Associates, Inc. v. Casarotto*.[1] The contractual approach rests on the principle that arbitration law is a part of contract law and courts should treat arbitration agreements, with few exceptions, like they treat other contracts.[2]

The particular aspect of the contractual approach to arbitration endorsed by *Doctor's Associates* is its method of dealing with issues of unconscionability, such as standard form contracts of adhesion and unequal bargaining power. As the number of standard form arbitration agreements signed by consumers, employees, and other individuals continues to grow,[3] so will the number of cases presenting unconscion-

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1. 116 S. Ct. 1652 (1996). The Supreme Court's advancement of the contractual approach to arbitration has been evident in numerous cases over the last twenty years. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 137 n.275 [hereinafter Ware, *Employment Arbitration*].

2. *See* Ware, *Employment Arbitration*, *supra* note 1, at 103-38; 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, 543 (1994) [hereinafter Ware, *Punitive Damages*].

3. "[W]e have seen an increasing use of arbitration in 'contracts of adhesion'—contracts 'to be taken or left,' characterized by the sort of lack of choice and imbalance of bargaining power typical of contracts entered into by consumers and employees." Alan S. Rau & Edward Sherman, Arbitration in Contracts of Adhesion 1-2 (Sept. 3, 1994) (unpublished manuscript circulated at the conference of the Society of Professionals in Dispute Resolution, Dallas, TX, Oct. 27-30, 1994). *See generally* S. Gale Dick, *ADR at the Crossroads*, DISP. RESOL. J., Mar. 1994, at 47, 52 (1994); Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at A3 (discussing pre-dispute arbitration clauses in contracts prepared by real estate brokers, finance companies, health

ability challenges to arbitration agreements. While *Doctor's Associates* requires courts to take a contractual approach to these issues, it does not explain the application of such an approach to typical arbitration cases. This article will provide such an explanation. In doing so, it will explicitly and implicitly advocate the contractual approach over competing approaches to issues of unconscionability in arbitration.

The first section of this article will outline the contractual approach to arbitration embodied in the Federal Arbitration Act (FAA),[4] as interpreted by the Supreme Court. Section II will discuss the relationship between the FAA and state law. The third section will apply the contractual approach to issues of unconscionability.

I. THE FAA'S CONTRACTUAL APPROACH TO ARBITRATION LAW

For centuries, Americans have used arbitration to resolve their disputes.[5] Sometimes they agree to arbitrate a dispute that has already arisen. More commonly though, the agreement to arbitrate is formed prior to any dispute. Many contracts include clauses obligating the parties to arbitrate, rather than litigate, any and all disputes arising out of or relating to the contract.[6] These pre-dispute arbitration agreements[7] are, like other contracts, sometimes breached. An example of such a breach is the initiation of a lawsuit on a claim arising out of the contract containing the arbitration clause. Another example is a

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care providers, and insurers, as well as World Cup Soccer tickets and Cheerios sweepstakes). The growth of arbitration agreements signed by employees is discussed in Ware, *Employment Arbitration*, *supra* note 1, at 94-103. The growth of arbitration agreements signed by consumers, particularly consumers of financial services, is discussed in Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); Richard C. Reuben, *Decision Gives Banking ADR a Boost*, A.B.A. J., Dec. 1994, at 32, 32-33; Susan Antilla, *Brokerage Firms Steer Dissatisfied Customers Away from Court, but in Only One Direction*, N.Y. TIMES, May 12, 1995, at A16; Michael Ferry, *Is It Time for Mandatory Arbitration in Contracts?*, BUS. L. TODAY, May-June 1995, at 22, 22-23.

4. 9 U.S.C. §§ 1-14, 201-208 (1994).

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

6. For example, a standard arbitration clause reads:

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

1A CLARK A. NICHOLS, NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 1.1705, at 108 (rev. vol. 1992).

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

party's refusal to arbitrate such a claim asserted against it. Until the 1920s, courts in the United States provided no meaningful remedy for these breaches.[8] Parties could breach their arbitration agreements without fear of any court-ordered sanction beyond nominal damages.[9]

Changing this required making pre-dispute arbitration agreements enforceable by the remedy of specific performance,[10] and that was precisely the effect of the FAA, enacted in 1925.[11] Sections 3 and 4 of the FAA make arbitration agreements involving interstate commerce enforceable by specific performance.[12]

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8. *See* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 4.3.2.2 (1994) (noting that during the period 1800-1920, agreements to arbitrate future disputes were not specifically enforceable in the United States); WESLEY STURGES, COMMERCIAL ARBITRATION AND AWARDS § 87, at 262 (1930); *see, e.g.*, Munson v. Straits of Dover S.S. Co., 102 F. 926, 927-28 (2d Cir. 1900) (holding that plaintiff who sought damages—in the form of lawyer's fees and costs incurred in defending a lawsuit—for breach of an agreement to arbitrate was entitled to nominal damages only).

9. *See, e.g., Munson*, 102 F. at 927-28. Court-ordered sanctions are not the only sanctions for breach of contract. Parties often perform their contracts because of private sanctions. *See generally* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990). Private sanctions sometimes apply to the performance of arbitration agreements like other contracts. *See* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 490 (1995); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992) ("Unlike a court, the [New York Diamond Dealers Club arbitrator] has the ability to bring unique pressures on the losing party to pay: it can put him out of business almost instantaneously by hanging his picture in the clubroom of every bourse in the world with a notice that he failed to pay his debt.").

10. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 20 (1992) (stating that the damages remedy was "largely ineffective").

11. Law of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14, 201-208). The statute was originally called the United States Arbitration Act, but is now commonly referred to as the Federal Arbitration Act.

12.

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1994).

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

Id. § 4.

The primary substantive provision of the FAA is § 2. It provides that a "written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[13] The significance of § 2 is apparent in light of the historical reluctance of courts to enforce pre-dispute arbitration agreements.

> The FAA was designed to "overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," and to place such agreements "'upon the same footing as other contracts.'" While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."[14]

This is the core of the contractual approach to arbitration, "overrul[ing] the judiciary's long-standing refusal to enforce agreements to arbitrate."[15]

For about fifty years (1925-1975) after the enactment of the FAA, significant remnants of the judiciary's refusal to enforce arbitration agreements remained unchallenged. Most significantly, courts often refused to enforce agreements to arbitrate claims created by "public interest" statutes in such areas as employment discrimination,[16] antitrust,[17] and securities.[18] Courts did this on the ground that it would

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13. The full text of § 2 is as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2.

14. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 478 (1989) (citations omitted). "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs." H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

15. *Volt*, 489 U.S. at 478.

16. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (refusing to enforce arbitration agreements to claims under Title VII), *cert. denied*, 493 U.S. 1045 (1990).

17. *See, e.g.*, American Safety Equip. Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir. 1968) (refusing to enforce arbitration agreements to claims under the Sherman Antitrust Act).

18. *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953) (refusing to enforce arbitration agreements under the Securities Act of 1933), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

Courts have held that other claims are not arbitrable as well. *See, e.g.*, Nicholson v. CPC Int'l Inc., 877 F.2d 221 (3d Cir. 1989) (holding that ADEA claims are not arbitrable); Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (1st Cir. 1986)

violate "public policy" to enforce such agreements.[19]

The Supreme Court's arbitration decisions over the last twenty years have been remarkably faithful to the contractual approach.[20] Most important, the Court has held that if the parties contract to resolve a dispute in arbitration, then that contract must be enforced even if the dispute involves claims in the employment discrimination,[21] antitrust,[22] and securities[23] areas. The Court has repeatedly emphasized that courts should relegate claims to arbitration when, and only when, contract law analysis would call for that.[24] Furthermore, parties are largely free to specify by contract the procedures governing their arbitration.[25] The Court has even suggested that they may be free to specify by contract the remedies the arbitrator may award, specifically, whether punitive damages are available in arbitration.[26] The Court's fidelity to the contractual approach has extended beyond agreements

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(holding that RICO claims are not arbitrable); Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985) (holding that ERISA claims are not arbitrable), *overruled by* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110 (3d Cir. 1993); Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983) (holding that "non-core" bankruptcy proceedings are not arbitrable); Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970) (holding that patent claims are not arbitrable), *cert. denied*, 401 U.S. 976 (1971); Kamakazi Music Corp. v. Robbins Music Corp., 522 F. Supp. 125 (S.D.N.Y. 1981) (holding that copyright claims are not arbitrable), *aff'd*, 684 F.2d 228 (2d Cir. 1982).

19. *See, e.g., Utley*, 883 F.2d at 186-87.

20. *See* Ware, *Employment Arbitration*, *supra* note 1, at 137 n.275 (citing cases).

21. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-28 (1991) (enforcing an agreement to arbitrate an ADEA employment discrimination claim).

22. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (enforcing, in an international context, an agreement to arbitrate an antitrust claim).

23. Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987) (enforcing, in a domestic context, an agreement to arbitrate a securities claim); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974) (enforcing, in an international context, an agreement to arbitrate a securities claim).

24. "[T]he arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . ." First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995). "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." *Id.* at 1924; *see also* AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

25. *See* 3 MACNEIL ET AL., *supra* note 8, § 32.4.

26. Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1216 (1995) ("[T]he case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages."). One commentator reads *Mastrobuono* as "declar[ing] in dicta . . . that it would have enforced the parties' intent if they had expressly precluded punitive damages." *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1682 (1996). For my argument that the FAA requires enforcement of arbitration clauses that specify whether arbitrators may award punitive damages, see Ware, *Punitive Damages*, *supra* note 2, at 532-44.

between businesses; this fidelity has extended to an employment agreement[27] and to an agreement involving consumers of a home termite protection plan.[28]

While the substance of the Court's arbitration decisions over the last twenty years has been remarkably faithful to the contractual approach, the Court's rhetoric has been even more supportive of the principle that arbitration law is a part of contract law. The Court invoked the libertarian philosophy underlying freedom of contract when it declared that "[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[29] In eliminating the public policy defense, the Court said, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude" enforceability.[30] The Court has repeatedly emphasized that it seeks "to ensure the enforceability, according to their terms, of private agreements to arbitrate."[31]

II. FAA PREEMPTION OF STATE LAW

A. *The FAA's Post-*Erie *Transformation*

The FAA's contractual approach to arbitration and the Supreme Court's enthusiasm for that approach over the last twenty years are significant in and of themselves. But their significance has been magnified by another development in the case law: the expansion of the FAA into state courts.

Prior to the enactment of the FAA, federal courts did not enforce arbitration agreements. The federal courts did not enforce the few state arbitration statutes requiring specific enforcement of arbitration agreements because of an adherence "to the proposition that state arbitration statutes were not substantive law and hence not binding on the federal courts."[32] In short, they believed that enforcement of arbitration agreements was a procedural matter "within the exclusive province of the court, federal or state, in which enforcement was sought—the forum court."[33]

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27. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-28 (1991) (enforcing an agreement to arbitrate an ADEA employment discrimination claim).

28. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 842-43 (1995) (enforcing an agreement to arbitrate consumers' claim).

29. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989).

30. *Gilmer*, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

31. *Mastrobuono*, 115 S. Ct. at 1216 (quoting Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989)); *see also* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) ("[T]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate.").

32. 1 MACNEIL ET AL., *supra* note 8, § 10.2.

33. *Id.*

"When it was enacted in 1925, the FAA was a procedural statute applicable only in federal courts."[34] During the following decades, there was "universal recognition that the [FAA] had nothing to do with proceedings in state courts."[35] This changed when the Supreme Court considered the effects of its landmark decisions in *Erie Railroad v. Tompkins*[36] and *Guaranty Trust Co. v. York*.[37] *Erie* held that federal courts lack power to create substantive law so they must decide cases according to state substantive law[38] and federal procedural law.[39] *Erie* thus required a line between "substance" and "procedure." *Guaranty Trust* provided such a line; it put on the substantive side any law that was "outcome determinative."[40] The Supreme Court used that line in *Bernhardt v. Polygraphic Co. of America*[41] to conclude that the FAA is substantive law.[42] Thus *Erie, Guaranty Trust* and *Bernhardt* moved the "FAA from the procedural side of the law, where Congress had put it in 1925, to the substantive side, where Congress had most decidedly not put it."[43]

Once the FAA became understood as substantive law, a troubling issue arose about the FAA's constitutionality. If the FAA applied only in the federal courts then the Supreme Court "would have had to decide if Congress could legislate where *Erie* had forbidden the federal courts to create common law."[44] In 1967 the Court avoided this difficult issue by concluding, against the evidence, that Congress had enacted the FAA pursuant to its power to regulate interstate commerce.[45] "The Court did not quite say that the FAA governs in state court, but its reasoning left little room for any other result."[46] The Supreme Court

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34. *Id.* § 10.1.

35. MACNEIL, *supra* note 10, at 130.

36. 304 U.S. 64 (1938).

37. 326 U.S. 99 (1945).

38. State substantive law does not, of course, apply to the extent that it is preempted by federal law. *See* U.S. CONST. art. VI, cl. 2.

39. *Erie*, 304 U.S. at 78.

40. *Guaranty Trust*, 326 U.S. at 109. The "outcome determinative" test classifies virtually all law as "substantive" and has not been followed strictly by the Supreme Court. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("But in this sense every procedural variation is 'outcome-determinative.' ").

41. 350 U.S. 198 (1955).

42. *Id.* at 203 ("If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where the suit is brought. . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.").

43. 1 MACNEIL ET AL., *supra* note 8, § 10.4.1.

44. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1320 (1985).

45. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-05 (1967). The Court's conclusion that the FAA was enacted pursuant to the Commerce Clause and thus creates substantive law applicable in state courts has been thoroughly criticized by Ian Macneil. *See* MACNEIL, *supra* note 10, chs. 9-11, 14 (1992) (arguing, for example, that the 68th Congress understood the FAA to be applicable only in federal courts).

46. 1 MACNEIL ET AL., *supra* note 8, § 10.4.2.

eventually concluded that the FAA governs in state court in the 1980s cases of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[47] and *Southland Corp. v. Keating*.[48]

Expanding the FAA to state courts tremendously increased the significance of the FAA's contractual approach because:

> The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. IV) or otherwise. Section 4 [of the FAA] provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.[49]

After extending the reach of the FAA to state, as well as federal, courts, there are few arbitration agreements not governed by the Act.[50] The FAA only governs arbitration agreements in a "maritime transaction or a contract evidencing a transaction involving commerce,"[51] and "commerce" is defined as interstate or international commerce.[52] However, the Supreme Court has concluded that this language extends the reach of the FAA to the limit permitted by the Commerce Clause of the United States Constitution.[53]

B. No Preemption of Contract Law

While the FAA applies to virtually all arbitration agreements[54] and, like all federal law, preempts inconsistent state law,[55] it does not

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47. 460 U.S. 1, 20 (1983).

48. 465 U.S. 1, 11 (1984).

49. *Moses H. Cone*, 460 U.S. at 25 n.32.

50. 1 MACNEIL ET AL., *supra* note 8, § 10.10.3 ("[T]here seem to be few arbitration agreements in modern America that are not contracts 'evidencing a transaction in commerce . . . .'").

51. 9 U.S.C. § 2 (1994).

52. "Commerce" is defined as

> commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

Id. § 1.

53. Allied-Bruce Terminix Cos., v. Dobson, 115 S. Ct. 834, 841 (1995).

54. *See supra* notes 50-53 and accompanying text.

55. U.S. CONST. art. VI, cl. 2.

> The appropriate application of [the Supremacy Clause] . . . is to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution . . . . In every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not contro-

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Id. § 1.

53. Allied-Bruce Terminix Cos., v. Dobson, 115 S. Ct. 834, 841 (1995).

54. *See supra* notes 50-53 and accompanying text.

55. U.S. CONST. art. VI, cl. 2.

> The appropriate application of [the Supremacy Clause] . . . is to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution . . . . In every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not contro-

preempt all state law pertaining to arbitration agreements.[56] In fact, it expressly adopts some state contract law.[57] Section 2 of the FAA compels courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."[58] Thus, as the Supreme Court explained in *Doctor's Associates*, "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] § 2."[59]

Prior to *Doctor's Associates*, some cases held that FAA preemption precluded any application of state unconscionability law to arbitration agreements.[60] Those cases are inconsistent with *Doctor's Associates* and other Supreme Court cases.[61] The law, as Ian Macneil summarizes it,

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verted, must yield to it.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

56. The FAA's preemption of state law was addressed by the Supreme Court in Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989). "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 477. But, the Supreme Court continued,

> even when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The preemption question, therefore, is whether application of a state law "would undermine the goals and policies of the FAA." *Id.*

57. In addition to expressly adopting some state contract law, "the FAA presupposes a comprehensive infrastructure of general contract law, including most particularly a law giving effect to parties' consent to agreements." 1 MACNEIL ET AL., *supra* note 8, § 10.6.2.1. "The contract infrastructure underlying the FAA is the general contract law of the particular state governing the parties' relationships," rather than a federal contract law courts might create to govern arbitration agreements. *Id.* § 10.6.2.3.

58. 9 U.S.C. § 2 (1994).

59. Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996).

60. *See* Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988) (stating that "state law adhesion contract principles may not be invoked to bar arbitrability of disputes" under the FAA); *accord* McCarthy v. Providential Corp., No. C 94-0627 FMS, 1994 WL 387852, at *4 (N.D. Cal. July 19, 1994) ("[T]he validity of a defense to the enforcement of an arbitration agreement is to be governed exclusively by application of federal standards."); Heily v. Superior Court, 248 Cal. Rptr. 673, 678 (Ct. App.) (agreeing with the *Cohen* analysis), *rev. denied*, 248 Cal. Rptr. 673, 673 (1988), *cert. denied*, 489 U.S. 1013 (1989); Chan v. Drexel Burnham Lambert Inc., 223 Cal. Rptr. 838, 841 (Ct. App. 1986) (holding that California contract law may not be applied to bar arbitration); Tonetti v. Shirley, 219 Cal. Rptr. 616, 618 (Ct. App. 1985) ("California adhesion contract principles are inapplicable to the enforcement of an arbitration clause in a contract governed by the [FAA]."); *see also* Badie v. Bank of Am., No. 944916, 1994 WL 660730, at *1 (Cal. App. Dep't Super. Ct. Aug. 18, 1994) ("The court makes no determination as to whether the otherwise applicable California law on . . . unconscionability . . . is preempted by . . . the Federal Arbitration Act.").

61. *See* Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (stating that the purpose of

is that "[a]rbitration agreements [are] burdened with whatever protections against one-sidedness that law and equity provide[] contracts in general, but no more."[62] Here, as elsewhere, the FAA places arbitration agreements "upon the same footing as other contracts."[63]

There is one important respect in which arbitration agreements are not placed upon the same footing as other contracts—a result of the one major area of arbitration law inconsistent with the contractual approach: the separability doctrine.[64]

> The separability doctrine is a legal fiction pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts. In addition to the contract really alleged to have been formed (the container contract), the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms.[65]

Because of the separability doctrine, a challenge to the enforceability of the container contract—based on a contract defense such as unconscionability[66]—is not a challenge to the enforceability of the fictional contract consisting solely of the arbitration clause. This fictional con-

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FAA § 2 "was to make arbitration agreements as enforceable as other contracts, but not more so").

62. MACNEIL, *supra* note 10, at 68.

63. *Doctor's Assocs.*, 116 S. Ct. at 1656 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

64. *See* Ware, *Employment Arbitration*, *supra* note 1, at 128-38 (criticizing the separability doctrine as inconsistent with the contractual approach to arbitration); 1 MACNEIL ET AL., *supra* note 8, § 10.7.4.1 (characterizing the separability doctrine as the FAA "displac[ing] general state contract law").

Another area of arbitration law inconsistent with the contractual approach is the federal policy requiring biased interpretation of arbitration clauses. The *Moses H. Cone* decision stated that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); *see* 1 MACNEIL ET AL., *supra* note 8, § 10.7.3 (arguing that the *Moses H. Cone* decision "flies in the face of the freedom of contract principle to which the Supreme Court has given primacy").

One might characterize the FAA's specific performance remedy for breach of arbitration agreements as a major exception to general contract law which ordinarily uses the remedy of money damages. This would be a mischaracterization because general contract law uses specific performance when money damages are ineffectual, as they are in the arbitration context. *See* RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, topic 3, intro. note (1981) ("Specific performance and injunctions are alternatives to the award of damages as a means of enforcing contracts.").

65. Ware, *Employment Arbitration*, *supra* note 1, at 131. The separability doctrine "separate[s] the arbitration clause from the rest of the contract and treat[s] it as an independent contract." 2 MACNEIL ET AL., *supra* note 8, § 15.2.

66. While the case adopting the separability doctrine under the FAA, Prima Paint Co. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967), involved a claim that the container contract was induced by fraud, "[i]ts separability principle is . . . by no means limited to fraud." 2 MACNEIL ET AL., *supra* note 8, § 15.3.2. The separability doctrine has been applied to a variety of defenses to contract enforcement, including unconscionability. *Id.*

tract is then enforced, sending to arbitration the dispute over whether the container contract is unconscionable and, therefore, unenforceable. The separability doctrine allows a court to hear an unconscionability challenge only if that challenge is "directed to the arbitration clause itself,"[67] but not to other clauses of the container contract or to the container contract generally.[68]

C. *Preemption of Anti-Contract Law*

With the major exception of the separability doctrine, the FAA applies state contract law to arbitration agreements.[69] This is essential to the contractual approach to arbitration law. Similarly essential is the FAA's preemption of state anti-contract law otherwise applicable to arbitration agreements. By "anti-contract" law, I refer to those laws which render rights inalienable.[70]

The most important sort of anti-contract law preempted by the FAA is state law precluding enforcement of agreements to arbitrate some or all types of claims. An example is the California law precluding enforcement of agreements to arbitrate claims created by the California Franchise Investment Law.[71] The Supreme Court has repeatedly held that such state law is preempted.[72] The FAA's preemption of state

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67. *Prima Paint*, 388 U.S. at 402.

68. I have argued elsewhere that the separability doctrine should be repealed. *See* Ware, *Employment Arbitration*, *supra* note 1, at 128-38. Courts should apply state contract law, including the unconscionability doctrine, to arbitration agreements, not just arbitration clauses. Doing so would ensure that disputes are resolved by arbitration only when the parties have consented to that in circumstances in which consent retains "its normal moral, and therefore legal, significance." *Id.* at 111 (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318 (1986)).

69. There are also minor exceptions. See *supra* note 64.

70. "Contract law concerns ways in which rights are transferred or alienated." Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986). The law of gifts also concerns ways in which rights are alienated. *See, e.g.*, Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987) (distinguishing complete inalienability from market inalienability).

71. CAL. CORP. CODE § 31512 (Deering 1979). For a case holding that this state law is preempted by the FAA, see Southland Corp. v. Keating, 465 U.S. 1, 3-5 (1984). Such law makes the right to litigate, rather than arbitrate, California Franchise Investment Law claims inalienable.

72. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 843 (1995) (preempting an Alabama state law denying enforcement to all pre-dispute arbitration agreements); Perry v. Thomas, 482 U.S. 483, 490-91 (1987) (preempting state law denying enforcement of agreements to arbitrate California Labor Code claims); *Southland Corp.*, 465 U.S. at 16 (preempting state law denying enforcement of an agreement to arbitrate California Franchise Investment Law claims); *see also* 2 MACNEIL ET AL., *supra* note 8, § 16.6.1 ("[S]tate public policy defense law is the clearest possible example of state arbitration law, which is superseded by the FAA.").

These Supreme Court cases indicate that the FAA preempts the following state anti-contract laws with the possible exception of those relating to insurance, *see* 1 MACNEIL ET AL., *supra* note 8, § 10.6.2.6, or employment, *see id.* ch. 11: ALA. CODE § 6-5-485 (1993) (medical malpractice); ARK. CODE ANN. § 16-108-201 (Michie Supp. 1995) (insurance contracts, personal injury claims); GA. CODE ANN. § 9-9-2(c) (Supp. 1996) (insurance con-

anti-contract law follows from the command of § 2 that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[73] A state law providing a ground for the revocation of an arbitration agreement that is not a ground for the revocation of any contract is in direct conflict with § 2 and, therefore, preempted by it.[74] Any law that singles out arbitration agreements by making them less enforceable than other contracts is preempted by the FAA.[75] In short, the FAA's contractual approach to

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tracts, personal injury claims, consumer contracts); IND. CODE ANN. § 34-4-2-1 (West 1986) (consumer contracts); IOWA CODE ANN. § 679A.1 (West 1987) (adhesion contracts, employment contracts, personal injury claims); KAN. STAT. ANN. §5-401(c) (Supp. 1995) (insurance contracts, personal injury claims); KY. REV. STAT. ANN. § 336.700 (Michie 1995) (employment contracts); *id.* § 417.050 (Michie Supp. 1996) (insurance contracts); LA. REV. STAT. ANN. § 9:4232 (West 1991) (medical malpractice); MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2A-01 to -09 (1995 & Supp. 1996) (medical malpractice); MO. ANN. STAT. §§ 435.350, 435.460 (West 1992) (adhesion contracts, insurance claims); MONT. CODE ANN. § 27-5-114 (1995) (insurance contracts, personal injury claims, property contracts); NEB. REV. STAT. § 25-2602 (1995) (workers' compensation); OHIO REV. CODE ANN. § 2711.01 (Anderson 1992) (rental contracts); OKLA. STAT. ANN. tit. 15, § 802 (West 1992) (insurance contracts except those between insurance companies); OR. REV. STAT. § 36.305 (1995) (all contracts); R.I. GEN. LAWS § 10-3-2 (Supp. 1995) (employment contracts, insurance contracts); S.C. CODE ANN. § 15-48-10 (Law. Co-op. Supp. 1995) (employment contracts, medical malpractice); S.D. CODIFIED LAWS ANN. § 21-25A-3 (Michie 1987) (insurance contracts); TENN. CODE ANN. § 29-5-302(a) (Supp. 1996) (all contracts); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West Supp. 1997) (employment contracts, personal injury claims); VT. STAT. ANN. tit. 12, §§ 5652, 5653 (Supp. 1995) (insurance contracts); Baxter v. John Weitzel, Inc., 871 P.2d 855 (Kan. Ct. App. 1994) (employment contracts).

The Patient Protection Act, 1996 Cal. Legis. Serv. Prop. 216 § 1796.11 (West), which was rejected by California voters this past November, would also have been preempted.

73. 9 U.S.C. § 2 (1994).

74. An important point about FAA preemption of state law is that it is, to some extent, a default rule, not a mandatory rule. A default rule is a rule the parties can avoid by forming an enforceable contract; in contrast, a mandatory rule is one that trumps an otherwise enforceable contract. Parties can, to some extent, contract around FAA preemption of state law. The extent to which parties can do this is unclear because the case authorizing it, Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989), may be given a broad or narrow reading. *Compare* Ware, *Punitive Damages*, *supra note 2*, at 551-58 (favoring a broad interpretation of *Volt*) *with* 1 MACNEIL ET AL., *supra* note 8, § 10.9.2.2 (citing authorities for a narrow interpretation of *Volt*); Alan S. Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of "Waiver,"* 6 AM. REV. INT'L ARB. 223, 257 (1995) (stating that *Volt* "has proven to be simply unworkable").

75. Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996); *accord Perry*, 482 U.S. at 492-93 n.9 (stating that "[a] state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" § 2 of the FAA); Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 722 (4th Cir.) ("[W]ith few limitations, if a state law singles out arbitration agreements and limits their enforceability it is preempted."), *cert. denied*, 498 U.S. 983 (1990); Note, *Incorporation of State Law Under the Federal Arbitration Act*, 78 MICH. L. REV. 1391, 1401 (1980) ("State laws conflict with section 2 of the Act if they discriminate against arbitration agreements, if, that is, they provide 'grounds . . . for the revocation' of arbitration agreements that are not applicable to 'any contract.' ").

arbitration means that contract law must be applied to arbitration agreements while anti-contract law must not be applied to them.[76]

III. UNCONSCIONABLE ARBITRATION AGREEMENTS

A. Doctor's Associates, Inc. v. Casarotto

The FAA's adoption of state contract law and preemption of state anti-contract law are central to the Supreme Court's opinion in *Doctor's Associates*. The case involved a franchise for a Subway restaurant in Montana.[77] The franchisees, the Casarottos, sued the franchisor, Doctor's Associates, Inc. (DAI).[78] DAI successfully moved the trial court for a stay of the suit based on the franchise agreement's clause requiring all claims relating to the agreement to be arbitrated in Bridgeport, Connecticut by the American Arbitration Association.[79] The Supreme Court of Montana overturned the stay.[80] 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."[81] The franchise agreement did not comply with this statute because the arbitration clause was on page nine and in ordinary type.[82]

The United States Supreme Court reversed the Montana court's decision.[83] The Supreme Court correctly held that the Montana statute is preempted by the FAA because the Montana statute "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."[84] 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."[85] The FAA "preclude[s] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' "[86]

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76. This proposition may be easier to state than to apply. *See* 1 MACNEIL ET AL., *supra* note 8, § 10.7.2 ("At the present time the boundary between restrictive state general contract law—acceptable under *Perry*—and restrictive state law relying on the uniqueness of arbitration—unacceptable under *Perry*—is unclear.").

77. Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1654 (1996).

78. *Id.*

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

80. *Id.*

81. *Id.* (referring to MONT. CODE ANN. § 27-5-114(4) (1995)).

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

83. *Id.* at 1657.

84. *Id.* at 1656.

85. 9 U.S.C. § 2 (1994).

86. *Doctor's Assocs.*, 116 S. Ct. at 1656 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

The Supreme Court of Montana's decision in *Doctor's Associates* is particularly interesting because its author, Justice Trieweiler, also wrote a special concurring opinion.[87] In it, he attacks the "arrogance"[88] of "those federal judges who consider forced arbitration as the panacea for their 'heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy."[89] Justice Trieweiler's criticism of federal judges names in particular Judge Selya of the First Circuit.[90]

Justice Trieweiler felt compelled to proclaim that "[i]n Montana, we are reasonably civilized and have a sophisticated system of justice."[91] He worries that this sophisticated justice system is "easily avoided by any party with enough leverage to stick . . . an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it."[92] He contends that Judge Selya's views on arbitration require enforcement of such arbitration clauses:

> Nowhere in Judge Selya's lengthy opinion is there any consideration for the total lack of procedural safeguards inherent in the arbitration process. Nowhere in his opinion does he consider the financial hardship that contracts, like the one in this case, impose on people who simply cannot afford to enforce their rights by the process that has

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With the possible exception of state statutes relating to insurance, *see* 1 MACNEIL ET AL., *supra* note 8, § 10.6.2.6, or employment, *see id.* § 11.2, other statutes preempted on the reasoning of *Doctor's Associates* include: CAL. CIV. PROC. CODE § 1298 (Deering Supp. 1996) (arbitration clauses in contracts involving a conveyance of real property shall contain prescribed notice in at least eight-point boldface type); CAL. BUS. & PROF. CODE § 7191 (Deering Supp. 1996) (arbitration clauses in certain residential contracts shall contain prescribed notice in at least ten-point roman boldface type); COLO. REV. STAT. ANN. § 13-64-403 (Supp. 1996) (arbitration clauses in agreements for medical services shall contain prescribed notice in at least ten-point boldface type); GA. CODE ANN. § 9-9-2(c)(8), (9) (Supp. 1996) (arbitration clause must be initialed); N.Y. PUB. HEALTH LAW § 4406-a(2), (3) (McKinney Supp. 1996) (arbitration provisions of health maintenance organization contracts must be "in at least twelve point boldface type immediately above spaces for the signature of the enrollee"); R.I. GEN. LAWS § 10-3-2 (Supp. 1995) (arbitration clauses in insurance contracts must be "immediately before the testimonium clause or the signature of the parties"); S.C. CODE ANN. § 15-48-10 (Law. Co-op Supp. 1995) (arbitration clause must be underlined, capitalized and on first page); S.D. CODIFIED LAWS ANN. § 21-25B-3 (Michie 1987) (arbitration clauses relating to medical services must be in twelve-point boldface type immediately above the space for signature); TENN. CODE ANN. § 29-5-302 (Supp. 1996) (arbitration clause in certain contracts must be signed or initialed by the parties); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West Supp. 1997) (arbitration clauses in certain contracts must be signed by parties and their attorneys); VT. STAT. ANN. tit. 12, § 5652 (Supp. 1995) (arbitration clause must be signed by parties and displayed prominently).

87. Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., concurring), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652 (1996).

88. *Id.* at 940 (Trieweiler, J., concurring).

89. *Id.* at 939 (Trieweiler, J., concurring).

90. *Id.* at 940 (Trieweiler, J., concurring) (citing Securities Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990)).

91. *Id.* at 939 (Trieweiler, J., concurring).

92. *Id.* at 940 (Trieweiler, J., concurring).

> been forced upon them. . . . The notion by federal judges, like Judge Selya, that people like the Casarottos have knowingly and voluntarily bargained and agreed to resolve their . . . claims by arbitration, is naive at best, and self-serving and cynical at worst.[93]

In short, Justice Trieweiler resists the conclusion that the FAA preempts the Montana statute, because he believes the Montana statute helps to prevent enforcement of unconscionable arbitration agreements.[94]

Justice Trieweiler seeks a permissible end—preventing enforcement of unconscionable arbitration agreements—but would use impermissible means. The impermissible means is state law, like the Montana statute, that creates a ground for the revocation of an arbitration agreement that does not "exist at law or in equity for the revocation of any contract."[95] A permissible means is a "generally applicable contract defense[], such as . . . unconscionability."[96] Distinguishing permissible from impermissible means may, at first, appear to be straightforward. It is not.

Suppose Montana had not enacted *Montana Code* section 27-5-114(4), the statute at issue in *Doctor's Associates*. Suppose further that DAI had moved to stay the Casarottos' suit, i.e., to enforce the arbitration clause in the franchise agreement. Could the Supreme Court of Montana have allowed the Casarottos' suit to proceed on the ground that the arbitration clause was unconscionable because it was on page nine of the franchise agreement and in ordinary type?[97] In other words, could Justice Trieweiler have avoided FAA preemption by using the exact same reasoning he used in *Doctor's Associates*, but by labeling that reasoning "unconscionability" instead of "*Montana Code* section 27-5-114(4)"?

The only way to answer "yes" to this question would be to distinguish between common law and statutory law. There is nothing in the FAA, however, to justify such a distinction. The FAA preempts state law grounds for the revocation of arbitration agreements that do not "exist at law or in equity for the revocation of any contract."[98] The FAA does not distinguish between common-law grounds and statutory grounds. In fact, the Supreme Court has stated that "state law, *whether of legislative or judicial origin*, is applicable [to arbitration agreements] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[99] So FAA pre-

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93. *Id.* (Trieweiler, J., concurring).
94. *Id.* (Trieweiler, J., concurring).
95. 9 U.S.C. § 2 (1994).
96. Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996).
97. *Id.* at 1654.
98. 9 U.S.C. § 2 (1994).
99. Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987) (emphasis added). Or, as Judge Selya put it, "[t]he gravamen of the FAA is to preserve the arbitral bargain against external onslaughts manifesting hostility to arbitration, whatever their genesis."

emption does not turn on whether the state law precluding enforcement of an arbitration agreement is common law or statutory. Therefore, Justice Trieweiler could not have avoided FAA preemption by labeling the reasoning he used in *Doctor's Associates* "unconscionability," instead of "*Montana Code* section 27-5-114(4)." Had he done so, the Supreme Court would have held that his application of the unconscionability doctrine is preempted by the FAA.[100]

While the FAA preempts some applications of the unconscionability doctrine to arbitration agreements, it does not preempt others. *Doctor's Associates* specifically identified unconscionability as a state law doctrine that "may be applied to invalidate arbitration agreements without contravening [FAA] § 2."[101] The challenge, therefore, is to determine when application of the unconscionability doctrine to arbitration agreements is, and when it is not, preempted by the FAA. The rest of this article addresses that challenge.

B. *When Is an Arbitration Agreement Unconscionable?*

The term "unconscionability" is "incapable of precise definition."[102] It is often categorized into two forms: substantive unconscionability and procedural unconscionability.[103] Substantive unconscionability refers simply to contract terms that are "unreasonably favorable" to one side.[104] Procedural unconscionability deals with the process of contract formation.[105] It encompasses "not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power."[106]

> 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

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Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1120 n.4 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990).

100. Similarly, Alabama courts could not declare all arbitration agreements unconscionable. That would be using the unconscionability doctrine effectively to revive the provision of the *Code of Alabama* that *Allied-Bruce* held was preempted by the FAA. ALA. CODE § 8-1-41(3) (1993). *See supra* note 53 and accompanying text.

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

102. E. ALLAN FARNSWORTH, CONTRACTS § 4.28 (2d ed. 1990); *see* James A. Pikl, *Arbitration and the DTPA*, 26 TEX. TECH L. REV. 881, 894 (1995) ("If there is a legal term of art more malleable than unconscionability, it is hard to find."); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 626 (1983) (describing unconscionability as a "vague slogan[]").

103. This distinction comes from Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

104. FARNSWORTH, *supra* note 102, § 4.28.

105. *Id.*

106. *Id.*

large amount of one type of unconscionability can make up for only a small amount of the other.[107]

How the unconscionability doctrine applies to arbitration agreements is a major unresolved issue in arbitration law.[108] The unconscionability doctrine is inherently case-specific, making it difficult to generalize about what sorts of contracts are unconscionable. With that

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107. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17-18 (1993). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 & cmt. (1981).

Some courts, particularly in California, use a verbal formulation that declines to enforce adhesion contracts if they are either substantively unconscionable or contain a term which "does not fall within the reasonable expectations of the weaker or 'adhering' party." *See, e.g.*, Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981). Denying enforcement to substantively unconscionable adhesion contracts is the standard rule. *See* Craswell, *supra*, at 17-18. What the "reasonable expectations" alternative adds to the standard rule is less clear. How does a court decide which terms are not within the "reasonable expectations" of the non-drafting party? The *Restatement* describes such a term as, roughly, one that is substantively unconscionable, i.e., "the term is bizarre or oppressive, . . . it eviscerates the non-standard terms explicitly agreed to, or . . . eliminates the dominant purpose of the transaction." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

108. Many commentators lament that courts too rarely find arbitration agreements unconscionable. *See, e.g.*, Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 107 (1992) (discussing few cases "willing to reject arbitration clauses on adhesion contract grounds"); Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 96 (1994) (discussing how the FAA was enacted to ensure the enforcement of arbitration agreements); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 112 (1993) (noting "the Supreme Court's zealous enforcement of arbitration clauses under the [FAA]"); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1379 (1991) (noting that according to the FAA, arbitration agreements found in contracts which involve interstate commerce are enforceable, absent limited exceptions). *See generally* 2 MACNEIL ET AL., *supra* note 8, § 19.3. On the other hand, one commentator contends that "courts are not manipulating the doctrine of unconscionability to favor the enforcement of arbitration clauses." Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 349 (1996).

State courts have generally been more likely than federal courts to make such a finding. *See* Jonathan E. Breckenridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925, 973-74 (1993); Alan S. Rau & Edward Sherman, Arbitration in Contracts of Adhesion 5 (Sept. 3, 1994) (unpublished manuscript circulated at the conference of the Society of Professionals in Dispute Resolution, Dallas, TX, Oct. 27-30, 1994, on file with author). This heightens uncertainty over the extent to which the FAA preempts application of the state unconscionability doctrine to arbitration agreements. It also heightens concern over whether a federal or state court will be deciding whether the FAA preempts a particular application of the unconscionability doctrine. Some state courts have vigorously resisted FAA preemption of state law. For instance, Alabama courts have been ardent defenders of "states' rights" in this area. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 628 So. 2d 354 (Ala. 1993), *rev'd*, 115 S. Ct. 834 (1995).

caution in mind, however, one can consider some arbitration agreements that might raise an unconscionability issue.

1. Substantive unconscionability

"Particular terms may be unconscionable whether or not the contract as a whole is unconscionable."[109] For that reason, one must distinguish whether an arbitration *clause* is unconscionable from whether an arbitration *agreement* (the container contract) is unconscionable. In some cases, there may be no objection to the arbitration clause, while the container contract is unconscionable because of its other terms. The unconscionability of those contracts has nothing to do with arbitration and, under the separability doctrine, is an issue for the arbitrator, not the court, to decide.[110] This section on substantive unconscionability analyzes arbitration *clauses* that may be substantively unconscionable.

To declare an arbitration clause, or any contract term, substantively unconscionable requires a substantive theory of fairness to distinguish conscionable from unconscionable terms.[111] "A substantive fairness theory assumes that a standard of value can be found by which the substance of any agreement can be objectively evaluated. Such a criterion has yet to be articulated and defended."[112] In short, values are subjective and substantive unconscionability is in the eye of the beholder.[113] That said, we can attempt to predict which arbitration clauses will, in the eyes of many courts, be substantively unconscionable.

a. Biased arbitrators. Perhaps the best example of a substantively unconscionable arbitration clause is one that names arbitrators with a pre-existing bias in favor of the drafting party.[114] The seminal case on this topic is *Graham v. Scissor-Tail, Inc.*[115] Bill Graham, promoter of legendary rock concerts,[116] contracted with Scissor-Tail, a cor-

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109. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e (1981).

110. For a discussion of the separability doctrine, see *supra* notes 64-68 and accompanying text.

111. Craswell, *supra* note 107, at 27.

112. Barnett, *supra* note 70, at 284.

113. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 75 ("The value of all things contracted for, is measured by the appetite of the contractors; and therefore the just value is that which they be contented to give.").

114. *See, e.g.*, Christine G. Cooper, *Where Are We Going With* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 222 (1992) ("The danger to justice arises when an arbitration clause is executed as a non-negotiable condition of employment exacted because the employer predicts that he will more likely win in arbitration than litigation.").

115. 623 P.2d 165 (Cal. 1981). *See generally* Gregory R. Kim, Note, Graham v. Scissor-Tail, Inc*: Unconscionability of Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CAL. L. REV. 1014 (1982).

116. *Graham*, 623 P.2d at 167.

poration wholly owned by musician Leon Russell, for Russell's musical services.[117] The contract obligated the parties to submit every dispute arising out of it "for determination by the [American Federation of Musicians] and such determination shall be conclusive, final and binding upon the parties."[118] The American Federation of Musicians (A.F. of M.) is a union of which Russell was a member.[119] In short, Graham and Russell agreed that Russell's union would be the arbitrator.[120]

Graham sued Scissor-Tail which successfully moved to compel arbitration.[121] The A.F. of M. arbitrator ruled against Graham and the California Superior Court confirmed the arbitrator's award.[122] The Supreme Court of California, however, held that the arbitration clause was unconscionable "because it designates an arbitrator who, by reason of its status and identity, is presumptively biased in favor of one party."[123] In essence, *Graham* reasoned that members of the union would have an unfair advantage over non-members.[124]

The argument that members have an unfair advantage over non-members has been repeatedly advanced in securities arbitration.[125] Securities firms are required by law to maintain membership in a Self Regulatory Organization (SRO) such as the New York Stock Exchange (NYSE) or the National Association of Securities Dealers (NASD).[126] SRO members, i.e., securities firms, routinely draft contracts requiring arbitration of disputes with non-members such as employees and customers of securities firms.[127] The contracts provide for arbitration by the SRO.[128] In a few cases, SRO arbitration has been successfully challenged on the ground that SROs are "presumptively biased" in favor of

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117. *Id.*

118. *Id.* at 168.

119. *Id.* at 167.

120. *See id.*

121. *Id.* at 169.

122. *Id.* at 170.

123. *Id.* at 173; *accord* Ditto v. RE/MAX Preferred Properties, Inc., 861 P.2d 1000, 1004 (Okla. Ct. App. 1993) (holding that an independent contractor's arbitration agreement was unconscionable because it "would exclude one of the parties from any voice in the selection of the arbitrators").

124. *See also* Linney v. Turpen, 49 Cal. Rptr. 2d 813, 822 (Ct. App.) (holding that a municipal employer's payment of the arbitrator's salary in a dispute between the municipality and a police officer was insufficient to establish even an "appearance of bias"), *rev. denied*, 49 Cal. Rptr. 2d 813, 813 (1996).

125. *See, e.g.*, Stephen H. Kupperman & George C. Freeman, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1570-71 (1991) (citing rules from cases advancing this argument).

126. *See* Ware, *Employment Arbitration*, *supra* note 1, at 146-47.

127. *Id.* at 148.

128. In the past, these contracts more often allowed the customer a choice between an SRO and the AAA. Commentators have called for a return of that choice. *See, e.g.*, Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV 327, 344 (1996).

SRO member firms.[129] Most courts, however, have rejected this argument.[130]

One ground for distinguishing SRO arbitration from other member/non-member arbitration is the heavy governmental regulation of SRO arbitration.[131]

> While the NASD in some ways resembles a private trade association, and the securities exchanges originated as private institutions, both the NASD and the exchanges have lost much of their private character. The SROs now have many of the characteristics of government agencies. An SRO may not come into existence without [Securities and Exchange Commission (SEC)] approval, and the SEC has oversight responsibility with respect to the SROs. The SROs must file their proposed rule changes with the SEC, and no SRO rule-change can take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act. The SEC even has the power to "abrogate, add to, and delete from . . . the rules of a[n] [SRO]." In fact, many changes in the SRO rules governing arbitration have been made "largely in response to" SEC initiatives.[132]

The heavy governmental regulation of SRO arbitration may explain why courts have so infrequently invoked the unconscionability doctrine to deny enforcement of securities arbitration agreements. Courts may believe that a federal administrative agency—the SEC—rather than the state common-law unconscionability doctrine, should police the fairness of SRO arbitration.[133]

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129. *See* Tonetti v. Shirley, 211 Cal. Rptr. 8, 12 (Ct. App.), *vacated*, 219 Cal. Rptr. 616 (Ct. App. 1985); Hope v. Superior Court, 175 Cal. Rptr. 851, 856 (Ct. App.) ("[H]ere, as in *Scissor-Tail*, the arbitral body is so associated with a party to the contract . . . as to be presumptively biased in favor of that party."), *hearing denied*, 175 Cal. Rptr. 851, 857 (1981), *cert. denied*, 456 U.S. 910 (1982).

130. Whether or not SRO arbitrators are, in fact, biased in favor of securities firms is the subject of some debate. *Compare* Antilla, *supra* note 3, at A16, Margaret A. Jacobs & Michael Siconolfi, *Losing Battles: Investors Fare Poorly Fighting Wall Street*, WALL ST. J., Feb. 8, 1995, at A1 ("[M]andatory arbitration has earned a reputation for being stacked squarely against brokerage firm customers."), *and* Margaret A. Jacobs, *Rulings Show Judges Are Growing Skeptical of Mandatory Arbitration*, WALL ST. J., Dec. 22, 1994, at B2, *with* ARBITRATION POLICY TASK FORCE, NAT'L ASS'N OF SEC. DEALERS, INC., SECURITIES ARBITRATION REFORM 18 (1996), NATIONAL ASS'N OF SEC. DEALERS, INC., NOTICE TO MEMBERS 93-64 (Sept. 1993), *and* Peter M. Mundheim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of* Mastrobuono, 144 U. PA. L. REV. 197, 226-34 (1995).

131. *See* Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 J. DISP. RESOL. 157, 205 (1989) ("Unlike the securities industry, there is no federal or state agency charged with monitoring the quality of arbitration practices and procedures. Thus, the monitoring is left to private institutions, such as the AAA, and the uncertain pressure of industry trade associations.").

132. Ware, *Employment Arbitration*, *supra* note 1, at 147-48.

133. *See, e.g.*, Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282 (9th Cir. 1988).

> As the Supreme Court has recognized, the Securities and Exchange Commission has virtually plenary authority over the arbitration procedures adopted by the national securities exchanges and securities associations. This authority includes the power to "abrogate, add to, and delete from" the arbitration

Allegations of arbitrator bias for "members" have arisen where the drafting party and arbitrator share membership in a profession, if not in a particular organization. For example, the drafting party in *Broemmer v. Abortion Services of Phoenix, Ltd.*,[134] was an abortion clinic. Its arbitration clause required arbitration before "licensed medical doctors who specialize in obstetrics/gynecology."[135] The Arizona Supreme Court found this provision unconscionable.[136] *Broemmer* shows the dangers of finding arbitration clauses unconscionable because of presumptive arbitrator bias. First, there is the problem that any decisionmaker will have some biases. In the case of abortion clinics, many decisionmakers will have very strong biases. Sending a claim against an abortion clinic to a jury may subject it to greater bias than sending it to a doctor-arbitrator. Second, bias may be hard to separate from expertise. One of the oft-touted advantages of arbitration is that the case is heard by experts. This is a particularly strong advantage in technical areas—like medicine—where the facts may be incomprehensible to laypeople. Those who can understand the facts will be found disproportionately among specialists in the field, i.e., those with a presumed bias.[137] Judi-

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> rules adopted by such bodies if necessary or appropriate to protect the rights created by the Securities Acts. The SEC has explicitly approved the NYSE and NASD arbitration rules and procedures at issue in this case. Because Congress has committed to the SEC the task of ensuring that the federal rights established by the Securities Acts are not compromised by inadequate arbitration procedures, we are bound by the Commission's determination that the procedures at issue here are satisfactory. Any contrary holding would frustrate this carefully crafted federal regulatory scheme.

Id. at 286 (citations omitted); *accord* Hope v. Dean Witter Reynolds, 226 Cal. Rptr. 439, 446 (Ct. App.), *rev. denied*, 226 Cal. Rptr. 439, 439 (1986).

134. 840 P.2d 1013 (Ariz. 1992).

135. *Id.* at 1014-15.

136. *See id.* at 1016 (characterizing the requirement that the arbitrator be a doctor as "potentially advantageous" to the abortion clinic); *id.* at 1017 (classifying the requirement as outside the "reasonable expectations" of the clinic's customer).

137. It is not clear whether the presumptive bias of specialists is for or against their fellow specialists. The Arizona Supreme Court presumed that obstetricians would be biased in favor of other obstetricians. *Id.* at 1016; *see also* Alan S. Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2032 (1993) ("Parties who are not themselves established members of a trade may be reluctant to confide the dispute to a process relying on decisionmakers who are 'insiders,' and who are therefore likely to share the preconceptions and values of their adversary.").

On the other hand, the financial self-interest of specialist-arbitrators may produce a bias against their fellow specialists. For instance, a large arbitration award against an obstetrician might, through the pressures of regulatory bodies or insurance companies, end the career of that obstetrician, resulting in one less competitor for the obstetrician-arbitrator. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 578 (1973) (holding that the Alabama Board of Optometry, whose membership was confined to private practitioners, could not, consistent with due process, judge complaints aimed at optometrists employed by corporations because upholding complaints "would possibly redound to the personal benefit of members of the Board" by eliminating competitors); Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192, 1199 (5th Cir. 1985); *cf.* Rau, *supra*, at 2054 (citing, with respect to lawyer-arbitrators' attitudes toward fellow lawyers, "antipathy on the part of the establishment bar to apparent 'corner-cutters' or marginal practitioners").

cial resistance to arbitrator bias in these cases may be the equivalent of judicial resistance to competent decisionmaking.[138]

Allegations of arbitrator bias can arise outside the member/non-member context. Often neither party is a member of the organization sponsoring arbitration, such as the American Arbitration Association (AAA). Typically, when the AAA arbitrates a dispute, it does not pick the arbitrators.[139] Rather, it provides the parties with a list of eligible arbitrators and the parties pick names off the list.[140] Nevertheless,

> [w]hen a firm or institution includes an arbitration clause in its standard form contract, it creates a great deal of business for arbitrators with the relevant background. It also means that a single large disputant will account for half of that business. Not surprisingly, this situation opens the door to charges of partiality on the part of arbitrators.[141]

Some commentators believe this risk of bias is heightened with for-profit arbitrators, as opposed to non-profit organizations like the AAA.[142] Certainly, arbitrators who seek repeat business have a greater incentive to please the party who drafted the arbitration clause rather than the non-drafting party.[143] The drafting party is a "repeat player" at arbitration while the non-drafting party is likely to be a "one-shot

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138. This is what Judge Posner calls the "tradeoff between impartiality and expertise." Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983).

139. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 9 (1993).

140. *Id.*

141. Dick, *supra* note 3, at 47, 55; *see* Moore v. Conliffe, 871 P.2d 204, 222-23 (Cal. 1994) (Baxter, J., dissenting) "Institutional litigants whose contracts relegate all disputes to arbitration are the major source of income for many arbitrators. Many serve repeatedly as arbitrators for institutional clients. Neutral decisionmaking is not, and cannot be, guaranteed under these circumstances.") (citations omitted). Furthermore, it has been alleged that

> arbitration panels are biased [in favor of employers in employment disputes] because (1) the panels are stacked with lawyers who primarily represent employers in employment disputes; (2) a vast majority of the panelists are men; (3) a vast majority of the panelists are white; (4) a vast majority of the panels are comprised of lawyers who do not represent a cross-section of society; and (5) the AAA receives substantial contributions from employers.

Olson v. American Arbitration Ass'n, 876 F. Supp. 850, 852 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

142.

> The neutrality of arbitrators is an important issue in those situations where the institution imposing arbitration on a weaker party specifies a for-profit company as the source of the arbitrator. "For-profit arbitrations . . . generate inherent conflicts of interest, including the ADR provider's pursuit of repeat business from high-volume customers."

Budnitz, *supra* note 3, at 294 (quoting Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53, 54) (alteration in original).

143. Sarah R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 478 (1996).

player."[144] On the other hand, lawyers representing non-drafting parties are often repeat players who may offset the incentive to please drafting parties.[145] There are certainly risks for an arbitrator who develops a reputation for bias, even if it is a reputation for bias in favor of drafting parties.[146] Hence, determinations of pre-existing arbitrator bias will often be difficult to make. Courts may prefer to allow arbitration to proceed, knowing they can later vacate the resulting arbitration award if the arbitrators did, in fact, reveal bias.[147]

b. Who pays? Arbitration, unlike litigation, is not subsidized by the taxpayer. Parties to arbitration must pay the administrative costs of arbitration, including any fee for the arbitrator.[148] Some arbitration clauses specify that the arbitrator will be paid by the drafting party.[149] This might lead to suspicion that the arbitrator will favor the drafting party.[150] For this reason, a court might hold substantively unconscionable a clause specifying that the arbitrator will be paid by the drafting party.

On the other hand, an arbitration clause might specify that the non-drafting party pays some or all of the administrative costs of arbitration.[151] Commentators opine that such clauses may be unconscionable.[152] This leaves drafting parties with a dilemma in deciding who

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144. *Id.* at 474-82.

145. *See* Engalla v. Permanente Med. Group, 43 Cal. Rptr. 2d 621, 638 (Ct. App.) (stating that Kaiser Permanente contended "that claimants' attorneys have access—through informal networking with other plaintiff's attorneys and specialty bar organizations—to a . . . store of information about individuals who have served as party or neutral arbitrators in Kaiser arbitrations"), *rev. granted*, 905 P.2d 416 (Cal. 1995). On the other hand, there may be

> little incentive for plaintiffs' lawyers to collect and maintain a database containing information about arbitrators. While such information would make a plaintiff's lawyer more marketable and would allow him to increase his fees if the information made him more successful, an investment in that information might not be fruitful because employees are one-shot players in the legal hiring world just as they are in the dispute resolution world.

Cole, *supra* note 143, at 477 n.127.

146. One of these risks is a guilty conscience.

147. 9 U.S.C. § 10(a)(2) (1994).

148. *See* Cole, *supra* note 143, at 478.

149. *See id.*

150. *See id.* (citing Tia S. Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, DISP. RESOL. J., June 1994, at 48, 50). An arbitrator might worry that it will be harder to collect his or her fee if the drafting party is displeased with the arbitrator's decision.

151. Some arbitration clauses, or the rules they incorporate, require the party initiating arbitration to pay the filing fee charged by the arbitration provider. *See* Spence v. Omnibus Indus., 119 Cal. Rptr. 171 (Ct. App. 1975) (refusing to enforce such a provision). *But see* Broemmer v. Otto, 821 P.2d 204, 209 (Ariz. Ct. App. 1991) (rejecting an unconscionability claim based on an argument that the AAA's fees were oppressive), *vacated*, 840 P.2d 1013 (Ariz. 1992).

152. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After* Gilmer v. Interstate/

should be responsible for fees. One commentator believes that the way out of this dilemma for employer-drafters "is to mandate contributions from both parties but to cap employees' contributions at a level based on their annual salary or financial position. This ensures both access and the appearance of objectivity."[153] This sort of arrangement may be the surest way to avoid unconscionability regarding the administrative costs of arbitration.

c. *Restrictions on arbitrable claims*. Some arbitration clauses require the non-drafting party to arbitrate its claims and allow the drafting party to choose whether to litigate or arbitrate its claims.[154] Other arbitration clauses require the non-drafting party to *litigate* its claims and allow the drafting party to choose whether to litigate or arbitrate its claims.[155] Either way, these clauses give, to the drafting party only, an "arbitration option." Such "arbitration option" clauses have been held unenforceable due to "lack of mutuality."[156] While such a holding is flawed because there is consideration for the promises of each party,[157] these "arbitration option" clauses could be held unconscionable. Like any option, they advantage the party holding the option, here, the drafting party. They give the drafting party a post-dispute choice of forum. Whether that disadvantages the non-drafting party so much as to be unconscionable is doubtful.[158]

A variation on the "arbitration option" clause has been used by insurance companies. Certain insurance policies make arbitration binding on both parties if the arbitration award is below a certain amount—good for the insurer—and non-binding if it exceeds that

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Johnson Lane Corp., EMPLOYEE REL. L.J., Autumn 1995, at 21, 45 (advising employers to "[a]llocate the cost of the arbitration in such a way so as not to preclude access by the employee to the arbitration procedure and to avoid the perception that if the company is paying for the arbitration, the arbitrator cannot be neutral"); Budnitz, *supra* note 3, at 335 ("[L]egislation should limit the costs of arbitration to the consumer.") Grodin, *supra* note 100, at 50; *see also* Moore v. Conliffe, 871 P.2d 204, 226 (1994) (Baxter, J., dissenting) ("[E]xpenses of the arbitrator . . . must be shared by the parties.").

153. *Developments in the Law—Employment Discrimination*, *supra* note 26, at 1687.

154. *See* Cored Panels, Inc. v. Meinhard Commercial Corp., 420 N.Y.S.2d 731, 731 (App. Div. 1979) (citing cases where such a clause was declared void for a lack of mutuality).

155. *See, e.g.*, Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 481 A.2d 553, 555 (N.J. Super. Ct. App. Div. 1984).

156. *See, e.g.*, Hull v. Norcom, Inc., 750 F.2d 1547, 1551 (11th Cir. 1985). Many New York cases held such clauses unenforceable for lack of mutuality until New York's highest court overruled them in Sablosky v. Gordon Co., 535 N.E.2d 643, 645-46 (1989).

157. *See Sablosky*, 535 N.E.2d at 646 ("Mutuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement.").

158. *Compare id.*, 538 N.Y.S.2d at 516 (finding such a clause not unconscionable) *with* Fritz v. Nationwide Mut. Ins. Co., No. CIV.A.1369, 1990 WL 186448, at 6 (Del. Ch. Nov. 26, 1990) (finding such a clause unconscionable).

amount—bad for the insurer.[159] This sort of clause is more likely to be unconscionable than an "arbitration option" clause because it gives the insurer a choice of forum *after* a decision has been rendered.[160] It is like letting one sports team decide after the game is over which stadium to play in; if the game was lost then the team can choose to try again in a different stadium.

Some arbitration clauses require arbitration of claims likely to be asserted by the non-drafting party, but allow litigation of claims likely to be asserted by the drafting party. For instance, a financial institution drafted its loan agreements to require arbitration of all claims, but "under no conditions shall any dispute or controversy as to whether or not Debtor has committed an act of default . . . be subject to arbitration."[161] These clauses should be less vulnerable to an unconscionability challenge than "arbitration option" clauses because these clauses impose less of a disadvantage on non-drafting parties. These clauses allow the drafting party to exercise a choice of forum *prior to* any dispute, while the "arbitration option" clauses allow the drafting party to wait until *after* a dispute arises to choose a forum.

d. Restrictions on remedies. Many arbitration clauses prohibit the arbitrator from awarding punitive damages.[162] Other arbitration clauses limit the amount of punitive damages the arbitrator may award.[163] Remedies other than punitive damages could also be limited by an arbitration clause. Because prohibitions on punitive damages seem to be the remedy restriction generating the most controversy,[164] they will be my focus.

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159. *See* Nationwide Mut. Ins. Co. v. Marsh, 472 N.E.2d 1061, 1062 (Ohio 1984) (holding such a clause unconscionable).

160. *Id.*

161. Lopez v. Plaza Fin. Co., No. 95-C-7567, 1996 WL 210073, at 1 (N.D. Ill. Apr. 25, 1996). *Lopez* held the clause unenforceable due to a lack of mutuality. *Id.* at 5; *see also* Budnitz, *supra* note 3, at 274 (noting that such clauses will rarely be used by the consumer).

162. *See, e.g.*, Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244, 1249 (9th Cir.), *cert. denied*, 116 S. Ct. 275 (1995); JOHN F. DOLAN, UNIFORM COMMERCIAL CODE: TERMS AND TRANSACTIONS IN COMMERCIAL LAW 81 (1991) (noting such a clause in a Chrysler Motors Corporation Sales and Service Agreement); Budnitz, *supra* note 3, at 281 (pointing to Republic National Bank of New York as an example of a bank with a "no punitive damages" provision in its form contract).

163. Bruce E. Alexander, *The Arbitration of Disputes with Consumers: Some Practical Pointers*, *in* FINANCIAL SERVICES LITIGATION 893, 921 (PLI Corp. Law & Practice Course Handbook Series No. B4-7153, 1996) ("If applicable law permits the award of punitive damages and the arbitrator authorizes such an award, any punitive damages awarded to You or Us may not exceed the greater of $250,000 or three times the amount of actual damages awarded by the arbitrator.").

164. *See* Ware, *Punitive Damages*, *supra* note 2, at 543 n.52 (citing commentators that have written on this controversy).

In 1990, the National Association of Securities Dealers (NASD) promulgated a rule which stated that "No agreement [between an NASD member and its customer] shall include any condition which . . . limits the ability of the arbitrators to make any award."

An arbitration clause prohibiting punitive damages awards raises an issue of interpretation.[165] The clause could be interpreted to prohibit the award of punitive damages in any forum. Or it could be interpreted to allow a court to award punitive damages in a separate proceeding from the arbitration of the claim. I have argued elsewhere that the first interpretation is the better one.[166] Others disagree.[167]

If an arbitration clause prohibiting punitive damages awards is construed as a waiver of punitive damages in any forum, then its unconscionability is easy to assess under the guideline of "placing arbitration agreements upon the same footing as other contracts."[168] If a contract clause waiving punitive damages in court is unconscionable, then an arbitration clause prohibiting arbitral punitive damages awards is unconscionable.[169] If, on the other hand, the former is enforceable, then so is the latter.

If an arbitration clause prohibiting arbitral punitive damages awards is construed as preserving a separate claim for punitive damages in court, then its unconscionability is harder to assess. The effect of the clause is to require duplicative proceedings—arbitration and litigation—on the same claim. Presumably, this generally burdens plaintiffs in the way all procedural hurdles to collecting a judgment burden plaintiffs. Whether this particular hurdle is so onerous as to be unconscionable is difficult to predict.

e. Distant forum. Another example of an arbitration clause that might be substantively unconscionable is one requiring arbitration far from the non-drafting party's home. This was undoubtedly a factor in Justice Trieweiler's reasoning in *Doctor's Associates* where the franchise agreement required Montana residents to arbitrate in Connecticut.[170] Concern about a distant arbitral forum was crucial in *Pat-*

NATIONAL ASS'N OF SEC. DEALERS, INC., NASD MANUAL (CCH) § IM-3110(f)(4), at 4892-93 (1996). The SEC interprets this rule to forbid agreements prohibiting the award of punitive damages. *See* Order Approving Proposed Rule Changes Relating to the Arbitration Process, Exchange Act Release No. 34-26805, 54 Fed. Reg. 21,144, 21,154 (May 16, 1989) ("If punitive damages . . . would be available under applicable law, then the agreement cannot limit parties' rights to request them, nor arbitrators' rights to award them."); *see also* Brief for the United States and the Securities and Exchange Commission at 5-7, Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) (No. 94-18) (arguing that the arbitrators' award of punitive damages should be upheld despite a clause prohibiting them).

165. *See* Ware, *Punitive Damages*, *supra* note 2, at 541 n.47.

166. *See id.* at 540.

167. 3 MACNEIL ET AL., *supra* note 8, § 36.3.2.2.

168. Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652, 1656 (1996) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

169. *Cf.* Note, *supra* note 75, at 1411-13 ("A state court does not discriminate against arbitration if it holds an arbitration agreement unconscionable for reasons that do not arise solely because an arbitrator rather than a judge or jury decides the dispute.").

170. Casarotto v. Lombardi, 901 P.2d 596, 597 (Mont. 1995), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652 (1996).

terson v. ITT Consumer Financial Corp.[171] *Patterson* involved loan agreements drafted by ITT and signed by borrowers residing in California.[172] The agreements contained a clause requiring disputes to "be resolved by binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota."[173] The California Court of Appeal held the arbitration clause unconscionable because "the provision on its face suggests that Minnesota would be the locus for the arbitration."[174]

Similar reasoning was applied to an arbitration clause in a construction contract in *Player v. George M. Brewster & Son, Inc.*[175] The contract between a New Jersey general contractor and a California subcontractor provided for arbitration in New Jersey.[176] The California subcontractor persuaded the court not to relegate its claim to arbitration because the particular dispute was not covered by the arbitration clause.[177] But the California Court of Appeal went on to discuss whether the New Jersey forum would preclude enforcement of the arbitration clause.[178] The court of appeal concluded that courts "should scan closely contracts which bear facial resemblance to contracts of adhesion and which contain cross-country arbitration clauses before giving them approval."[179]

On the other hand, there are Supreme Court cases that do "not augur well for a party challenging location" of arbitration.[180] The Supreme Court has called an arbitration agreement "a specialized kind of forum selection clause."[181] And in *Carnival Cruise Lines, Inc. v. Shute*,[182] the Supreme Court showed how strongly it resists arguments that forum selection clauses are unconscionable. In *Shute*, a cruise ship passenger ticket required that suits against the shipowners be

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171. 18 Cal. Rptr. 2d 563 (Ct. App.), *rev. denied*, 18 Cal. Rptr. 2d 563, 563 (1993), *cert. denied*, 510 U.S. 1176 (1994).

172. *Id.* at 564-66.

173. *Id.* at 566.

174. *Id.*; *see* Dwight Golann, *Designing a Consumer ADR Clause*, *in* FINANCIAL SERVICES LITIGATION 909, 914 (PLI Corp. Law & Practice Course Handbook Series No. B4-7153, 1996) ("ITT's arbitration clause has been successfully attacked for unconscionability based, in part, on the perception that it forced consumers to travel to ITT's Minnesota headquarters to arbitrate.").

175. 96 Cal Rptr. 149 (Ct. App. 1971).

176. *Id.* at 151 n.1.

177. *Id.* at 154.

178. *Id.* at 155.

179. *Id.* at 156; *see also* Bos Material Handling, Inc. v. Crown Controls Corp., 186 Cal. Rptr. 740, 745 (Ct. App. 1982) (remanding for a determination of whether arbitration in Ohio gives an unfair advantage or is unduly oppressive).

180. 2 MACNEIL ET AL., *supra* note 8, § 19.3.2 n.23. "Claims that the designated arbitration forum is too distant have rarely been successful [in federal court]." Breckenridge, *supra* note 108, at 965. "The relative lack of success on such claims under federal law is, however, in significant contrast to the approach taken by courts applying state law." *Id.* at 973.

181. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

182. 499 U.S. 585 (1991).

brought in Florida.[183] The Court conceded that the terms of the contract are non-negotiable and that the passengers did not "have bargaining parity with the cruise line."[184] The Court nevertheless enforced the forum selection clause.[185] "It seems virtually certain that, but for a statutory provision requiring passenger claims to be litigated, the Court would have reached the same result in *Carnival Cruise* if the questioned clause had provided for arbitration in Florida rather than merely limiting the judicial forum to Florida."[186]

Some state courts may be less willing than the Supreme Court to enforce forum-selection clauses relegating non-drafting parties to a distant forum.[187] If so, they may—consistent with the FAA—be equally resistant to enforcing arbitration clauses relegating non-drafting parties to a distant forum. However, if a state enforces forum-selection clauses requiring distant fora, it cannot find unconscionable arbitration clauses requiring distant fora because doing so would "singl[e] out arbitration provisions for suspect status," rather than placing them "upon the same footing as other contracts."[188] Similarly, state statutes denying enforcement to clauses providing for arbitration outside the state are also preempted by the FAA.[189]

2. Procedural unconscionability

In contrast to substantive unconscionability's concern with "evils in the resulting contract," procedural unconscionability is concerned with "bargaining naughtiness."[190] In its focus on the bargaining process, procedural unconscionability resembles other contract defenses, such as duress, misrepresentation and undue influence. Procedural unconscionability is easier than substantive unconscionability to reconcile with traditional notions of contractual freedom.[191]

As stated above, "both procedural and substantive unconscionability are generally required before courts will grant relief from a chal-

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183. *Id.* at 587-88.

184. *Id.* at 593.

185. *Id.* at 596-97.

186. 2 MACNEIL ET AL., *supra* note 8, § 19.3.3.

187. *See, e.g.*, Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 680 A.2d 618 (N.J. 1996). *See generally* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 11.6 (2d ed. 1992).

188. Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

189. An Oregon statute makes revocable arbitration clauses providing for arbitration outside the state, OR. REV. STAT. § 36.305 (1995), and a Florida court has interpreted the Florida Arbitration Code to the same effect. Donmoor, Inc. v. Sturtevant, 449 So. 2d 869, 870 (Fla. Dist. Ct. App. 1984).

190. Leff, *supra* note 103, at 487.

191. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 301-06 (1975); *see also* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 296 (1995) (stating that procedural unconscionability is not a "restrictive contract rule").

lenged term."[192] There may be some procedural unconscionability in making a typical form contract, but that alone does not make its terms unenforceable. If those terms are, in the courts' view, substantively fair, then they are enforceable despite being part of a contract of adhesion. So we return to the "vaguely mathematical metaphor in which a large amount of one type of unconscionability can make up for only a small amount of the other."[193] If the terms are substantively fair, then courts generally tolerate significant procedural unconscionability.[194] As the terms become more substantively unconscionable, it takes less procedural unconscionability to deny enforcement.[195]

This can be applied to arbitration agreements. If there is nothing substantively unconscionable about a particular arbitration clause, then it should be enforced despite significant procedural unconscionability in the formation of the container contract. In this regard, an arbitration clause buried many pages deep in fine print should be treated like any other clause buried there. If the clause is fair, it should be enforced.[196] Denying enforcement of an arbitration clause simply because it is part of an adhesion contract applies the unconscionability doctrine more aggressively to arbitration agreements than to contracts generally[197] and is, therefore, preempted by the FAA.[198]

For example, *Bell v. Congress Mortgage Co.*[199] held that arbitration

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192. Craswell, *supra* note 107, at 17-18.

193. *Id. See generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 & cmt. (1981).

194. Breckenridge, *supra* note 108, at 949.

195. Craswell, *supra* note 107, at 19.

196. This reasoning applies whether or not the fine print is signed by the nondrafting party. *See* Badie v. Bank of Am., No. 944916, 1994 WL 660730, at 1 (Cal. App. Dep't Super. Ct. Aug. 18, 1994). Badie involved an arbitration clause in a bank's standard form notice. *Id.* The notice was mailed to the bank's customers, along with their statements. *Id.* at 3. The customers already had contracts with the bank providing for modifications in this manner. *Id.* at 8.

Badie reasoned that because the arbitration clause was substantively fair, it "does not necessarily work to deprive the customer . . . of expected benefits or bargained-for benefits of the agreement"; it was enforceable, notwithstanding any procedural unconscionability in a contract formation process likely to leave many consumers ignorant of the arbitration clause. *Id.* at 2.

197.

> Courts . . . treat arbitration agreements or clauses contained in adhesion contracts differently than other terms contained in the same contract. The terms of adhesion contracts normally are enforceable unless they are outside of the reasonable expectations of the adhering party, are oppressive, or are unconscionable. However, under the statutes that expressly exclude adhesion contracts, no showing of oppression, unconscionability, or surprise appears necessary.

Breckenridge, *supra* note 108, at 956-57.

198. *See* Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996); Perry v. Thomas, 482 U.S. 483, 490 (1987); Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 722 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990); *see also* 2 MACNEIL ET AL., *supra* note 8, § 19.3.1.2 (1994) ("[I]f a state requires more information or greater choice for arbitration than for other contracts, state law will be preempted by FAA § 2.").

199. 30 Cal. Rptr. 2d 205 (Ct. App.), *rev. denied*, 30 Cal. Rptr. 2d 205, 205 (1994).

clauses in adhesion contracts are unenforceable unless they "appear in clear and unmistakable form by highlighting, bold type, or with an opportunity for specific acknowledgment by initialing."[200] This does by common law what *Montana Code* section 27-5-114(4) did by statute in *Doctor's Associates*.[201] It applies the unconscionability doctrine more aggressively to arbitration agreements than to contracts generally and is, therefore, preempted by the FAA.[202]

An even clearer case of FAA preemption is provided by state statutes that prohibit enforcement of any arbitration clause in an adhesion contract, no matter how well highlighted.[203] These statutes are preempted because they clearly "singl[e] out arbitration provisions for suspect status," rather than placing them "upon the same footing as other contracts."[204]

While the procedural unconscionability in the formation of a typical adhesion contract does not make its terms unenforceable, there will be a greater degree of procedural unconscionability in particular transactions. Under the "vaguely mathematical formula" discussed above, this procedural unconscionability might, in some cases, rise to the level at which even a substantively fair arbitration clause is unenforceable. What sort of case presents such extreme procedural unconscionability? To reiterate, procedural unconscionability encompasses "not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power."[205] I will first address lack of understanding, then I will turn to inequality of bargaining power.

Some have suggested that arbitration clauses are too procedurally unconscionable to enforce if they do not explain, in plain English, their effect.[206] Mark Budnitz calls for arbitration agreements to disclose that arbitration is "usually final and binding and subject to only very limited review by a court."[207] Others suggest that disclosure should specif-

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The California Supreme Court ordered that *Bell* not be officially published. *Id.*

200. *Id.* at 210.

201. *Doctor's Assocs.*, 116 S. Ct. at 1654.

202. Also preempted is Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 786 (Ct. App. 1976) ("Absent notification and at least some explanation, the patient cannot be said to have exercised a 'real choice' in selecting arbitration over litigation.").

203. *See* IOWA CODE ANN. § 679A.1.2.a (West 1987) (denying enforcement of arbitration clauses in adhesion contracts); MO. ANN. STAT. § 435.350 (Vernon 1992) (same); NEB. REV. STAT. § 25-2602 (1995) (same). In contrast, TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West Supp. 1997) denies enforcement to only "unconscionable" arbitration agreements.

204. *Doctor's Assocs.*, 116 S. Ct. at 1656 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)); *see, e.g.*, Webb v. R. Rowland & Co., 800 F.2d 803 (8th Cir. 1986).

205. FARNSWORTH, *supra* note 102, § 4.28.

206. "Even if arbitration contracts are in bold-faced type, they may be vulnerable to a procedural unconscionability attack on the grounds that the contract fails to adequately explain the arbitration procedure and what the consumer is surrendering." Budnitz, *supra* note 3, at 304.

207. *Id.* at 276.

ically emphasize that parties are waiving the right to a jury trial.[208]

These sorts of disclosure requirements might or might not be preempted by the FAA. It will depend on whether state law imposes analogous requirements on contracts that do not have an arbitration clause.[209] Arbitration clauses are like various provisions in insurance policies and other contracts in that they may not be readily understood by many parties. Yet, there is nothing tricky or convoluted about using the word "arbitration" in a contract, just as there is nothing tricky or convoluted about using the word "subrogation" in an insurance policy. "Arbitration" and "subrogation" are simply technical terms beyond the vocabulary of many parties. If state law requires the technical terms of all contracts to be explained in plain English, then application of that requirement to arbitration clauses merely places arbitration agreements on the same footing as other contracts.[210] If, however, state law enforces unexplained technical terms in other contracts, then it may not require more of arbitration clauses. Doing so applies the unconscionability doctrine more aggressively to arbitration agreements than to contracts generally and is, therefore, preempted by the FAA.[211]

"Inequality of bargaining power" is an important contributor to procedural unconscionability. If it is present, procedural unconscionability may rise to the level at which even a substantively fair arbitration clause is unenforceable.[212] It is crucial, then, to figure out what courts mean when they use a phrase—"bargaining power"—that "has never been successfully defined."[213]

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208. Bell v. Congress Mortgage Co., 30 Cal. Rptr. 2d 205 (Ct. App.), *rev. denied*, 30 Cal. Rptr. 2d 205, 205 (1994), required arbitration clauses in adhesion contracts to "elicit a clear and informed waiver" of the right to a jury trial. *Id.* at 209. The California Supreme Court ordered that *Bell* not be officially published. *Id.* at 205.

209. *See supra* note 86 and accompanying text.

210. To avoid FAA preemption, a state law would not have to require explanations of technical terms in, literally, *all* contracts. If the requirement applied to all "consumer" contracts or all "credit agreements," then it would apply to arbitration clauses in the relevant class of contracts.

211. *See supra* notes 69-76 and accompanying text.

212. *See, e.g., Bell*, 30 Cal. Rptr. 2d at 209 ("[T]he borrowers are generally elderly, unsophisticated and financially distressed individuals who relied upon the good graces of skilled sales persons from a substantial corporate lender."); Pittsfield Weaving Co. v. Grove Textiles, Inc., 430 A.2d 638, 639 (N.H. 1981) ("[T]he defendant was a larger company than the plaintiff and . . . arbitration clauses were uniformly required by other sellers with whom the plaintiff dealt.").

Courts finding substantive unconscionability in an arbitration clause often also emphasize concerns about bargaining power. For instance, *Graham v. Scissor-Tail, Inc.* emphasized that "all concert artists and groups of any significance or prominence are members of the A.F. of M. . . . [and] pursuant to express provision of the A.F. of M.'s constitution and bylaws members are not permitted to sign any form of contract other than that issued by the union." 623 P.2d 165, 172 (Cal. 1981). For a discussion of *Graham v. Scissor-Tail, Inc.*, see *supra* notes 115-24 and accompanying text.

213. Craswell, *supra* note 107, at 50 n.99. Richard Epstein argues that "[t]he idea of inequality of bargaining power, the idea of dictation, fails the most decisive test: it has no *descriptive* power." RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 84 (1995). For an article relying heavily on the concept of bargaining power in opposing the

"Bargaining power" seems to be a euphemism for wealth and experience in business.[214] Parties with substantial wealth and experience in business are described as having more "bargaining power" than parties with little wealth and experience in business.[215] More vaguely, relative "bargaining power" seems to depend on "who needs a deal more."[216] This concept appears in the unconscionability doctrine insofar as courts find procedural unconscionability when there is "an absence of meaningful choice on the part of one of the parties."[217]

Arbitration agreements in the employment context have been attacked by those who cite the "inequality of bargaining power typically present in the workplace."[218] Sharona Hoffman argues that "[w]hen employees are forced to choose between signing an arbitration agreement and losing their jobs, they are not faced with any meaningful choice regarding arbitration."[219] United States Senator Russell Feingold and Representative Patricia Schroeder agree with Hoffman and have introduced legislation to deny enforcement to certain employment arbitration agreements.[220]

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contractual approach to arbitration, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

214. *See, e.g., Bell*, 30 Cal. Rptr. 2d at 207 ("[T]he borrowers were inexperienced in business matters and were in financial difficulty . . . ."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1249 (1983) (equating "gross inequality of bargaining power" with "a wide disparity of economic resources"); Sternlight, *supra* note 213, at 637 & n.1 (contrasting "large companies such as banks, hospitals, brokerage houses and even pest exterminators" with "customers, employees, franchisees and other little guys"). *See generally* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 614-24 (1982) (arguing that the doctrine of unequal bargaining power strives for equality even though it often fails to meet its objective).

215. *See* Rakoff, *supra* note 214, at 1249.

216. Craswell, *supra* note 107, at 50 n.99 (noting that unequal bargaining power seems to mean some combination of "economic necessity, an inability to obtain better terms elsewhere in the market, or perhaps monopoly or collusion on the part of sellers").

217. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

> [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Id.

218. Cooper, *supra* note 114, at 236.

219. Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 153 (1996).

220. 140 CONG. REC. E1753 (daily ed. Aug. 17, 1994) (statement of Rep. Schroeder) ("Mandatory arbitration represents a disturbing trend in employment law, one that forces many workers to choose between a job or promotion and their civil rights. This is a choice no one should be forced to make."); 140 CONG. REC. S4267 (daily ed. Apr. 13, 1994) (statement of Sen. Feingold) ("It is simply unfair to require an employee to waive, in advance, his or her statutory right to seek redress in a court of law in exchange for

The issue of "meaningful choice" to contract is a challenging one. Every contracting party *chooses* to contract because a contract cannot be formed without each party's volitional act manifesting assent. What makes a choice "meaningful" is a grand philosophical question. Contract law has addressed that question through its defenses to enforcement. For example, the choice to contract with a gun pointed at one's head is not, according to the doctrine of duress, "meaningful" choice.[221] Whether an employee's choice to contract for arbitration—rather than lose her job—is a "meaningful" choice is a much closer question. For present purposes, it is sufficient to note that courts may well find the procedural unconscionability in such circumstances sufficient to deny enforcement to even substantively fair arbitration clauses.

The Supreme Court, however, has indicated that it is not receptive to "unequal bargaining power" challenges to arbitration agreements. The Court addressed this issue in *Gilmer v. Interstate/Johnson Lane Corp.*[222] *Gilmer* enforced a securities firm's employee's agreement to arbitrate,[223] even though every securities firm required such an agreement as a condition of employment.[224] Justice Stevens' dissent raised "concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual . . . employee, on the other."[225] The majority responded that

> [m]ere inequality of bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. . . . "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inade-

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employment or a promotion.").

Similar views were apparently shared by some of the legislators in the Congress which enacted the FAA.

> On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts "are really not voluntarily [sic] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . . ." He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J., dissenting) (footnotes omitted).

221. RESTATEMENT (SECOND) OF CONTRACTS §§ 174-177 (1981).

222. 500 U.S. 20 (1991).

223. *Id.* at 23.

224. *See* Ware, *Employment Arbitration*, *supra* note 1, at 145-59.

225. *Gilmer*, 500 U.S. at 43 (Stevens, J., dissenting).

> quacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.[226]

Gilmer, then, establishes a difficult standard for parties making procedural unconscionability arguments based on inequality of bargaining power.[227] Not a single reported case since *Gilmer* has held an employment arbitration agreement unconscionable.[228]

CONCLUSION

For two decades, the Supreme Court has advanced the contractual approach to arbitration law.[229] This advance has greatly strengthened the enforceability of arbitration agreements. It has eliminated all but a few grounds for denying their enforcement. *Doctor's Associates* reduces these grounds even further.

Some approaches to issues of unconscionability would deny enforcement to most or all arbitration agreements signed by consumers, employees and other individuals. These approaches manifest themselves in state statutes and common law. State statutes prohibit enforcement of arbitration clauses in adhesion contracts altogether or impose on them notice requirements which are not imposed on other contracts. Judicial decisions apply unconscionability, and other common law doctrines, more aggressively to arbitration agreements than to other contracts. Those approaches are preempted by the FAA. *Doctor's Associates* makes clear that states cannot "singl[e] out arbitration provisions for suspect status"[230] in the way various state statutes do. And *Doctor's Associates* confines judicial use of the unconscionability doctrine in the arbitration context to its use outside the arbitration context. While the case-specific nature of the unconscionability doc-

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226. *Id.* at 33 (citation omitted) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

227. 2 MACNEIL ET AL., *supra* note 8, § 19.3.1.1.

228. Post-*Gilmer* cases rejecting unconscionability challenges to employment arbitration agreements include: Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1163 (5th Cir. 1992) (noting that the employee waived the argument); Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091, 1092 (E.D. Mich. 1996); Cherry v. Wertheim Schroder & Co., 868 F. Supp. 830, 836 (D.S.C. 1994); Lockhart v. A.G. Edwards & Sons, Inc., No. CIV.A.93-2418-GTV, 1994 WL 34870, at 2 (D. Kan. Jan. 25, 1994); Feinberg v. Bear, Stearns & Co., No. 90.CIV.5250, 1991 WL 79309, at 3 (S.D.N.Y. May 3, 1991); Neubrander v. Dean Witter Reynolds, Inc., 610 N.E.2d 1089, 1091 (Ohio Ct. App. 1992). All of the above cases involve securities employees. *But see* Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932, 934-35 (9th Cir. 1992) (remanding to develop "the issue of adhesion"); *see also* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994) (declining to enforce employees' agreement to arbitrate Title VII claims because the employees did not "knowingly" agree to arbitrate), *cert. denied*, 116 S. Ct. 61 (1995). *See generally* Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution For Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1019-20 (1996) (arguing that arbitration clauses may not always be enforceable).

229. *See* Ware, *Employment Arbitration*, *supra* note 1, at 137 n.275.

230. Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996).

trine means generalizations about it will have exceptions, it is clear that *Doctor's Associates* increases the number of arbitration agreements that will survive unconscionability challenges. Unless overruled by federal legislation, *Doctor's Associates* clears the way for a shift of disputes from litigation to arbitration. The extent to which that shift occurs will now be decided by contracting parties, regulated only by contract law.