Arbitration and Constitutional Rights

Edward Brunet

ARBITRATION AND CONSTITUTIONAL RIGHTS

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Traditionally, constitutional rights have been unavailable in arbitration proceedings. Classical arbitration theory, in an effort to preserve the speed, informality, and finality of arbitration, posits that parties to arbitration have expressly opted out of the judicial system, including its constitutional protections. Furthermore, many feel that since arbitration lacks state action, arbitration proceedings do not invoke constitutional rights. In this article, Professor Edward Brunet examines the current status of private arbitration and demonstrates the absence of constitutional rights. Professor Brunet argues, however, that the classical defenses of this absence fail to account for the real world of arbitration in which participants lack knowledge about arbitration and do not realize the implications of their agreement to arbitrate. Professor Brunet looks to the language and purpose of the Federal Arbitration Act (FAA) and suggests that the Act contemplates the application of constitutional rights to arbitration. He further contends that "industrial due process" as practiced by labor arbitrators should serve as a model for incorporating notions of fairness into all commercial arbitration.

I. INTRODUCTION

Are constitutional rights applicable to arbitration proceedings? What seems a simple question yields paradoxically dissimilar answers. According to classical arbitration theory, there is little or no role for constitutional rights within an arbitration hearing. Arbitration represents an alternative to litigation and offers a forum where legal rights are not guaranteed and, in a very real sense, are de-emphasized.[1] The asser-

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1. *E.g.*, Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308, 461 N.E.2d 1261, 1266, 473 N.Y.S.2d 774, 779 (1984) (asserting that the arbitrator "may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement"); GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 25:01 (1984) (stating that arbitrators are not compelled to " 'follow otherwise applicable law when deciding issues [sic] before them [sic] unless they are commanded to do so by the terms of the arbitration agreement' ") (quoting University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1140 (Alaska 1974)).

tion of constitutional rights in arbitration hearings might undesirably judicialize arbitration.[2] Speed, informality, and finality are the claimed advantages of arbitration which are preferred by some potential litigants to the vexatious characteristics of litigation. Moreover, this classical theory holds that parties who contract to arbitrate formally opt out of the judicial system. According to this view, a private contract to arbitrate represents a volitional forfeiture of legal rights, including constitutional rights.[3] Freedom to contract incorporates the concept of a party's choice to avoid litigation. Furthermore, the private covenant to arbitrate lacks any real nexus to the state; this absence of "state action" precludes any argument based on constitutional rights.[4]

The same question can yield a different answer. The civil rights advocate assumes that constitutional rights can be advanced and assessed in any adjudicatory setting. Arbitration, while certainly a form of alternate dispute resolution, nonetheless resembles traditional adjudication since it involves adversary presentations of proof and reasoned argument to an arbitrator.[5] According to this contrasting view, arbitration, like administrative agency adjudications, must respect constitutional rights. Since arbitration awards are final and effectively cannot be judicially reviewed,[6] an arbitration hearing may be the only forum where constitutional rights can be addressed. Moreover, the agency analogy is useful because agencies, like organizations sponsoring arbitration, were created to provide expertise and speed, and to address dissatisfaction with conventional

2. *See* C. William Fletcher III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 454 (1987) ("The lack of the expensive elements of litigation is what makes arbitration so attractive.").

3. *See infra* text accompanying notes 133-38.

4. *See infra* text accompanying notes 139-72.

5. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-64 (1978); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 159 (1989) (In arbitration the parties present "evidence and reasoned arguments to an arbitrator whose final decision should be responsive to the dispute as presented.").

6. Arbitration awards are final. They may be vacated only rarely and under circumstances requiring a very high level of proof. Speidel, *supra* note 5, at 191-98. Courts will not vacate arbitral awards because of an "error of law." *See, e.g.*, Merrill Lynch, Inc. v. Bobker, 808 F.2d 930, 993 (2d Cir. 1986). While some courts will invalidate an arbitrator's award that is "in manifest disregard of the law," they require the error to appear on the face of the award. *See, e.g.*, Greenfield v. Mosley, 201 Cal. App. 3d 735, 746, 247 Cal. Rptr. 314, 321 (1988). Because arbitrators usually do not write opinions and their awards typically constitute simple declarations of the final result, courts rarely vacate awards on "manifest disregard of the law" grounds. *See, e.g.*, Sargeant v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989) (reversing a trial court's vacating of an arbitral order because a lump sum arbitration award cannot be rejected for lack of an explanation), *cert. denied*, 494 U.S. 1028 (1990). In short, little judicial review of arbitral awards exists.

court adjudication.[7] Pursuant to this "civil rights view," arguments that arbitration participants have waived their constitutional rights are overly broad in scope: Some parties who agree to arbitrate might never have intended to relinquish precious constitutional rights.[8] Moreover, with the explosive growth of arbitration into areas as diverse and unbalanced as medical malpractice, automobile insurance, small business loans, and opening of brokerage accounts, there exists a serious question whether inexperienced signatories to arbitration clauses truly consent to arbitration with any measure of understanding about the legal rights concomitant with such a proceeding.

This article examines the validity of these conflicting views of whether constitutional rights exist in arbitration. The article concerns only private arbitral hearings held pursuant to contract. Because burgeoning court-annexed arbitrations[9] are beyond the scope of this topic, the article contemplates a private contract to arbitrate signed by the arbitral participants. The conflicting views of the role of constitutional rights in arbitration are most relevant in so-called commercial arbitration but are also important to the increasing amount of tort arbitration. This article specifically addresses whether, and to what extent, constitutional arguments can be heard within the arbitral forum and in the very limited judicial review available to the arbitral parties.

This question is practical as well as theoretical. The applicability of constitutional rights arises increasingly in arbitrations: a stockbroker wants to invoke the Fifth Amendment privilege against self-incrimination at a customer-broker arbitration; an employee arbitrating a grievance challenges an employer-required drug test as constitutionally infirm

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7. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 24 (2d ed. 1984) (emphasizing "deference to the administrative expert" as an important aspect of administrative law).

8. *Compare* North Carolina v. Alford, 400 U.S. 25, 25 (1970) (waiver of constitutional rights must be after a "voluntary and intelligent choice among the alternate choices") *with* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 512-63 (1981) (reading existing civil cases concerning waiver of constitutional rights to permit relinquishment of civil rights so long as contract law principles are followed).

9. *See generally* PATRICIA A. EBENER & DONNA R. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (1985) (describing court-administered arbitration programs in eleven federal district courts and sixteen states); A. Leo Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537, 538-39 (1983) (detailing use of court-annexed procedures in federal and state courts). The term "court-annexed arbitration" may be a misnomer. Court-annexed arbitration is normally not final; rather a litigant is required to "arbitrate" but may have a full plenary trial if dissatisfied with the result of the arbitration. Since court-annexed arbitrations lack finality, a principal feature of arbitration, it is confusing to think of them as arbitration. In this sense, court-annexed arbitration resembles mediation where a participant, unhappy with a mediated result, may go forward to a full trial. *See* Speidel, *supra* note 5, at 160; Daoud A. Awad, Note, *On Behalf of Mandatory Arbitration*, 57 S. CAL. L. REV. 1039, 1044 (1984).

under the Fourth Amendment; or a participant in a construction arbitration argues that an arbitrator's bias violates due process of law.

Part I of this article explores and describes the current lack of definite constitutional rights in arbitration. Part II discusses the two principal justifications for denying constitutional rights in arbitral settings: the express waiver of civil liberties by the arbitration participants and the lack of state action in private arbitration. Part III examines sources available to permit enhanced consideration of constitutional rights at arbitrations and on review. It recommends changes in arbitration procedure to assure that some degree of constitutional protection will be present in the process.

II. THE PAST AND PRESENT: ROUTINE DENIAL OF CIVIL LIBERTIES IN ARBITRATION

A. The Nature of Arbitration

Definitions of arbitration tend to be opaque. Good, clear definitions require firm, rigid proscriptions. By contrast, modern "arbitration" resists a neat definition because it arose as a reaction to the slow and rigid system of substantive and procedural positivism that characterizes traditional litigation.

The reactive and informal nature of arbitration has created a variety of differing arbitral procedures and types of arbitration. An arbitration of an employee-employer grievance held pursuant to a collective bargaining agreement can differ greatly from a commercial arbitration between two small businesses or an international arbitration between two trading partners. Recognizing that various types of arbitration employ different procedures, one can identify important characteristics shared by most arbitration hearings.

1. Private Proceedings

Most arbitrations are private. Privacy permeates the atmosphere of arbitration and is often perceived by contracting parties as an advantage over public litigation.[10] In addition to the private location of hearings,

10. *See* IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 1110 (2d ed. 1978) (characterizing "preservation of privacy" as an advantage of arbitration); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961) (listing "desire for privacy" as one of the "chief moving factors" underlying commercial arbitration); Joseph P. Tomain & Jo Anne Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 7 (1989) (discussing reduction in publicity associated with mediation and other alternative processes); Comment, *Pre-Hearing Procedures in Labor Arbitration: A Proposal for Reform*, 43 U. PITT. L. REV. 1109, 1110-11 (1982) (noting that arbitration provides "the parties a degree of privacy unavailable in civil litigation").

the results of arbitration are also private; published opinions are rare.[11] The typical arbitration concludes with a terse, non-explanatory written award that is not disclosed to the public. In short, most arbitration results are essentially secret.

2. Subordination of Substantive Law

Arbitrators are not compelled to apply rules of substantive law. The weight of authority permits an arbitrator to "do justice as he sees it" and fashion an award that embodies the individual justice required by a given set of facts.[12] Frequently, arbitration results in a compromise with no clear winner and thus the arbitration award often makes neither party happy.

Although it would be incorrect to say that substantive rules play no role in the informal style of arbitration, arbitrators, unlike judges, are not bound to use substantive law.[13] This freedom from substantive rules creates a milieu in which arbitrators can ignore the law when making decisions.[14] The general failure of arbitrators to provide findings of fact or explanations for their awards and the extremely narrow nature of judicial review of arbitral awards contribute to the subordinate role of legal rules in arbitration.

3. Informal Procedures

Informality is the hallmark of arbitral proceedings. Formal rules of evidence are avoided by the sponsors of arbitration.[15] Instead, arbitra-

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11. Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 13 (1987); WILNER, *supra* note 1, § 29.06 ("Arbitrators are not required to state the reasons for their award, and commercial arbitration awards, unlike labor awards, are rarely accompanied by written opinions."). Labor arbitrations, where published opinions are the norm, represent an important exception to unpublished arbitration results.

12. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 259 (1987) (Blackmun, J., concurring in part and dissenting in part) (observing that "arbitrators are not bound by precedent"); *In re* Aimcee Wholesale Corp. (Tomar Products, Inc.), 21 N.Y.2d 621, 626, 237 N.E.2d 223, 225, 289 N.Y.S.2d 968, 971 (1968) (noting that "[a]rbitrators are not bound by rules of law"); Fudicker v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 400 (1875) (commenting that arbitrators "disregard strict rules of law or evidence and decide according to their sense of equity"). Both the Federal Arbitration Act (FAA), 9 U.S.C. § 1-15 (1988) and the Uniform Arbitration Act (UAA), 7 U.L.A. 5 (1955), are silent as to whether the arbitrator must apply law when deciding a dispute.

13. For example, counsel, if present, may try an arbitration using substantive rules as a guide, and many arbitrators regularly use substantive legal principles in crafting an award. Mentschikoff, *supra* note 10, at 861.

14. *See* David E. Feller, *Relationship of the Agreement to External Law*, *in* LABOR ARBITRATOR DEVELOPMENT 33 (Christopher A. Barreca et al. eds., 1983) (suggesting that a labor arbitrator should not entertain formal claims of violations of statute).

15. WILNER, *supra* note 1, § 24.02 ("Arbitrators have discretionary power to admit and

tors usually try to consider all evidence the arbitral participants desire to submit.[16] While some discovery may be possible in certain jurisdictions,[17] full litigation-style discovery is avoided in arbitration.[18] Typically, the parties are largely free to create their own procedures and may agree in advance to use a particular jurisdiction's rules of evidence. Such an agreement, however, would be unusual since formal rules of evidence generally are viewed as incompatible with the goal of a speedy and inexpensive resolution of the dispute.[19]

4. Finality

Arbitration results are essentially final.[20] While there exists a se-

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hear any evidence that the parties may wish to present through witnesses or documents."); Robert Coulson, *Appropriate Procedures for Receiving Proof in Commercial Arbitration*, 71 DICK. L. REV. 63, 64-68 (1966) (noting that rules of evidence are not followed strictly in arbitration); AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES, Rule 31 (1984) ("conformity to legal rules of evidence shall not be necessary").

16. *See* MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 7 (2d ed. 1987) (describing arbitrators as accepting evidence "for what it may be worth"); JOHN S. MURRAY, ALAN S. RAU & EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION 557 (1989) ("[A]n arbitrator is in fact more likely to get into trouble by following the rules of evidence than by ignoring them—and far more likely to get into trouble by excluding evidence than by admitting it."); Clare B. McDermott, *An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?*, *in* DECISIONAL THINKING OF ARBITRATORS AND JUDGES 1, 14 (James L. Stern et al. eds., 1981) ("I am prepared to listen to just about anything a party wants me to hear.").

17. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1283.05, 1283.1 (West 1982) (granting the authority to "take depositions and to obtain discovery" in personal injury arbitration); N.J. STAT. ANN. § 2A:23A-10(b) (West 1987) (permitting oral depositions and document inspection within 60 days of demand for arbitration or order compelling arbitration); Stanton v. Paine Webber Jackson & Curtis, Inc. 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988) (holding that arbitrators have power to issue pre-hearing subpoena for the production of documents).

18. *See, e.g.*, Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) (Selection of arbitration is intentional rejection of "procedural niceties which are normally associated with a formal trial."); John G. Malcolm & Eric J. Segall, *The Arbitrability of Claims Arising Under Section 10(b) of the Securities Exchange Act: Should* Wilko *Be Extended?*, 50 ALB. L. REV. 725, 756 (1986) (commenting that only limited discovery is available in arbitration of disputes between securities investors and sellers).

19. WILNER, *supra* note 1, § 24:02 ("It is a well established principle of arbitration law and practice that the usual common-law rules regarding the admission and rejection of evidence are not strictly observed in arbitration."). Resolving evidentiary disputes is time consuming and inconsistent with the informal nature of arbitration.

20. International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Commercial, 745 F. Supp. 172, 178 (S.D.N.Y. 1990) ("The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts."); Morris v. Zukerman, 69 Cal.2d 686, 691, 446 P.2d 1000, 1004, 72 Cal. Rptr. 880, 884 (1968) ("neither the merits of the controversy nor the sufficiency of the evidence . . . are matters for judicial review"); *In re* Aimcee Wholesale Corp. (Tomar Products, Inc.), 21 N.Y.2d 621, 626, 237 N.E.2d 223, 225, 289 N.Y.S.2d 968, 971 (1968) ("[a]rbitrators are not bound by rules of law and their decisions are essentially final"); WILNER, *supra* note 1, § 34:00 (arbitrator's award "will not be reviewed by

verely limited form of judicial review following arbitration,[21] there is no true appeal from an arbitral award. Judicial review is not available to arbitration signatories because they seek a fair, informal, and prompt result without the delays associated with a formalized appeal system. As expressed by Professor Richard Speidel, finality is a "core ingredient" of arbitration that "supposedly gives arbitration an advantage over litigation."[22]

A party dissatisfied with an arbitral result may seek to have the award judicially vacated or modified on limited grounds. For example, clear fraud by the arbitrator may cause an award to be vacated.[23] Similarly, judicial designation of an award as inconsistent with public policy constitutes a severely limited avenue of review.[24] Nevertheless, the chances of overturning an arbitral award are slim.[25] Courts have construed these methods of review narrowly in order to preserve the finality of arbitration.

Although earlier cases set aside an arbitral award if it was in "manifest disregard of the law,"[26] more recent cases appear to limit review of

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the court since his decision on issues of fact and law has been agreed by the parties as final and binding upon them").

21. *See infra* text accompanying notes 173-87.

22. Speidel, *supra* note 5, at 191; *see also* George L. Blum, *Disclosing Conflict of Interest in the California Arbitration System:* Bainwait v. Hernandez *and the Erosion of Duty*, 5 OHIO ST. J. ON DISP. RESOL. 97, 97 (1989) (opining that arbitral forum should be as "final as possible").

23. *See* 9 U.S.C. § 10(a) (1988) (providing that arbitral awards can be set aside or vacated because of "fraud, corruption or undue means"); Bonan v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (holding that in order to vacate an arbitration award "the movant must establish fraud by clear and convincing evidence" and demonstrate that the result of the arbitration hearing would have been different but for the fraud); *cf.* Lofarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir. 1986) (movant seeking to set aside award on ground of fraud must show fraud to have been discoverable prior to or during arbitration).

24. *E.g.*, Northrop Corp. v. Triad Int'l Mktg. S.A., 811 F.2d 1265, 1271 (9th Cir.), (reversing trial court's refusal to enforce arbitral award because result contrary to public policy), *cert. denied*, 484 U.S. 914 (1987); E.I. Dupont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, 790 F.2d 611 (7th Cir.) (reversing trial court order vacating an arbitration award on grounds of "workplace safety" and reinstating employee who suffered a nervous breakdown and was hospitalized after attacking fellow employees and damaging employer property), *cert. denied*, 479 U.S. 853 (1986); Union Employers Div. of Printing Indus. v. Columbia Typographical Union No. 101, 353 F. Supp. 1348, 1349 (D.D.C. 1973) (restricting "public policy" ground of review to narrow situation where award "compels the violation of law or conduct contrary to accepted public policy"), *aff'd*, 492 F.2d 669 (D.C. Cir. 1974).

25. *See generally* A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992) (stating that "federal court review of arbitration awards is extremely limited"); Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) ("judicial review of an arbitration award is extraordinarily narrow"); Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir.) (requiring judicial review of arbitration to be "narrowly limited"), *cert. denied*, 446 U.S. 983 (1980); Speidel, *supra* note 5, at 191-98.

26. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by*

an arbitrator's substantive decision. Refusals to overturn awards because of mere "error[s] of law" are now the norm.[27] The typical lack of a written opinion in commercial arbitration facilitates this development. Courts cannot easily review inscrutable awards lacking explanation and, therefore, often refuse to overturn arbitration awards that fail to supply a rationale.[28] This development has led Professor Speidel to state that "if the arbitrator does not prepare a written opinion, the applicable law cannot be delineated and analyzed."[29]

5. Expertise and Lack of Jury

Arbitrators are often said to be experts in the subject matter of the disputes they adjudicate. Certainly this was true of the historic commercial arbitrations between textile merchants. The merchants would select an expert in their particular trade to hear and decide their dispute. The growth of private arbitration, however, has produced such a demand for experts that there is reason to doubt modern arbitration expertise.[30]

An expert arbitrator is a substitute for the jury. Lack of a jury trial is a significant feature of arbitration and is valued by some business parties who generally are disadvantaged by jury trials.

B. Arbitration in Action: A Lack of Firm Constitutional Rights

At present there is little guarantee that constitutional arguments are useful in commercial arbitration proceedings. Probably the biggest impediment to enforcing constitutional rights is arbitration's tendency to de-emphasize substantive rights. Because arbitrators are not constrained by legal rules, constitutional protections have little or no impact within

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Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); French v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986).

27. *See, e.g.*, Rostad & Rostad Corp. v. Investment Management & Research, Inc., 923 F.2d 694, 697 (9th Cir. 1991) (asserting that there is "some doubt" whether manifest disregard of the law is still a basis for vacating arbitral awards); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (rejecting vacation of arbitral awards because of mere "error of law" and narrowing "manifest disregard" review to rare situations where the arbitrator "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it").

28. *See, e.g.*, Sargeant v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532-33 (D.C. Cir. 1989) (reversing trial court's vacating of an arbitral order because a lump sum arbitration award cannot be rejected for lack of supporting explanation), *cert. denied*, 494 U.S. 1028 (1990).

29. Speidel, *supra* note 5, at 198.

30. Arbitrators can easily be appointed to panels merely by filing forms listing their experience. While arbitral organizations, in theory, review these forms for legitimacy, no thorough assessment or test of the arbitrator's knowledge of the substantive law of the specialty area is conducted. Today's arbitrator often may not be an expert.

an arbitration proceeding. An arbitrator may listen to an argument that a constitutional right has been breached, but will not be required to apply any aspect of substantive law, including civil liberties, to remedy that breach.

The informal process of arbitration prevents careful study of the treatment of constitutional rights in arbitral proceedings. Most commercial arbitrations conclude only with an award and no opinion revealing the rationale or findings for the result. This process frustrates identification of the assertion and disposition of civil liberties arguments. Civil liberties issues within arbitration are invisible except in those rare instances where a party raises constitutional rights as the ground for setting aside an arbitral award and the court writes an opinion somehow discussing the constitutional question within the typically inscrutable arbitration result.

A more thorough study of the interplay between constitutional rights and arbitration, however, is possible through examination of the issue in labor arbitration. The customary practice of labor arbitrators is to write opinions explaining their awards. These written opinions provide a unique opportunity for insight not available in most other types of arbitration.

Examination of the status of constitutional rights within labor arbitration is particularly appropriate because the field of labor arbitration has played an important role in the growth of arbitration. Arbitration of employee-employer grievances before labor arbitrators has a rich and successful history and often is looked to as a model of dispute resolution.[31] Another reason to focus upon labor arbitration is the field's "relational contract"[32] nature, which results from collective bargaining agreements between parties with long-term relationships. Much of commercial arbitration also involves relational contracts between parties with ongoing business dealings. Accordingly, special attention must be given to labor arbitration's treatment of constitutional rights.

1. The Ambiguous "Due Process" of Labor Arbitration

Assertions of violations of civil liberties are common in labor arbitration hearings. An employee may question whether her employer can suppress her right to free expression; an employer's program of random

31. *See, e.g.*, David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 745-51 (1973).

32. *See generally* IAN R. MACNEILL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 10-16, 210-13 (2d ed. 1978) (discussing transactional and relational contract structures and collective bargaining relationships).

drug testing may be attacked as without probable cause; or application of an employer's work rules without specific advance notice may be challenged as lacking appropriate due process notice protections.

The applicability of the various constitutional rights in a labor arbitration hearing is uncertain. Arbitrators often assert that constitutional arguments have no place in labor arbitration. More specifically, Robben Fleming and Willard Wirtz have observed that the privilege against self-incrimination has little role in a labor arbitration hearing.[33] Professor Edgar Jones cautions that automatic application of the constitutional norms of criminal cases is misplaced in arbitration.[34]

Statements by leading academics that labor arbitrators need not apply constitutional rights should come as no surprise. While special factors such as the need for a stable, peaceful procedure to resolve multiple grievances quickly help make labor arbitration particularly successful,[35] labor arbitration is nonetheless a type of arbitration where legal rights have no definitive applicability. The procedural law of labor arbitration mandates that the arbitrator's primary source of law is the arbitration clause in the collective bargaining agreement.[36] A labor arbitration clause represents the signatories' choice "to be bound, not by decisions of courts or other arbitrators in somewhat comparable matters, but by [the arbitrator's] judgment as to how the case should be decided on the facts in the record and the arguments advanced."[37]

A few examples from written labor arbitration decisions illustrate how arbitrators deal with civil liberty arguments. Arbitrators often refuse to find a constitutional right not to incriminate oneself because the

33. ROBBEN W. FLEMING, THE LABOR ARBITRATION PROCESS 182 (1965); Willard Wirtz, *Due Process of Arbitration*, *in* THE ARBITRATOR AND THE PARTIES: PROCEEDINGS OF THE 11TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 19-20 (Jean T. McKelvey ed., 1958).

34. Edgar A. Jones, Jr., *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 UCLA L. REV. 1241, 1286-90 (1966); *see also* OWEN FAIRWEATHER, FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 267-71 (Ray J. Schoonhoven ed., 3d ed. 1991) ("[M]ost arbitrators find that the strictures that result from too free borrowing of due process principles from criminal law are out of place in the 'shirt sleeves business of arbitration.' ").

35. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960) (holding that labor arbitration was the quid pro quo for preventing work stoppages via "no strike" clause).

36. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (stating that an arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement").

37. Peter Seitz, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse)*, ARB. J., Dec. 1983, at 58, 59; *see also* Carlton J. Snow, *An Arbitrator's Use of Precedent*, 94 DICK. L. REV. 665, 666-70 (1990) (stating that arbitrators, not reviewing courts, should decide precedential value of earlier arbitral awards).

employee-grievant failed to provide information to his employer during investigations of work-related conduct. When presented with a Fifth Amendment argument, arbitrators have ruled that the constitution does not prevent employee discipline even though it might protect an employee charged with criminal wrongdoing.[38] Similarly, labor arbitrators have drawn negative inferences from an employee's refusal to testify,[39] approved the discharge of an employee based upon a blood test administered while the grievant was unconscious,[40] and permitted searches of employee property without Fourth Amendment protections.[41]

While these decisions are consistent with the prevailing norm that legal rights need not be adhered to by an arbitrator, labor arbitrators do not systematically ignore assertions of constitutional rights. Indeed, labor arbitrators claim to consider civil liberties by adhering to the doctrine of "due process of arbitration" or "industrial due process."[42] Pursuant to this doctrine, labor "disciplinary actions must conform to procedural fairness."[43]

To the outside observer this doctrine may seem somewhat amorphous. Rather than guaranteeing the regular and systematic application of constitutional rights, "due process of arbitration" describes the attitude and set of values of arbitrators. As such it is hardly positivist and seems foreign to the usual safeguards of constitutional protection.

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38. Illinois Power Co., 84 Lab. Arb. Rep. (BNA) 586, 590 (1985) (Penfield, Arb.) ("While the Constitution protects an accused in criminal proceedings, it does not guarantee that an employee who invokes the Fifth Amendment during the investigation of infractions of Company rules and policies will continue to be employed."); Fort Monroe Exch. & Nat'l. Ass'n of Gov't Employees, Local R 4-11, 82-2 Lab. Arb. Awards (CCH) ¶ 8358, at 4620 (1982) (Harkless, Arb.) (holding that constitutional rights are not violated by using failure to testify against ex-employee because "privilege against self-incrimination applies in criminal cases and is not ordinarily recognized in arbitration proceedings"); *accord* LABOR AND EMPLOYMENT ARBITRATION 4-26 (Tim Bornstein & Ann Gosline eds., 1992) ("a majority of arbitrators hold that the Fifth Amendment . . . is not applicable to arbitration").

39. Brown Shoe Co., 16 Lab. Arb. Rep. (BNA) 461, 466 (1951) (Klamon, Arb.) (stating that the employees' refusal to testify "abundantly sustains the Company's position").

40. New York Tel. Co., 76-2 Lab. Arb. Awards (CCH) ¶ 8420, at 6333 (1976) (Markowitz, Arb.).

41. *See, e.g.*, Aldens, Inc., 68-2 Lab. Arb. Awards (CCH) ¶ 8814, at 5823 (1968) (Kelliher, Arb.); *cf.* Lucky Stores, Inc., 53 Lab. Arb. Rep. (BNA) 1274, 1276 (1969) (Eaton, Arb.) (holding no application of Fourth Amendment required in arbitration proceeding if no state action).

42. *See generally* FAIRWEATHER, *supra* note 34, at 267 ("Most arbitrators endeavor to give meaning and application in labor arbitration to the principles of 'due process' established in the law of constitutional criminal procedure."); Robben Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235, 235-48 (1961) (tracing development of an industrial due process concept and focusing upon issues of notice, avoidance of surprise and confrontation).

43. United Tel. Co. of Fla., 61 Lab. Arb. Rep. (BNA) 443, 447 (1973) (Murphy, Arb.).

Nonetheless, "industrial due process" is a fact of life in labor arbitration. Examination of labor arbitration decisions demonstrates that some measure of civil liberties protection is present in the arbitral process by virtue of labor arbitrators' use of their unique brand of "due process of arbitration."

In *Goddard Space Flight Center, NASA*,[44] an arbitrator used the concept of labor arbitration due process to overturn the discharge of an electrician and to order his return to work with full back pay, seniority, and benefits. The grievant had been fired by the Goddard Space Flight Center following his guilty plea and a suspended sentence for possession of cocaine with intent to distribute. The arbitrator's reversal of the discharge was premised upon the employer's failure to specify the charges against the grievant and the sanctioning supervisor's use of a written investigative report that included statements obtained from a prison interview with a convicted felon who had sold cocaine to the employee. The arbitrator found that the grievant was "denied substantive and procedural due process" because he was not "informed, in writing of the charges against [him]" and because the written investigative report "biased" the sanctioning supervisor.[45] It is significant and typical of "arbitration due process" that the arbitrator concluded that the grievant "did not enjoy . . . rudimentary features of due process in this case," but, nonetheless, excluded any detailed reasoning as to why due process had been denied.[46]

A similarly vague but effective use of "arbitration due process" occurred in *Red Wing Co.*,[47] in which an arbitrator overturned the demotion of two employees. Management had questioned the employees following customer complaints of finding a razor blade in the employer's manufactured peanut butter, and the employer had argued that the disciplined employees had answered hypothetical questions in a way which led the company to think they would fail to report product adulteration. The arbitrator reversed the demotions because the employer had violated "basic notions of fairness" by disciplining the grievants "without prior notice either by work rule or warning" that their answers would cause demotion.[48] Here, as in *Goddard*, the arbitrator required a measure of due process in the employment setting and, by doing so, incorporated the assertion of civil liberties into the arbitration hearing.[49] It is noteworthy

44. 89-1 Lab. Arb. Awards (CCH) ¶ 8038 (1988) (Berkeley, Arb.).

45. *Id.* at 3189.

46. *Id.*

47. 79-1 Lab. Arb. Awards (CCH) ¶ 8254 (1979) (Denson, Arb.).

48. *Id.* at 4055.

49. The arbitrator also applied a First Amendment constitutional-rights analysis by ex-

that, unlike the *Goddard* arbitration, no state action was present in the *Red Wing* arbitration.[50]

A third example of industrial due process is *City of Detroit*.[51] The arbitrator set aside a prison guard's suspension because the employer had disciplined the employee before allowing him to give his own version of the facts. The employee was suspended and given a written notice that he was disciplined for "conduct unbecoming a city employee"; in fact, the employer relied upon a report that the employee had permitted prisoners to engage in sexual activity and to consume alcoholic beverages. The arbitrator reasoned that "industrial due process" required "that the employee be advised promptly of the charges against him, in detail, and be given an opportunity to explain his version of the story before discipline is administered."[52]

The precise role due process played in *City of Detroit* arbitration is noteworthy and common in labor arbitration. The collective bargaining agreement called for application of "just cause" in cases of employee discipline. The arbitrator reasoned that the "just cause"[53] language "necessarily includes the concept of 'industrial due process.' "[54] The arbitrator also provided a helpful definition of arbitral due process:

> In addition to a valid substantive basis, disciplinary actions must conform to procedural fairness, sometimes referred to as "industrial due process." This requires a full and fair investigation of the facts and circumstances surrounding the employee conduct, and normally will include an opportunity for the employer [sic], before the Company makes its final decision, to offer any denials, explanations or justifications which may be relevant. It is a basic principle of fairness, in industrial discipline as well as legal proceedings, that no one should be penalized without opportunity to speak in his own behalf.[55]

This language reveals the exact manner in which the *City of Detroit* arbitrator applied due process protections. One simple interpretation is that the arbitrator did nothing more than apply the arbitral participants' con-

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plicitly recognizing the employee's "freedom of expression," but then balancing this right against the "clear and present danger to the safety of the consuming public." *Id.*

50. *See infra* text accompanying notes 139-72.

51. 79-2 Lab. Arb. Awards (CCH) ¶ 8533 (1979) (Roumell, Arb.).

52. *Id.* at 5358.

53. A "just cause" provision of a collective bargaining agreement means that an employee will not be disciplined without reason. Such clauses are typical in collective bargaining agreements. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594-95.

54. *City of Detroit*, 79-2 Lab. Arb. Awards (CCH) ¶ 8533, at 5358.

55. *Id.* (quoting United Tel. Co. of Fla., 61 Lab. Arb. (BNA) 443 (1973) (Murphy, Arb.)).

tractual choice to require "just cause" in disciplinary proceedings. Parties to arbitration can, of course, dictate their own procedures by specifying them in their contract to arbitrate. Perhaps nothing more than the arbitrator's incorporation of rough constitutional principles occurs in those "due process" labor arbitrations controlled by "just cause" clauses.

This view implies that if the agreement provides for a grievance hearing guided by "just cause" principles, the arbitrator may apply constitutional norms because he believes the parties chose to be bound by them. Professor St. Antoine characterized the arbitrator as a "contract reader" charged by the contract signatories with the job of interpreting the agreement.[56] The arbitrator is the parties' "joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the unanticipated omissions of the initial agreement."[57] If interpreting the collective bargaining agreement requires reference to external law, the arbitrator may apply law.[58] In endorsing this theory, Judge Harry Edwards requires that both the parties and the courts be "bound by the arbitrator's interpretation without regard to whether a judge would reach the same result if the matter were heard in court."[59] The implications of this theory are central to an overall understanding of labor arbitration. Courts must respect the finality of the arbitrator's legal interpretation so long as it derives its essence from the collective bargaining agreement.[60] This may require a court to confirm a labor arbitration award that mistakenly interprets the law so long as the legal interpretation has a source in the contract itself.[61]

The vision of constitutional rights being applied by a "contract reader" is reinforced by instances in which arbitrators specifically point to the collective bargaining agreement as the ultimate source of their ability to apply civil liberties. For example, one arbitrator overturned a worker's discharge because of the employer's failure to allow the accused employee and a union steward to investigate the scene of an alleged inci-

56. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1138-44 (1977) (emphasizing the role of the arbitrator as a "contract reader" designated by collective bargaining agreement parties to resolve disputes using the terms and implications of the contract).

57. *Id.* at 1140.

58. The parties' contract language may call for the application of legal principles, "either expressly or impliedly." *Id.* at 1143.

59. American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 6-7 (D.C. Cir. 1986).

60. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

61. *See American Postal Workers Union*, 789 F.2d at 6 (stating that "[a]lleged 'mistake of law' does not alter the standard of review").

dent. The arbitrator reasoned that the worker had been denied his "contract[ ] due process" rights to defend himself.[62] Similarly, another arbitrator pointed to a "just cause" clause in a collective bargaining agreement as the source of his ability to apply First Amendment freedom of expression principles. These principles were used to overturn the punishment of a town employee who erroneously charged municipal employees with misappropriating town property.[63]

Yet some labor arbitrators apply due process and other constitutional rights without articulating any rationale and specifically without reference to a "just cause" clause. In contrast, some courts refuse to uphold awards based upon due process without a "just cause" clause in the collective bargaining agreement.[64] Such cases merit careful study. They may represent little more than the freedom of an arbitrator to decide disputes unhampered by substantive legal principles. They may result from the many non-lawyer arbitrators who are vaguely familiar with legal principles but are not familiar with legal rules. Or such cases may represent the arbitrator's application of industrial common law to the practices of the industry.[65]

Nevertheless, loose application of constitutional safeguards in labor arbitration has become so frequent that there may be a separate explanation for this development. Application of "due process" in labor arbitration might be justified by an arbitrator's belief that such procedural protection is necessary to make labor arbitration achieve its goal of labor harmony. Successful arbitration of employee grievances facilitates peaceful and productive relations between labor and management.[66] In this sense, use of constitutional rules within labor arbitration appears to be based on "relational contract" considerations because a long-term need for peaceful resolution of disputes animates the matter. In addition, successful labor arbitration creates a healthy environment for labor-management governance because it provides a measure of independent problem-

62. International Salt Co., 86-1 Lab. Arb. Awards (CCH) ¶ 8146, at 3618 (1985) (Kates, Arb.).

63. Town of Plainville, 82-1 Lab. Arb. Awards (CCH) ¶ 8002, at 3016-21 (1981) (Sacks, Arb.). *See also* Gougler Indus., 86-2 Lab. Arb. Awards (CCH) ¶ 8360, at 4544-45 (1986) (Duda, Arb.) (arbitrator relied on "due process" requirement in labor contract to overturn employee discharge because of supervisor's refusal to discuss reason for discharge notice); Village of Boubonnais, 85-2 Lab. Arb. Awards (CCH) ¶ 8362, 4502-03 (1985) (Hayford, Arb.) (premising a "property interest" in seniority entirely on terminology within the collective bargaining agreement).

64. *See, e.g.*, Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union Local 261, 950 F.2d 95, 99 (2d Cir. 1991) (overturning award based upon lack of notice and due process because labor contract lacked just cause language).

65. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

66. *See* Abrams & Nolan, *supra* note 53, at 610-11.

solving for parties with long term relations.[67] These factors support an arbitrator's finding of a "just cause" concept in a collective bargaining contract.[68]

2. The Amorphous Status of Constitutional Rights in Commercial Arbitration

Although the concept of "industrial due process" is ambiguous, the status of constitutional rights in commercial arbitration is even more so. The lack of written opinions in commercial arbitration frustrates careful study of this subject. Also, because commercial arbitrators can ignore substantive rules, they may refuse to recognize civil liberties.

Of course, in a given dispute, the arbitrator may decide to enforce a constitutional right. No legal barrier prevents such action. Yet no prevailing custom or theory supports the regular application of constitutional rules in arbitration. Thus far no equivalent of labor arbitration's "industrial due process" has arisen to support increased procedural protections in commercial arbitration. Accordingly, we find almost no guarantee of the application of civil liberties in commercial arbitration.

Commonwealth Coatings Corp. v. Continental Casualty Co.[69] represents the leading commercial arbitration case dealing with the applicability of procedural rights during arbitration hearings. In *Commonwealth Coatings*, a sharply divided Supreme Court permitted a construction arbitration award to be set aside because the "neutral" arbitrator of a three-member panel failed to disclose that he had been employed by a contractor whose surety was a party to the arbitration. After the arbitrators unanimously entered an award in favor of the prime contractor's surety and against a subcontractor, facts emerged that the "neutral" arbitrator had received "about $12,000 [from the prime contractor] over a period of four or five years, and [that] the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit."[70] Justice Black, in a plurality opinion joined by three other Justices, vacated the arbitration award because of Section 10 of the Federal Arbitration Act (FAA) which permits courts to set aside awards

67. *See* St. Antoine, *supra* note 56, at 1138 ("[T]he key to the special status of labor arbitration is that it is an integral component of union and management's autonomous regulation of their ongoing relationship.").

68. *See* Jean T. McKelvey, *Discipline and Discharge, in* ARBITRATION IN PRACTICE 88, 89 (Arnold M. Zack ed., 1984) (stating that some arbitrators imply a just cause concept in labor arbitration despite lack of such a clause in the collective bargaining agreement).

69. 393 U.S. 145 (1968).

70. *Id.* at 146 (plurality opinion). The lawsuit referred to was the suit to set aside the arbitration award.

"procured by corruption, fraud or undue means" or "evident partiality . . . in the arbitrators."[71] The plurality reasoned that the standards of impartiality for arbitrators must be just as strict as those for judges because arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review."[72]

In his dissent, Justice Fortas attacked the factual basis of Justice Black's opinion because no party had claimed that the arbitrator in question was actually biased. Justice Fortas reasoned that the "neutral" arbitrator had been guilty, at most, of an "innocent failure to volunteer information."[73] The record showed that the "neutral" arbitrator was a "respected consulting engineer who has performed services for 'most of the contractors in Puerto Rico,' "[74] and that he was a friend of the attorney for the losing arbitration participant. On this record, Justice Fortas was unwilling to find that the "evident partiality" standard of the FAA had been met.[75]

The concurring opinion of Justice White, joined by Justice Marshall, signaled that the decision should not hold arbitrators to constitutionally-premised judicial standards of bias and conceded that arbitrators' prior relationships often would enhance their decision-making capacity.[76] Nonetheless, Justice White found the arbitration tainted because of the complete lack of "frankness at the outset" of the arbitration.[77] This pragmatic concurring opinion noticeably lacked any explanation of how the targeted arbitrator's behavior violated the FAA's "undue means" or "evident partiality" standard.

The *Commonwealth Coatings* decision is confusing. The Second Circuit concluded that "much of Justice Black's opinion must be read as dicta, and we are left in the dark as to whether an 'appearance of bias' will suffice to meet the seemingly more stringent 'evident partiality' standard"[78] of the FAA. *Commonwealth Coatings* lacked the facts necessary

71. 9 U.S.C. § 10 (1988).

72. *Commonwealth Coatings*, 393 U.S. at 149-50 (plurality opinion).

73. *Id.* at 152 (Fortas, J., dissenting).

74. *Id.* at 152-53 (Fortas, J., dissenting).

75. *Id.* at 153-54 (Fortas, J., dissenting).

76. *Id.* at 150-52 (White, J., concurring). In contrast, the modern concept of an impartial jury is based upon jurors with little or no personal knowledge of the parties or the subject matter. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 8.13, at 456 (3d ed. 1985) (stating that information regarding a prospective juror's knowledge of the facts or parties "may be a ground for challenge"). The common-law concept of the jury was similar to arbitration because "originally the jury was supposed to decide on the basis of its members' own knowledge." *Id.* § 8.13, at 453.

77. *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring).

78. Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984). The *Morelite* decision crafted a "reasonable person" test for

for the plurality to reach its seemingly "statutory construction" conclusion that the FAA had been violated. Instead, Justice Black seemed to premise a difficult statutory construction result on constitutional grounds. Justice Black cited *Tumey v. Ohio*[79] which held that the Due Process Clause required the decision of a court to be set aside upon the showing that a judge had the "slightest pecuniary interest" in the result.[80] Justice Black argued that if the Constitution subjected courts to a strict bias standard, it would be logical for the FAA to apply the "same concept" in arbitration.[81] Justice Black's analysis is difficult to reconcile with the text of the FAA because, in effect, he reads a broad constitutional doctrine into the FAA's more restrictive grounds for setting aside arbitral awards. Although the *Commonwealth Coatings* plurality tried to read constitutional due process into the arbitration procedure, three dissenters and two concurring judges ignored any constitutional principle or authority. A majority of the Court refused to interject constitutional rights into a commercial arbitration hearing.

Lower courts have struggled with the "less than clear standard"[82] of *Commonwealth Coatings*. Some decisions refuse to hold arbitrators to the same "appearance of bias" standard as judges,[83] while others apply a watered-down version of the constitutionally premised "appearance of bias" test.[84] Not surprisingly, no lower court case interprets *Commonwealth Coatings* as mandating the application of constitutional due process principles in arbitration proceedings.[85]

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assessing partiality which is different from any approach taken by *Commonwealth Coatings*. *Id.* at 83-84; *accord* Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971).

79. 273 U.S. 510 (1927).

80. *Id.* at 524. In *Tumey* the judge was paid a percentage of the traffic fines imposed. *Id.* at 520.

81. *Commonwealth Coatings*, 393 U.S. at 148 (plurality opinion).

82. Steven J. Goering, Note, *The Standard of Impartiality as Applied to Arbitrators by the Federal Courts and Codes of Ethics*, 3 GEO. J. LEGAL ETHICS 821, 824 (1990).

83. Toyota of Berkeley v. Auto Salesmen's Union, Local 1095, 834 F.2d 751, 755-56 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83-84 (2d Cir. 1984) (applying a "reasonable person" test of arbitrator bias); Overseas Private Inv. Corp. v. Anaconda Co., 418 F. Supp. 107, 110 (D.D.C. 1976) (applying fact-based bias test relying on Justice White's concurrence in *Commonwealth Coatings*).

84. *See, e.g.*, Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1199-1200 (7th Cir.) (applying appearance of bias test and then suggesting test was "objective" and "less exacting" than that applied to judges), *cert. denied*, 449 U.S. 873 (1980); United States Wrestling Fed'n v. Wrestling Div. of AAU, Inc., 605 F.2d 313, 317-19 (7th Cir. 1979); Sanko S.S. Co. v. Cook Indus., 495 F.2d 1260, 1263-65 (2d Cir. 1973).

85. *See* Taylor v. New York City Transit Auth., 433 F.2d 665, 669 (2d Cir. 1970) (stating that the *Commonwealth Coatings* decision reflects a "violation . . . not of constitutional due process but of a provision in the United States Arbitration Act").

Perhaps because arbitrators are allowed to depart from substantive law, few commercial cases reach the issue of the applicability of constitutional rights within the arbitral setting. Assertions of labor arbitrators that "even in the most informal of proceedings certain minimum requirements of 'due process' must be met if the award is to be legally binding"[86] are more relevant in labor arbitration where the concept of "industrial due process"[87] applies. Nonetheless, examination of the few decisions that specifically address constitutional issues arising in arbitration yields valuable insight about the role of constitutional rights.

The United States Court of Appeals for the Eighth Circuit refused to require arbitrators to apply constitutional safeguards in *Stroh Container Co. v. Delphi Industries, Inc.*[88] *Stroh Container* is a logical starting point for analysis. The court of appeals refused to set aside a commercial arbitration award and, by so doing, clearly rejected any requirement of constitutional rights in arbitration:

> The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured *without due process*, rules of evidence, accountability of judgment and rules of law.... No one ever deemed arbitration successful in labor conflicts because of its superior brand of justice.[89]

The United States Court of Appeals for the Seventh Circuit recently adopted the *Stroh Container* reasoning in *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis.*[90] The *Ellis* decision rejected a claim that the arbitrator's alleged refusal to consider evidence violated due process. The Seventh Circuit found the hearing procedures "fair," cited the *Stroh Container* dictum that arbitration procedures need not afford due process, and reasoned that arbitration participants are bound by their contractual choice of arbitration as an alternate means of dispute resolution.[91]

Similarly, the Ninth Circuit's decision in *Todd Shipyards Corp. v. Cunard Line, Ltd.*,[92] displayed a typical rejection of due process claims

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86. RUSSELL A. SMITH ET AL., COLLECTIVE BARGAINING AND LABOR ARBITRATION 212 (1st ed. 1970).

87. *See supra* notes 42-61 and accompanying text.

88. 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986).

89. *Id.* at 751 n.12 (emphasis added).

90. 849 F.2d 264 (7th Cir. 1988).

91. *Id.* at 268 (quoting E.I. DuPont de Nemours v. Graselli Employees Indep. Ass'n, 790 F.2d 611, 614 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986)). The *Ellis* opinion flirts with the proposition that the signatories to a valid arbitration clause waive any rights to due process. For discussion of the waiver of rights concept, see *infra* notes 108-38 and accompanying text.

92. 943 F.2d 1056 (9th Cir. 1991).

about the arbitration process. In *Todd*, Cunard sought to set aside the one million dollar punitive damage arbitration award by arguing that the arbitration procedures violated due process principles because of the narrow standard of review and "the absence of the rules of evidence."[93] The court of appeals' refusal to set aside the award was premised upon the parties' voluntary agreement to arbitrate and the appellant's full participation in the arbitration proceeding. Since the appellant agreed to arbitrate and took advantage of the arbitral process, "which it entered voluntarily, [the appellant] cannot now argue that its due process was denied."[94]

Despite these cases, commentators have opined that "[t]he [F]ifth [A]mendment entitles all parties in arbitration proceedings to fundamentally fair hearings."[95] There is little case authority, however, supporting this proposition. *Harvey Aluminum v. United Steelworkers*[96] did contain assertions that arbitral participants "have the right to assume that any arbitration hearing . . . will afford them the opportunity of presenting *all* of their material evidence,"[97] although this requirement appears to have been premised upon the rules of the American Arbitration Association (AAA) rather than upon constitutional doctrine.[98] Similarly, in *Bell Aerospace Co. Division of Textron v. Local 516*,[99] Judge Paul Hays, a longtime critic of arbitration,[100] ruled that the arbitrator must, at a minimum, "grant the parties a fundamentally fair hearing."[101] Judge Hays, who would have been expected to base this "right" on as strong a ground as possible, did not rely on the Constitution. Instead, he vaguely referred to the requirement of judicial review of arbitral awards for failure to ad-

93. *Id.* at 1063.

94. *Id.* at 1064.

95. *See, e.g.*, Douglas R. Davis, Note, *Overextension of Arbitral Authority: Punitive Damages and Issues of Arbitrability*, 65 WASH. L. REV. 695, 706 (1990); *accord*, SMITH et al., *supra* note 86, at 212 (suggesting that arbitrators must guarantee due process to make their results legally binding).

96. 263 F. Supp. 488 (C.D. Cal. 1967).

97. *Id.* at 492.

98. *See id.* at 492-93. *Harvey Aluminum* relied upon Rule 31 of the AAA rules and did not refer to any constitutional provision.

99. 500 F.2d 921 (2d Cir. 1974).

100. *See generally* PAUL N. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 116-18 (1966) (arguing that courts should not be used to enforce highly flawed labor arbitration system).

101. *Bell Aerospace*, 500 F.2d at 923. *See also* Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971) (*Commonwealth Coatings* required arbitrator disclosure of financial dealings "as a matter of fundamental fairness"); Yates v. Yellow Freight Sys., 501 F. Supp. 101, 104 (S.D. Ohio 1980) ("Courts will set aside awards in which there is a procedural impropriety which denies a party fundamental fairness.").

mit relevant evidence in Section 10(c) of the FAA.[102]

Hoteles Condado Beach v. Union de Tronquistas Local 901[103] represents a similar refusal by a court to use due process violations to overturn an arbitral award. In *Hoteles Condado* the Court of Appeals for the First Circuit affirmed a trial court order which set aside an award because the arbitrator refused to consider the employer's evidence of employee wrongdoing. The evidence consisted of a transcript of criminal proceedings involving the same acts of alleged indecent exposure that had led to the employee's discharge. Judge Wisdom's sole ground for affirming the vacating of the award was the FAA's language authorizing vacating arbitral awards for "refusal to hear evidence."[104] The case law in general, and *Hoteles Condado Beach* in particular, do not support the general proposition that arbitrators must apply broad due process principles. *Hoteles Condado Beach* signifies only that courts will use the FAA to overturn awards where "the exclusion of relevant evidence 'so affects the rights of a party that it may be said he was deprived of a fair hearing.' "[105]

Although arbitrators are not required to apply due process principles to commercial arbitration hearings, one cannot conclude that civil liberties are completely foreign to such proceedings. The refusal of some courts to incorporate constitutional rights into the arbitral setting is predicated on the notion that courts should apply constitutional principles only when necessary. Cases requiring arbitrators to conduct a "fair hearing,"[106] although premised on the FAA, have due process overtones that certainly impact on both the arbitrator and reviewing court. The clearest ground for setting aside an arbitration award is blatant arbitrator refusal to admit or consider evidence. One would expect how-to arbitrator manuals to caution against any such tendency to exclude evidence,[107] because a perception of fairness more likely will accompany the arbitral hearing. This perception of fairness, however, is not a substitute for firm application of a positivist set of constitutional rights. Little existing authority supports the view that constitutional rights may be asserted either in the arbitration hearing or as a ground for setting aside an arbitral award.

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102. *Bell Aerospace*, 500 F.2d at 923.

103. 763 F.2d 34 (1st Cir. 1985).

104. *Id.* at 38.

105. *Id.* at 40 (quoting Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968)).

106. *See Bell Aerospace*, 500 F.2d at 923; *Newark Stereotypers'*, 397 F.2d at 600; Harvey Aluminum v. United Steelworkers, 263 F. Supp. 488, 493 (C.D. Cal. 1967).

107. *See* MURRAY et al., *supra* note 16, at 557 (warning that the "arbitrator is in fact far more likely to get into trouble by excluding evidence than by admitting it").

III. Defending the Status Quo: Justifying Denials of Constitutional Rights in Arbitration

The vast majority of commercial arbitrators probably have not considered whether constitutional doctrines are applicable to arbitration hearings. This section offers two reasons arbitrators fail to examine this issue. First, the parties to a commercial arbitration sign a contract to arbitrate and, therefore, expressly agree to a procedure with minimal legal rights. According to this view, the parties have voluntarily waived any constitutional rights. Second, the presence of constitutional doctrine demands a governmental nexus or state action. A contract providing for commercial arbitration seems to lack the requisite state action.

A. Waiver of Constitutional Rights by Contract to Arbitrate

The orthodox view holds that parties who consent by contract to arbitration expressly waive their constitutional rights. The parties opt out of the judicial system with its rigid substantive rules. This view relieves the arbitrator of any obligation to consider constitutional assertions in the arbitration proceeding.

In order to assess properly the issue of waiver, it is helpful to examine the nature of written agreements to arbitrate and the process of executing an arbitration clause. The primary provider of arbitration services, the AAA, recommends the following as an arbitration clause in commercial agreements:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the AAA, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.[108]

Many contracts use this boilerplate language. The arbitration clause is broad because it calls not only for arbitration of disputes involving the contract terms, but also of any disputes occurring as a result of the contract.[109]

Of course, parties are free to fashion their own arbitration clauses and often do so with varying degrees of specificity.[110] An arbitration

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108. *Id.* at 477.

109. *Id.* (warning that "departure from hallowed formulas may leave the door open to idiosyncratic judicial rulings").

110. Whitmore Gray, *Dispute Resolution Clauses: Some Thoughts on Ends and Means*, Alternatives to the High Cost of Litigation, Aug. 1984, at 12 (emphasizing ability of the contracting parties to shape the nature of the arbitration process by adding specifics to the arbitration clause).

clause may only consist of a one sentence agreement to "arbitrate any dispute arising out of this contract." Such simple language can lead to disputes about whether the parties intended to arbitrate disputes involving post-contract behavior of the parties or only other disputes concerning terms of their contract.[111]

At the other extreme, contracting parties may give considerable attention to the arbitration clause. It is common for a particular arbitration clause to elaborate on arbitral procedures and to specify the scope of future arbitrations.[112] While such clauses may risk future interpretative problems,[113] specific, customized contracts to arbitrate permit the parties to chart their dispute resolution course. Parties who anticipate that future disputes will be factually complicated may opt to use specific discovery services or even to adopt the broad discovery rules of the Federal Rules of Civil Procedure. Parties also may opt for no discovery whatsoever. The identity of the arbitrator may be agreed to by the parties. The important characteristic of an arbitration clause is that, like other elements of the contract, the parties control their own destiny. They generally are free to construct any arbitration edifice desired.

Conspicuously absent from this brief description of arbitration clauses is any reference to constitutional rights. Contracts to arbitrate are normally silent regarding constitutional rights. The implications of this silence are significant. In the classic "commercial arbitrations" between merchants of a particular trade, two contractual partners intelligently contract to arbitrate.[114] The use of arbitration by New York textile industry firms is illustrative. Often each firm is a repeat player with arbitration experience and knowledge. In this context, supporters of the "classic view" are correct that a contract to arbitrate just refers to

111. *See, e.g.*, Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1168 (8th Cir. 1984) (finding that part of a dispute between brokerage firm and former employee was not arbitrable as dispute "arising out of employment or the termination of employment"); Bowmer v. Bowmer, 50 N.Y.2d 288, 291, 406 N.E.2d 760, 761, 428 N.Y.S.2d 902, 904 (1980) (rejecting claim that support dispute is arbitrable after parties sign arbitration clause agreeing to arbitrate "any claim, dispute or misunderstanding arising out of or in connection with this Agreement, or any breach hereof, or any default in payment").

112. *See* Brunet, *supra* note 11, at 33 (arguing that the "ambiguity of the existing arbitration and mediation discovery rules" justifies the incorporation of specific discovery provisions or rules into arbitration clauses); Gray, *supra* note 110, at 12.

113. *See* MURRAY et al., *supra* note 16, at 477 (cautioning that "more detailed clauses are likely to invite litigation over arbitrability").

114. *See* Robert L. Bonn, *The Predictability of Nonlegalistic Adjudication*, 6 LAW & SOC'Y REV. 563, 565-76 (1972) (discussing arbitration among textile merchants experienced in arbitration); William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 210 (tracing history of arbitration in the "mercantile community"); Mentschikoff, *supra* note 10, at 848-54 (discussing arbitration between merchant members of a trade association).

a form of dispute resolution with an informal but somewhat settled procedure. Law in general is de-emphasized and, instead, industry custom is elevated. Signatories to the arbitration clause are well informed about the meaning and nature of the arbitration process. The parties to the arbitration clause understand that constitutional rights are not a part of the typical arbitration process. To these experienced players, arbitration means no legal rights, an expert decision maker, privacy, and speed.

Arbitration, however, has expanded far beyond the merchant context. Today's contract to arbitrate may contain no more than the boilerplate AAA arbitration clause and involve one contractual partner who has no prior arbitral experience or even no prior litigation experience. A large volume of arbitration clauses are signed by laypersons without the advice of counsel. The routine use of arbitration clauses in the securities industry[115] means that new stock brokerage customers sign contracts to arbitrate. The arbitration clauses are part of multi-clause, new-account form contracts. These customers are likely to have no prior arbitration experience. Consumer goods purchasers[116] and hospital patients[117] sign similar boilerplate arbitration clauses. In Professor Galanter's words, they are "novices" or rookies in the dispute resolution business.[118]

The implications of the word "arbitrate" in an arbitration clause are vastly different when one party to the contract knows little or nothing about arbitration. Courts should be reluctant to enforce automatically a superficially consensual arbitration clause without examining carefully the factual background and prior dispute resolution experience of the parties. The arbitration agreement may be at most the general selection of an out-of-court forum and include no precise reference to mutually understood procedures. In particular, the rookie signatory to an arbitration clause may be unaware that signing the clause triggers an informal proceeding in which potentially valuable legal rights are not available.

Arbitration clauses also have economic implications that are deceptively straightforward. Efficiency is furthered by agreements to exchange

115. *See* Barbara Franklin, *Rewriting the Rules—Securities Arbitration: Claims Up; Procedures Proposed*, N.Y. L.J., Jan. 28, 1988, at 5, 5 (detailing routine use of arbitration clause to resolve customer-broker disputes and increase in arbitration hearings); *It's Rough Out There*, FORBES MAGAZINE, Dec. 26, 1988, at 85 (stating that "most brokers ask customers to sign agreements sending disputes to arbitration").

116. The use of arbitration clauses in contracts to purchase new automobiles is increasingly common. *See* BETTER BUSINESS BUREAU, AUTOLINE: A NATIONAL PROGRAM OF MEDIATION/ARBITRATION FOR AUTOMOTIVE DISPUTES (1984).

117. Hospitals have inserted arbitration clauses into their admission forms. *See infra* notes 130-131 and accompanying text.

118. Marc Galanter, *Why the "Halves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

items because each party will receive a more useful item than it surrenders.[119] The improvements in individual welfare obtained by legally enforceable contracts are recognized by contract law.[120] Central to an efficient exchange is a full understanding by each contractual partner of the items traded. In the economist's terms, "perfect" or complete information regarding the contract is essential to an efficient exchange.[121]

Of course, the exchange transaction involves costs to each party. The contract will have to be negotiated, drafted, reviewed and, after execution, policed. The time and fees comprising these costs have an opportunity cost representing the return available on an identical alternative investment. This package of costs is designated "transactions cost."[122] The transaction cost implications of arbitration clauses are noteworthy. Because arbitration clauses are often part of "standard form" agreements, they can be characterized as a tool designed to lower transaction costs.[123] The boilerplate AAA arbitration clause can be considered an efficiency device designed to avoid the potentially high costs of a fully negotiated, individualized arbitration clause. The fear of lengthy negotiations about discovery issues, choice of arbitrators, or the use of substantive law leads some firms to use boilerplate arbitration clauses.

This efficiency argument assumes perfect information, minimal negotiating costs, and minimal transaction costs. While these are plausible assumptions for the purpose of analysis, they do not always exist in a real world setting. Consider a new brokerage firm customer who desires to purchase securities. She is handed a standard form contract containing a boilerplate arbitration clause. The brokerage firm is a repeat player familiar with the costs and benefits of arbitration compared with conventional litigation. This firm understands that arbitration results are likely to be more predictable than the jury awards available in court. In addi-

119. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 79 (3d ed. 1986) (arguing that voluntary exchanges transfer resources "from less to more valuable uses").

120. *Id.* at 83 (stating that contract law is "a handmaiden of exchange").

121. *See* S.A. Ozga, *Imperfect Markets Through Lack of Knowledge*, 74 Q.J. ECON. 29 (1960).

122. *See* JOINT ECON. COMM., 91ST CONG., 1ST SESS., *Contracting Cost and Public Policy*, THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURE: THE PPB SYSTEM 167, 169 (Comm. Print 1969) (Harold Demsetz) (transaction costs include "the costs of search and negotiation in the market place and the cost of insuring that voluntary agreements are honored"); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (transaction costs must include every aspect of a contract); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390-91 (1937) ("costs of negotiating and concluding a separate contract for each exchange transaction . . . must also be taken into account"); George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

123. *See* Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 462 (1974).

tion, the firm wants a printed form arbitration clause to avoid or discourage expensive transactions costs and to lower the possibility of future disputes.[124] By contrast, the new customer is a dispute resolution rookie unfamiliar with the nature of arbitration. We can assume that many customers will simply sign the contract without discussing the meaning of arbitration. Other customers may ask a question or two regarding the arbitration clause. A few knowledgeable individuals may feel strongly about giving up potential court redress and seek a new account with a competitor firm not mandating arbitration. Perfect information will not exist for the rookie signatory. Indeed, we can speculate confidently that only a few customers realize that signing the arbitration clause specifically waives constitutional rights during arbitration. In short, efficiency is frustrated by holding a rookie signatory to the terms of the standard, new account agreement with the brokerage firm.

Nonetheless, a typical court will enforce this hypothetical arbitration clause.[125] Few courts ever strike down arbitration clauses for lack of assent or adhesive grounds.[126] The individual consumer's theoretical ability to seek preferable alternative forms of dispute resolution with competing firms or to bargain with the brokerage firm about the arbitration option prevents traditional courts from ready employment of "adhesion contract" doctrine.

Judicial hostility to avoiding arbitration because of an adhesion argument is consistent with the economist's classic defense to the form contract. Faced with potentially unfavorable terms, the consumer should "shop around" with competitor firms for preferable alternatives. Such reasoning might be an acceptable course of action if the costs of this "shopping" were minimal, if competitive alternative terms without an arbitration clause or with a dickered, improved arbitration clause were

124. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943) (growing use of standardized mass contract is "inevitable" efficiency device used by informed bargainers to avoid future risks).

125. *See, e.g.*, Avila Group, Inc. v. Norma J., 426 F. Supp. 537, 540 (S.D.N.Y. 1977) (requiring arbitration and specifically rejecting contention that a failure to read or assent particularly to arbitration clauses in a contract can avoid operation of the arbitration clause); Southern Tile v. Commercial Constr. Co., 548 So.2d 47, 48-49 (La. Ct. App. 1989) (upholding validity of a signed acknowledgment of goods document containing an arbitration clause because of plaintiff's duty to read); Federico v. Frick, 3 Cal. App. 3d 872, 876, 84 Cal. Rptr. 74, 76 (1970) (failing to understand non-neutral nature of arbitration will not avoid result of arbitration).

126. *See generally* Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 991-93 (1972) (suggesting that while courts will analyze arbitration clauses for assent using "adhesion" doctrine, results of decisions indicate that the arbitration clauses will be upheld).

available, and if a rookie consumer understood the meaning of the arbitration clause. Of course, these assumptions do not comport with reality.

Competition among brokerage firms, which should theoretically protect the interests of even the rookie arbitration clause signatory, does not in fact do so. Professor Goldberg reasons that other rival firms are unlikely to react competitively to a particular standard form contract because "few, if any, customers will perceive the existence of variations in terms."[127] Moreover, the brokerage firm can easily "renegotiate the terms for the few aggressive customers while keeping the high information barrier for other customers virtually intact."[128]

To be sure, some courts are unwilling to enforce signed arbitration clauses executed under particularly egregious circumstances. An arbitration clause may not be enforced if it is offered by a stronger party to a weaker, rookie signatory on a "take it or leave it" basis.[129] For example, in *Hope v. Superior Court of Santa Clara County*,[130] the court found adhesive and unconscionable a standard form contract to arbitrate an employment dispute. Similarly, in *Wheeler v. St. Joseph Hospital*,[131] the court refused to enforce an "arbitration option" clause in a printed form contract presented to hospital admittees. The contract was signed without having been read by an incoming patient suffering from a "coronary insufficiency." No procedures existed to alert the patient to the arbitration clause.[132]

Nonetheless, few courts are willing to reject arbitration clauses on adhesion contract grounds. Traditionally, courts have been reluctant to ignore the relevance of a contract signature because it represents voluntary assent to the terms of a contract. Judge Learned Hand reasoned that "[a] man must indeed read what he signs, and he is charged, if he does not."[133] Usually a court will be reluctant to reject an arbitration clause on adhesive grounds because there is "no unfairness in expecting

127. Goldberg, *supra* note 123, at 485.

128. *Id.* (discussing customizing a few standard form contracts as a form of "contract term discriminat[ion]").

129. *See generally* Kessler, *supra* note 124, at 631-38 (discussing standardized contracts and their effect on the "weaker" party); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1173-84 (1983) (suggesting that form terms in an adhesion contract should be presumptively unenforceable).

130. 122 Cal. App. 3d 147, 154, 175 Cal. Rptr. 851, 856 (1981), *cert. denied*, 456 U.S. 910 (1982).

131. 63 Cal. App. 3d 345, 357, 133 Cal. Rptr. 775, 783 (1976).

132. *Id.* at 349-51, 133 Cal. Rptr. at 778-80.

133. Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir.), *cert. denied*, 331 U.S. 849 (1947); *see also* Todd Shipyards Corp. v. Cunard Line, Ltd., 942 F.2d 1056, 1064 (9th Cir. 1991) (enforcing arbitration award and rejecting argument that arbitration procedures violated due process because parties entered into agreement to arbitrate "voluntarily").

parties to read contracts before they sign them."[134]

This judicial endorsement of arbitration clauses usually precludes assertion that signatories to an arbitration clause did not validly waive their constitutional rights. The present law governing waiver of constitutional rights in civil cases is particularly tepid in its protection of civil liberties. Unlike the rigorous Warren Court criminal standard requiring waiver to be "a voluntary and intelligent choice among the alternative courses of action,"[135] the present threshold for waiving civil constitutional rights seems to be that the waiving party only have satisfied contract law principles.[136] In essence, a waiver can validly relinquish civil constitutional rights if no principle of contract is violated.

Carnival Cruise Lines v. Shute[137] illustrates the Supreme Court's reluctance to scrutinize carefully consumer contracts for possibly adhesive agreements to arbitrate. *Shute* required judicial enforcement of a choice-of-forum clause contained on a cruise ticket. Despite the fact that the purchasers of the cruise ticket were clearly at a disadvantage with respect to bargaining power, the *Shute* Court failed to conduct a proper adhesion contract analysis and rigidly held the parties to the boilerplate ticket language. *Shute* has particular significance for arbitration because of the relationship between choice-of-forum and arbitration clauses: "[A]n arbitration clause is a form of forum selection clause."[138]

Shute seems to make it easy to waive significant civil liberties in the process of contracting. Provided that a business using contracts containing a boilerplate arbitration clause has not acted unconscionably or adhesively and meets the assent requirement, the arbitration clause is likely to pass muster under the present standard for waiving civil constitutional rights.

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134. Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286-87 (9th Cir. 1988) (enforcing arbitration of dispute between investor and stock brokerage firm despite attack that brokers "fraudulently induced" signing of clause by failing to disclose the meaning and effect of an arbitration clause).

135. North Carolina v. Alford, 400 U.S. 25, 31 (1970); *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (explaining that an effective waiver requires "intentional relinquishment or abandonment of a known right").

136. *See generally* Rubin, *supra* note 8, at 516-18 (reading D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) and Fuentes v. Shevin, 407 U.S. 67 (1972), as requiring only that a civil waiver meet contractual standards).

137. 111 S. Ct. 1522, 1527-28 (1991).

138. John M. Kirby, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in* Carnival Cruise Line v. Shute, 70 N.C. L. REV. 888, 897 n.87 (1992) (" 'An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.' ") (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)).

B. The Requisite State Action Nexus in Commercial Arbitration

Any contention that constitutional rights exist in arbitration runs the risk of summary rejection because of the absence of state action. According to the majority view, a contract to arbitrate is a consensual transaction agreeing to no governmental involvement in resolving a dispute. Viewed in this light, a contract to arbitrate is essentially a private transaction having no connection to the state. Accordingly, arbitrators need not consider constitutional rights because state action is lacking.

This argument, while syllogistically attractive, must be analyzed in light of the comprehensive arbitral enforcement machinery of the FAA and similar state legislation. The FAA makes arbitration clauses efficacious by making valid arbitration clauses enforceable in federal court.[139] Three procedural subsections are important to an understanding of the FAA. The legislation empowers federal courts to force or compel arbitration[140] and to stay pending litigation until arbitration is concluded.[141] It also provides that a court can enforce an award by "confirming" it.[142] These three complementary provisions create a system whereby arbitration clauses are presumed valid and are judicially enforceable. Under the FAA, courts facilitate arbitration by forcing parties to honor arbitration clauses and by making awards equivalent to court judgments. Although the FAA is not a jurisdictional statute,[143] state courts play a similar enforcement role because most states have arbitration legislation calling for state courts to compel arbitration, to confirm awards, and to stay litigation until arbitration is complete.[144]

To say that the FAA has received hospitable treatment by the courts during the 1980s would be an understatement. During this period the Supreme Court sent repeated signals to lower courts emphasizing the

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139. 9 U.S.C. § 2 (1982) (providing that a written arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *see* Leslie M. Gillin, Comment, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?*, 35 VILL. L. REV. 389, 402 (1990) ("The primary objective of the FAA is to enforce arbitration provisions in commercial contracts.").

140. 9 U.S.C. § 4 (1982).

141. *Id.* § 3.

142. *Id.* § 9.

143. *See* Southland Corp. v. Keating, 465 U.S. 1, 6-9 (1984) (holding that FAA does not create "independent subject matter jurisdiction"); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 125 n.32 (1983); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1341 (1985) (explaining that actions to force arbitration, to confirm awards, or to stay pending litigation must have an independent basis of subject matter jurisdiction).

144. *See, e.g.*, UNIFORM ARBITRATION ACT §§ 1 & 11, 7 U.L.A. 5, 133 (1955) (providing state judicial enforcement of arbitration clauses and judicial confirmation of prior arbitral awards). The UAA has been adopted in thirty-four states. *See* 7 U.L.A. 1 (Supp. 1989).

FAA's expansive coverage. Despite a limited legislative history which seemingly limits the FAA's purpose to providing federal court enforcement of arbitration awards and agreements,[145] the Court has viewed the FAA as preempting any provisions of state arbitration legislation that discourage, frustrate, or prevent arbitration. In *Southland Corp. v. Keating*,[146] the Court held that the FAA preempted a California Franchise Investment Act provision voiding agreements to arbitrate in franchisee-franchisor transactions.[147] Professor Hirshman describes the broad *Southland* preemption decision as "displac[ing] all state law limiting arbitration."[148] The FAA's preemptive effect was reaffirmed by the Court in *Perry v. Thomas*.[149] The *Perry* Court found unconstitutional a provision of California's labor law that permitted suits to collect unpaid wages "without regard to any private agreement to arbitrate."[150]

The favorable judicial construction of the FAA extends beyond the Act's important preemptive effect. During the 1980s the Supreme Court reconstrued the FAA to require arbitration of statutory claims formerly thought not to be subject to arbitration. The Court interpreted the FAA to mandate arbitration of antitrust claims between international trading partners,[151] claims under Section 10(b) of the Securities Exchange Act of 1934,[152] claims brought under the Racketeer Influenced and Corrupt Organizations Act[153] and claims under the Securities Act of 1933.[154] In *Shearson/American Enterprises, Inc. v. McMahon*, the Court noted a

145. *See* Julius Henry Cohen & Kenneth Drayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 277-78 (1926) ("The primary purpose of the statute is to make enforceable in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."); Speidel, *supra* note 5, at 168-69.

146. 465 U.S. 1 (1984).

147. *Id.* at 10-16; *see* CAL. CORP. CODE § 31512 (West 1987). This provision, which voids "any condition . . . bind[ing] any person acquiring any franchise to waive compliance with any provision of this law," was interpreted by the California Supreme Court to bar arbitration of claims brought under the legislation. Keating v. Superior Court of Alameda County, 31 Cal. 3d 584, 598-602, 645 P.2d 1192, 1202-04, 183 Cal. Rptr. 360, 367-70 (1982), *appeal dismissed in part, rev'd in part sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

148. Hirshman, *supra* note 143, at 1350. Professor Hirshman theorizes that the impact of *Southland* is so great that state law defenses to formation of the arbitration clause will be preempted. *Id.*

149. 482 U.S. 483, 489-91 (1987).

150. CAL. LAB. CODE § 229 (West 1987).

151. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-40 (1985).

152. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227-38 (1987).

153. *Id.* at 238-42.

154. Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 479-85 (1989).

" 'federal policy favoring arbitration' "[155] and found an earlier "mistrust of arbitration" misplaced.[156] Similarly, the increasingly pro-arbitration attitude of the Supreme Court was evident in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, in which the Court observed that a prior " 'old judicial hostility to arbitration' " had undergone a process of erosion,[157] and described the FAA as mandating rigorous enforcement of arbitration.[158]

The 1980s also saw a contraction of the relatively modest form of judicial review granted by Section 10 of the FAA. The anti-review attitude of judges was expressed by Judge Posner who, in affirming a trial court's refusal to set aside an arbitral award, observed that "this court has been plagued by groundless lawsuits seeking to overturn arbitration awards. . . . [W]e have said repeatedly that we would punish such tactics, and we mean it."[159]

This pro-arbitration attitude of the courts has created a potent enforcement machinery for private arbitral awards. Arbitration enforcement extends well beyond the level of court enforcement of restrictive racial covenants found objectionable in the landmark *Shelley v. Kraemer*[160] decision. In *Shelley*, the Supreme Court based its holding of illegal discrimination on the ease of enforcing restrictive covenants in court.[161] The situation for arbitration agreements is analogous because arbitration clauses would be ineffective without court orders compelling arbitration, confirming awards, or staying court suits in order to force arbitration. As with restrictive covenants, the availability of direct and speedy court action enforcing arbitration agreements acts as a tool for any arbitration clause signatory against anyone who dishonors the arbitration agreement. Without the FAA and its pro-enforcement judicial interpretation, agreements to arbitrate would be meaningless.

Characterizing a *Shelley*-type court enforcement as state action could be criticized because the case has been interpreted as limited to its facts. Modern commentators have not been kind to the *Shelley* state-action analysis. Professor Kurland termed *Shelley* "constitutional law's

155. *McMahon*, 482 U.S. at 226 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

156. *Id.* at 233.

157. *Rodriguez De Quijas*, 490 U.S. at 480 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

158. *Id.* at 480-481 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

159. Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1194-95 (7th Cir. 1987) (ending judicial review of labor arbitration if court finds that arbitrator interpreted the collective bargaining agreement).

160. 334 U.S. 1 (1948).

161. *Id.* at 18-20.

Finnegan's Wake,"[162] and Professor Graglia railed that the *Shelley* reasoning was "disconcerting," conclusionary and mysterious.[163] In a thoughtful essay on *Shelley*, Professor Allen stated that "[t]he principal analytic weakness of the *Shelley* opinion may be its insistence on the strict dichotomy between the *making* of restrictive agreements, which is seen as wholly private, and the judicial *enforcement* of the covenants, which is seen as public action."[164]

The most positive characterization of the state-action decisions is Laurence Tribe's opinion that the Court "has not succeeded in developing a body of state action 'doctrine'."[165] In defending the *Shelley* result, Professor Allen stresses that, without governmental participation and aid in the form of broad court enforcement, widespread restrictive covenant use never would have occurred.[166] According to this view, the government did more than merely lend court enforcement to restrictive covenants.

Professor Allen's interpretation of *Shelley* supports a state action nexus in arbitration. More than mere court enforcement of essentially private contracts is involved in arbitration by virtue of the FAA and Uniform Arbitration Act (UAA). The ability to obtain quick and routine judicial stays of litigation in derogation of specific arbitration clauses deters any arbitration signatory from instituting a court suit. The specific availability of confirmation suits encourages parties to comply with the results of arbitration hearings. The broad construction of the FAA represents a strong signal to the free market that facilitates and encourages arbitration. The courts' need for arbitration as a docket clearing device has created a mutually beneficial relationship between courts and the private arbitration establishment. As it now stands, the modern interpretation of the FAA has created a federal delegation to private parties and encourages them to resolve disputes in private at their expense in return for easy and public court enforcement. In sum, a tenable argument for

162. Philip B. Kurland, *The Supreme Court 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 148 (1964).

163. Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 788 (1989).

164. Francis A. Allen, *Remembering* Shelley v. Kraemer*: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709, 725 (1989).

165. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1690 (2d ed. 1988). In contrast, other scholars suggest the lack of a clear state action doctrine "has continued to haunt constitutional adjudication and legal literature." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 12.5, at 448 (3d ed. 1986).

166. Allen, *supra* note 164, at 726.

Shelley-style state action exists.[167]

Nonetheless, the recent contraction of the state-action doctrine means an uphill fight for any argument that asserts that state action requires application of constitutional rights during arbitration. The vague concept of state action has been narrowed by the Supreme Court.[168] The *Flagg Brothers, Inc. v. Brooks*[169] decision stands as a particularly troublesome obstacle. In *Flagg Brothers,* the Court rejected arguments that a post-eviction sale of furniture permitted under the New York Uniform Commercial Code (UCC) constituted state action.[170] The Court specifically rejected the argument that the state had delegated a "public function" of dispute resolution to the storage company that sold the claimant's furniture.[171] The Supreme Court found that an "exclusive" role for the state did not exist because the UCC authorized alternative modes of dispute resolution.[172]

While *Flagg Brothers* represents a clear rejection of a broad state-action doctrine, it can be distinguished from enforcement of arbitral awards under the FAA. The terms of the FAA make private arbitration awards enforceable in court. Without clear support from the state, private arbitration would not be successful. Although this distinction seems valid, the existing disfavor for broadened use of state action requires examination of other ways to incorporate increased standards of procedural fairness in arbitration hearings.

IV. NON-CONSTITUTIONAL LEGAL SOURCES FOR INCREASED SENSITIVITY TO CONSTITUTIONAL RIGHTS IN ARBITRATION

In contrast to Section II's focus on the major roadblocks to court application of constitutional rights to arbitration hearings, Section III examines more promising non-constitutional sources that may permit

167. *See also* Leo P. Dreyer, *Arbitration Agreements After* Volt *and* Browning Ferris, 38 KAN. L. REV. 667, 721-22 (1990) (discussing constitutional defenses and "the existence of state action in the imposition of punitive damages in private, consensual arbitration proceeding.")

168. *See* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988) (holding that NCAA is not a state actor in enforcing and making rules); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546-47 (1987) (holding that U.S. Olympic Committee is not a state actor despite apparent federal connections as a sponsor); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163-64 (1978); *see also* Erwin Chemerinsky, *Rethinking State Action,* 80 NW. U. L. REV. 503, 505 & n.10 (1985) (describing the Burger Court's lack of willingness to subject private conduct to the Constitution).

169. 436 U.S. 149 (1978).

170. *Id.* at 164-66.

171. *Id.* at 157-58.

172. *Id.* at 159-60.

some constitutional protection in arbitration. This section first looks at the intent and text of the FAA as a potential source for increased attention to constitutional rights. It then examines the inherent power held by arbitrators as a possible means for enhancing constitutional protections.

A. The Text of the Federal Arbitration Act

The FAA is a simple and direct source of non-constitutionally based procedural rights during arbitration. While this 1925 legislation does not directly regulate arbitral procedure, its section on judicial review provides some degree of procedural protection and merits closer examination.

Section 10(a)(1) of the FAA creates judicial power to vacate an award "procured by corruption, fraud, or undue means."[173] Most interpretations of this subsection have focused on the "corruption" or "fraud" language and pay scant attention to "undue means."[174] One interpretation of "undue means" would read this phrase as a mere repetitive synonym for the preceding words "fraud" and "corruption." This interpretation would not provide any additional measure of constitutional protection because it gives no independent significance to the words "undue means."

In contrast, the phrase "undue means" could be read more expansively but still consistently with its plain meaning. These words focus clearly on procedure. They invite a court to examine arbitral procedure broadly. In particular, the word "undue" could be expansive in scope. The modern due process revolution has created a flexible "due" process concept which depends on the factual context of the due process assertion.[175] These cases read the word "due" in a pragmatic fashion: due means appropriate process. The "due" or appropriate process a citizen receives depends on the facts presented.

A plain meaning interpretation of section 10(a)(1)'s "undue means" language would place in judicial hands the power to examine arbitral awards for particularly egregious procedural irregularity. This construc-

173. 9 U.S.C. § 10(a)(1) (Supp. 1992).

174. *See, e.g.*, Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) ("perjury constitutes fraud" within meaning of § 10(a)); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 600 (3d Cir.) (proving perjury constituting fraud will not cause award to be vacated unless fraud relates to actual core of dispute), *cert. denied*, 393 U.S. 954 (1968); Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 35 (2d Cir. 1951) (vacating arbitral awards reluctantly despite proof of perjury that constitutes fraud).

175. *See generally* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 5.31, at 288-92 (3rd ed. 1991) (using term "flexible due process"); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (devising procedures that are fair, feasible and followable when affording due process under a myriad of circumstances).

tion would require courts to examine private arbitrations for procedural unfairness as a matter of interpreting the FAA rather than the Constitution. This argument, however, while appealing as a matter of statutory construction, loses force when placed in the modern, pragmatic context of arbitration. Because arbitral awards usually lack any findings or explanation,[176] courts are prevented from review of the facts needed to provide an appropriate process definition of "undue means." Moreover, the contemporary judicial attitude, which resists serious review of arbitral awards, creates an uphill battle for this attractive plain-meaning construction of "undue means." Modern cases interpret the FAA as encouraging arbitration and discouraging judicial review of arbitral awards.[177] A particularly strong reason for interpreting "undue means" in this manner must arise before any increased judicial review can be expected.

A second FAA source of possible increased procedural protection is section 10(a)(3), which allows an award to be vacated under the following terms:

> Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; *or of any other misbehavior by which the rights of any party have been prejudiced.*[178]

The italicized language potentially grants a court wide power to set aside awards on discretionary grounds such as violation of an arbitral party's "rights." The words "other misbehavior" are vague. They become especially powerful when considered in context; they follow instances of failure to postpone the hearing or to admit evidence. Certainly "other misbehavior" must be procedural in nature and more than the mere admission of evidence.

The critical word in section 10(a)(3) is, however, "*rights.*" At first blush this word seems misplaced in arbitration because the informal nature of arbitration usually means that the parties have no guaranteed rights.[179] In a situation where no rules of evidence or substantive rules apply, how can Congress have chosen denials of "rights" as a ground for

176. *See supra* text accompanying note 11.

177. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1650 (1991) (subjecting statutory claim brought under Age Discrimination in Employment Act to compulsory arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (emphasizing the "liberal federal policy favoring arbitration agreements" when deciding issue of whether a statutory based claim is arbitrable); Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) (commenting that"judicial review of an arbitration award is extraordinarily narrow").

178. 9 U.S.C. § 10(a)(3) (Supp. 1992) (emphasis added).

179. *See supra* text accompanying notes 12-14.

setting aside arbitral awards? The answer may be that Congress understood the potential danger of a purely informal procedure and inserted the word "rights" as a check on the powers of arbitrators. Moreover, the plain meaning of the word "rights" logically could refer to constitutional rights. Arguably, these rights are the most significant legal protection that Congress seeks to safeguard by using the term "rights."

Strong historical evidence supports a judicial review function which would examine an arbitration for serious procedural errors. The initial drafter of the FAA was Julius Cohen.[180] Cohen's interpretation of the new Act was published in February, 1926, one month after the Act was in force.[181] While Cohen cautioned that under the new legislation courts should not lightly vacate arbitral awards,[182] his description of the legislation conveys a remarkably active role for the courts in preserving procedural protections for the arbitral parties. Cohen actually referred to the arbitral participants as possessing "rights": "[I]f arbitrators' awards are subject to mistakes and other human frailties, as necessarily they must be, it is obvious that review solely by a judge sitting at a motion term will not suffice to *safeguard the party whose rights will have been substantially violated by the arbitrators.*"[183] This reference to "rights" explains the power Congress gave courts to vacate arbitral awards for "prejudice" of the "rights of any party" under Section 10(a)(3) of the FAA. Cohen understood that there must be some room for serious judicial review under the legislation because "to deny any *right* of appeal at all would be to take away a most important privilege and safeguard without a compensating gain."[184]

The role Cohen envisioned for courts must be placed in the context of arbitration as it existed in 1925. Cohen saw the legislation as "directed primarily toward settlement of commercial disputes."[185] He envisioned arbitration as a "remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact" and as hav-

180. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Committees on the Judiciary,* 68th Cong., 1st Sess. 10 (1924) (testimony of W.H.H. Piatt, Chairman, American Bar Association Committee on Commerce, Trade and Commercial Law, indicating that Cohen "has had charge of the actual drafting of the work"); *id.* at 15 (testimony of Julius Cohen, indicating that he wrote first draft of legislation).

181. Cohen & Drayton, *supra* note 145, at 265.

182. *See, e.g., id.* at 268 (describing review powers of court in such a way as to reveal a clear goal of arbitral finality); *id.* at 273 (discussing need to limit appeal from awards).

183. *Id.* at 274 (emphasis added).

184. *Id.* (emphasis added).

185. *Id.* at 265.

ing a place "in the determination of the simpler questions of law."[186] Cohen's article describing the Act reveals an intent to devise a remedy entirely for commercial disputes. This narrow scope of the FAA also is evidenced by the FAA's legislative history, which makes reference to disputes between "merchants."[187]

Cohen's vision of the FAA is a far cry from its contemporary application to torts and disputes between businesses and consumers. Significantly, Cohen viewed the new legislation as not setting forth a "proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes," subjects he felt were "better left to the determination of skilled judges."[188] Cohen's explanation supports leaving questions of constitutional rights to the courts for review following an arbitration and is compatible with an expansive role for the courts in safeguarding rights.

B. The Inherent Powers of Arbitrators: Toward a Concept of Commercial Due Process in Arbitration

Arbitrators have the power to safeguard fair procedure in an arbitration hearing. They possess broad control over the nature of the arbitral hearing and certainly can apply procedural norms that safeguard rights. Because of the incredible scope of powers possessed by the arbitrator it is not necessary to pinpoint a precise legal source for applying procedural protections. If the arbitrator is willing to apply rights of some kind, her inherent powers provide a satisfactory basis of authority.

Strong policies support arbitrators' considering and applying procedural rights without any prodding by the courts. First and foremost, the application of fundamentally fair procedure is probably a goal of the parties who have chosen to arbitrate. It would be a strange set of disputants who would choose *not* to apply fair procedures.

Another important policy reason justifying increased arbitrator sensitivity toward procedural rights is the need to preserve the integrity of the arbitration process itself. At present, arbitration operates in a culture where, as a matter of doctrine, no definite legal norms safeguard constitutional rights. Arbitrations can be, and sometimes are, arbitrary. Ar-

186. *Id.* at 281.

187. *See Sales and Contracts to Sell in Interstate and Foreign Commerce and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923) (testimony of Mr. W.H.H. Piatt, indicating that "[the legislation] is purely an act to give *the merchants* the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it") (emphasis added).

188. Cohen & Drayton, *supra* note 145, at 281.

bitrators are supposed to be fair. This attribute is designed to appeal to the arbitral parties. Enhanced procedural fairness is simply good for arbitration.

The long tradition of arbitrator control over evidentiary matters would support any decision by an arbitrator to permit the consideration of constitutional agreement. Arbitrators possess the "discretionary power to admit and hear any evidence that the parties may wish to present."[189] The high level of discretion given arbitrators regarding the admission of evidence[190] is sensible because of the informality of arbitration.

Accordingly, strong policies buttress an arbitrator's application of procedural rights without any definite need to do so under either the FAA or the Constitution. Enhanced application of procedural rights should take place as a matter of arbitrator choice.

It is plausible that "commercial due process" will develop. This concept would be commercial arbitration's equivalent of labor arbitration's doctrine of "industrial due process." While it is true that an occasional court decision vacating an arbitral award due to procedural unfairness would certainly influence arbitrators, the evolution of commercial due process may occur as a matter of arbitrator initiative and not because of external forces such as the courts or legislation. Two parties with the common goal of solving a commercial problem probably desire an element of fair procedure in their hearing. Particularly in those situations where parties have an ongoing business relationship, such as supplier-customer or franchisor-franchisee, there is a need to make the arbitration result seem fair and just in order to preserve the business association. "Industrial due process" evolved in labor arbitration because of its overall importance to ongoing labor relations and the need to preserve harmony between labor and management. Similarly, application of rough due process during a commercial arbitration will aid the chances of the disputants considering one another as business associates. Refusal to apply fairness principles in a commercial arbitration could prevent any chance of a continuing relationship between the disputants.

It is unlikely that an arbitrator-initiated due process will evolve from the increased use of non-commercial arbitration because the dispu-

189. WILNER, *supra* note 1, § 24.02, at 364.

190. *See, e.g.*, Companis Panemena Maritima San Gerassimo, S.A. v. J.E. Hurley Lumber Co., 244 F.2d 286, 289 (2d Cir. 1957) (restricting judicial review of arbitrator's evidentiary rulings because review would cause "waste of time, the interruption of the arbitration proceeding, and encourage delaying tactics"); Catz Am. Co. v. Pearl Grange Fruit Exch., Inc., 292 F. Supp. 549, 553 (S.D.N.Y. 1968) ("Arbitrators must be given discretion to determine whether additional evidence is necessary or would simply prolong the proceedings.").

tants have no ongoing relationship. For example, arbitration of automobile accident disputes among strangers provides no incentive for preserving a continuing relationship among the disputants. Certainly application of fair procedures in such an arbitration hearing has independent value. Nonetheless, the dynamic of an ongoing relationship, so critical in the development of "industrial due process," will not spur the arbitrator of a tort accident dispute to create harmony among the disputants by assuring a fair procedure.

V. CONCLUSION

The relationship between constitutional rights and arbitration is uneasy. Classical arbitration theory rejects the application of definite constitutional rights in an arbitration hearing. Such rights would needlessly judicialize what is supposed to be an informal process. Moreover, the parties have opted out of the formal, judicial process by contracting to arbitrate and have voluntarily removed any "state action" nexus which would mandate the application of constitutional rights.

The classical view holds true when applied to parties who are experienced, repeat players in arbitration. Any argument of wholesale waiver of procedural rights, however, which applies to all arbitration fails to account for the explosive growth of arbitration. Arbitration has grown into areas such as consumer purchases or consumer loans where rookie signatories to arbitration clauses are unlikely to waive constitutional rights intentionally or intelligently. The doctrine of waiver of constitutional rights is, at this time, simply inadequate to explain the absence of constitutional rights in all arbitration settings.

How can increased procedural protections find their way into both the arbitration hearing and judicial review of arbitration awards? The lack of a traditional basis of state action makes it improbable that courts will mandate the application of constitutional rights. A much more attractive legal ground is an historically accurate reading of the FAA which requires courts to protect "rights" of arbitral parties. The FAA's text provides a basis for vacating awards obtained by "undue means" and to safeguard "the rights" of parties to an arbitration. To date, courts have largely ignored these phrases, perhaps because of a general feeling that courts should avoid review of arbitral awards.

The best way to enhance the application of procedural fairness in arbitration is to examine the arbitrator's reasons to incorporate procedural fairness into the arbitration process. In the field of labor arbitration, "industrial due process" has arisen because of the need to give labor arbitration integrity and to preserve on-going relationships between labor

and management. There is reason to believe that similar conditions could cause commercial arbitrators to be increasingly sensitive to fairness concerns when hearing a dispute between parties who may have a continuing relationship. "Commercial due process" may be the method by which constitutional rights begin to permeate commercial arbitration. Nonetheless, in the increasing amount of tort-based arbitration, arbitrators are unlikely to find pressure to increase fairness protections. In these cases, no ongoing or continued association binds the disputants and some alternative reason will be needed to guarantee the preservation of procedural rights in what is, after all, a type of judicial process, arbitration.