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Constitutionality of Commercial/Maritime Arbitration

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I
INTRODUCTION

Arbitration[1] is one form of alternative dispute resolution (ADR).[2] The aim of arbitration is to create a less formal forum than litigation with its own manifest substantive and procedural characteristics.[3] Maritime/Commercial arbitration is commended as an economical and speedy alternative to judicial recourse.[4] Arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[5] To that extent, arbitration enhances access to justice by permitting claimants

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[1]G. Zekos, *International Commercial and Marine Arbitration*, 2008 Routledge-Cavendish Publishers London www.routledge.com; G. Zekos, *The European Union's New Competition Approach and Arbitration*, 4 Hertfordshire L.J. 36 (2006); G. Zekos, *Arbitration's status under EU law*, The Journal of World Investment & Trade 13 (2012) 390–419, www.brill.nl/jwit; G. Zekos, *Antitrust/Competition Arbitration in EU versus U.S. Law*, (2008) Journal of International Arbitration 1–29; Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 290 (1921) (Cardozo, J.) ("Arbitration is a form of procedure whereby differences may be settled.")

[2]Hans Smit, *The Future Of International Commercial Arbitration: A Single Transnational Institution?* 25 Colum. J. Transnat'l L. 8, 9 (1983) ("Rather than permit international disputes to be settled in national courts, many parties often prefer to submit them to a tribunal that is not part of the governmental structure of a particular state. Nationalistic favoritism can be avoided by selecting a forum in a neutral state.")

[3]Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 Wm. & Mary L. Rev. 5, 12 (1996) (The intention was to create a less formal forum than litigation.); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 2 (2011).

[4]Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 553 N.E.2d 1284, 1285 (Mass. 1990) (citing Marino v. Tagaris, 480 N.E.2d 286, 288 (Mass. 1985)) (claiming "predictability, certainty, and effectiveness" intertwined with voluntary arbitration).

[5]Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

to bring claims they could not afford to bring in court.[6] Furthermore, arbitration is defined in Halsbury's Laws of England[7] as "the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction." Maritime/Commercial arbitration is in most jurisdictions practiced in accordance with law made by the state.[8]

The aim of this article is to investigate the constitutionality[9] of arbitration and the establishment of arbitration as a co-equal independent of the courts' dispute mechanism. First, a historical reference will allow us to see the utility of arbitration in the long history of justice in a society; second, reference to constitutional matters in relation to arbitration will show the validity of arbitration as a second co-equal pole in achieving a better justice system in any country.

II
HISTORICAL BACKGROUND

Dispute resolution has never been, and it is expected will never be, an exclusive function of the state.[10] It is worth noting that private arbitration predates the public court system.[11] Arbitration began as an extrajudicial mechanism for resolving disputes.[12] Has arbitration been transformed from an independent dispute mechanism system into an appendage of the courts?

Historical treatments of the pre-Revolutionary period suggest that what we now call "alternative dispute resolution" was the norm rather than the exception in the colonies of England.[13] Cohen observed, after the passage of

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[6]Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, Disp. Resol. J., Nov. 2003/Jan. 2004, at 44, 45; Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995) ("arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.")

[7]Halsbury's Laws of England, 3d Ed., Vol. 2 at 2, para 2.

[8]The Arbitration and Conciliation Act Cap 19; Laws of Nigeria 1990; Arbitration Act of England, 1996.

[9]G. Zekos, *Constitution, Arbitration and Courts*, 2013 Nova Publishers. New York, www.novapublishers.com.

[10]Sarah Rudolph Cole, *Arbitration and State Action*, 2005 Brigham Young Univ. Law Review 1 at 47.

[11]William Holdsworth, *A History of English Law*, 187 (A.L. Goodhart & H.G. Hanbury eds. 1964).

[12]Sarah Rudolph, *Blackstone's Vision of Alternative Dispute Resolution*, 22 Memphis St. U. L. Rev. 279 (1992); Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards*, 548-74 (1930); John T. Morse Jr., *The Law of Arbitration and Award*, 383-406 (1872).

[13]Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443, 468-81 (1984); Lawrence M. Friedman, *History of American Law*, 32-33, 94 (1973).

the New York Arbitration Act in 1920, that "this statute establishes legal machinery for protecting, safeguarding and supervising commercial arbitration. Instead of narrowing the jurisdiction of the Supreme Court it broadens it . . . Instead of being ousted of jurisdiction over arbitration, the courts are given jurisdiction over them, and . . . the party aggrieved has his ready recourse to the courts."[14] Julius Henry Cohen thought of arbitration that it should not function as second-class adjudication but as independent and co-equal to courts.[15]

In the U.S., Congress passed the Federal Arbitration Act ("FAA") in 1925 to make arbitration an equitable alternative to litigation that would reduce the number of cases in the court system.[16] Congress sought to encourage efficient and speedy dispute resolution - but the question to be answered is if the current courts' involvement indicates an independent system or a supplement to the courts. To that extent, Peter R. Sonderby[17] and Robert Coulson[18] consider that arbitration can deliver effective dispute resolution services, while avoiding the cost, delay, hostility and public notice of litigation. Arbitration achieved its superiority in the commercial field[19] because arbitration is praised as an economical and expeditious

[14]Cohen, Julius H., *The Law of Commercial Arbitration and the New York Statute*, 31 Yale Law Journal, 147, 150 (1921).

[15]Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926) ("[Arbitration] has a place also in the determination of the simpler questions of law—the questions of law which arise out of the[] daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.")

[16]Southland Corp. v. Keating, 465 U.S. 1, 13-16 (1984); see Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577, 601 (1997) (discussing the history of arbitration in the United States in the early twentieth century); Bull NH Information Systems, Inc. v. Hutson, 1998 WL 426047 (D. Mass. 1998), at *1: ("the FAA is something of an anomaly in the field of federal-court jurisdiction because it creates a body of federal substantive law without simultaneously creating any independent federal question jurisdiction . . .") (internal quotes omitted).

[17]Peter R. Sonderby, *Commercial Arbitration: Enforcement of an Agreement to Arbitrate Future Disputes*, 5 J. Marshall J. Prac. & Proc. 72 (1971).

[18]Robert Coulson, *Texas Arbitration: Modern Machinery Standing Idle*, 25 Sw. L.J. 290 (1971).

[19]Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. Ill. L. Rev. 1119, 1153 (1986) ("The characteristics of arbitral adjudication mesh with the basic philosophy of a cohesive and interdependent commercial community. Merchants do not share lawyerly concerns with the litigation process. Adversarial wrestling for truth weakens the commercial ideals of good faith and arms' length dealings, and might undermine the present or future basis for commercial relationships. . . . [T]he expertise, flexibility, and efficiency of arbitral adjudication can clearly favor the special interests of commerce.")

alternative to judicial recourse,[20] although that characteristic seems to be lost lately.[21]

Arbitration now rivals court adjudication as the preferred means of resolving civil disputes based on expert knowledge[22] in the adjudication of the dispute.[23] According to Matthew Eisler "though it is substantively different than litigation, arbitration is an equally valid forum of dispute resolution."[24] In line, Justice Sandra Day O'Connor has described the arbitral process as "the functional equivalent of the courts,"[25] providing a party equal protection regarding any substantive or statutory rights.

III
ARBITRATION AND JUSTICE

Equal access to justice is one of the fundamental bases upon which any legal system is founded. The development of alternative dispute resolution

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[20]Stefano Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 Am. Rev. Int'l Arb. 243, 248 (2003) ("One of the major advantages of arbitration, in fact, is that the parties can agree to numerous substantive and procedural aspects, and are entitled to choose an informal and flexible process, which can be specially adapted to fit their dispute."); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 393-96 (2005) (describing the ascendancy of an "arbitration hegemony" over federal statutory claims); Thomas E. Carbonneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds*, 105 (1989) ("Contemporary American statutory and decisional law on arbitration are in keeping with the unequivocal . . . acceptance of arbitral adjudication.")

[21]Amir A. Shalakany, *Arbitration and the Third Work: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 Harv. Int'l L.J. 419, 434-35 (2000) (observing that international arbitration is no longer quicker than adjudication; suggesting that the "American law model" is a cause); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, Disp. Res. J., Feb.- Apr. 2003, at 37- 38 (noting that arbitration has become a legalistic method of adjudication); Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 Cardozo J. Int'l & Comp. L. 281, 306-07 (2006) (describing the disadvantages of arbitration, including costs similar to litigation and lengthy discovery process and hearings).

[22]John Berryhill, *Public Interest Considerations in Private Resolution of Patent Disputes*, available at http://www.johnberryhill.com/patdis.html (claiming that it is unreasonable to expect judges and juries to properly evaluate the technical subject matters in patent suits and that a savings in time and cost may be achieved by appointing an expert arbitrator).

[23]G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. Rev. 623, 626-27 (1988) ("Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes."); Kamaratos v. Palias, 821 A.2d 531, 535 (N.J. Super. Ct. App. Div. 2003) (stating that there is a "strong judicial approval for the technique of arbitration"); John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998) ("[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the 'language and workings of the shop,' may best serve the interest of the parties."); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration . . . .").

[24]Matthew Eisler, *Difficult, Duplicative and Wasteful? The NASD's Prohibition of Class Action Arbitration in the Post-Bazzle Era*, Vol. 28:4 Cardozo Law Review 1891, 1897 (2007).

[25]Shearson/American Express v. McMahon, 482 U.S. 220, 257 n.14 (1987).

has been one of the most momentous movements in conflict management and judicial reform, and it has become a global need.[26] H Lauterpacht regards the difference between a court and an arbitral tribunal as a difference of forum and not a difference in the method of resolving a dispute, and so "the judicial character of international arbitration is a matter of historical fact and of positive international law."[27] Hence, it is recognized that arbitration is a dispute mechanism of a "judicial manner" and not a lawless mechanism. Since the system of arbitration conflicts with the ability of the judiciary to hear claims, it initially operated subject to judicial jealousy; indeed, judicial jealousy might be present nowadays as well.

The public's trust and confidence in the courts is one of its most valued and fundamental assets.[28] Can arbitration also gain the same level of public trust? Does arbitration advance the objectives of democratic governance? Arbitration has the ability to augment democratic governance in numerous important ways.[29] First, it is possible for arbitration to achieve gains in efficiency for the public justice system, as logic suggests that having formalized disputes resolved by arbitration will reduce the number left for resolution by public courts. Second, voluntary arbitration enhances personal autonomy by providing a means of governmentally enforceable dispute resolution to complement public adjudication. Democratic governance requires dispute resolution, and a democracy should recognize that this may be achieved through many different methods that allow disputants to "fit the forum to the fuss."[30]

On the one hand, law and ethical values exist and are preserved in authoritative texts. On the other hand, anthropologists and sociologists have told us that informal dispute resolution operates within systems of state law, and consequently is better portrayed as one of several overlapping "legalities," rather than as merely an alternative to formal law and state regulation.[31]

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[26]KD Raj, *Alternate Dispute Resolution System: A Prudent Mechanism of Speedy Redress in India*, www.ssrn.com, at 2.

[27]H Lauterpacht, *The Function of Law in International Community*, Oxford, 1933 at 379; J Ralston, *International Arbitration from Athens to Locarno*, Stanford, 1929 at 24.

[28]Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?* 18 Ohio St. J. On Disp. Resol. 93, 97 (2002).

[29]Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, 12 Disp. Resol. Mag. 18, 19 (2006) (Meadow has argued that there are strong connections between deliberative democracy theory and the ADR movement including a shared appreciation for "constitutional experimentalism . . . in which there are feedback mechanisms for sharing and coordinating local outcomes with the broader polity."); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 Nev. L. J. 347, 348 (2004) (exploring "the use of alternative, legal, political and social problem solving institutions that draw on conflict resolution theory and practice.")

[30]Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Negot. J. 49 (1994).

[31]Christine B. Harrington, *Informalism as a Form of Legal Ordering*, The Oxford Handbook Of Law And Politics 378, 389-90 (Keith E. Whittington et al. eds., 2008).

Owen Fiss argued that ADR is powerless to promote, and in addition is expected to undermine, popular commitments to public values.[32] Moreover, Fiss portrayed public values as moral ideals about justice, rights, and social cohesion that a public should want to uphold, and which, in any event, the state is obligated to enforce. However, arbitration generates exactly the kinds of public values that public judicial institutions should strive for.[33] The dogmatic approach that only courts produce law and justice cannot be accepted because all actions of society produce norms and principles.

Rules and laws are created prospectively and must be suitably precise both in terms of defining the conduct to which they apply and the consequences that they will entail. Robert H. Mnookin and Lewis Kornhauser argued that the law acts "not as imposing order from above, but rather as providing a framework within which [parties] can themselves determine their . . . rights and responsibilities . . . individuals in a wide variety of contexts bargain in the shadow of the law."[34] Thus, the authenticity and legitimacy of adjudication depends on the degree to which it maximizes parties' participation, because adjudication or any other dispute mechanism such as arbitration is "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[35] Fiss' critique of ADR processes is rooted in his view that adjudication is mainly a public function that derives its legitimacy from an exact process, and for Fiss the court's power to resolve cases is based on a "conception of the judicial function [that] sees the judge as trying to give meaning to our constitutional values" and a view that "adjudication is the process through which that meaning is revealed or elaborated."[36] It should be taken into account that independence is a significant ingre-

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[32]Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085-87 (1984).

[33]Susan Sturm, *Law's Role in Addressing Complex Discrimination*, Handbook Of Employment Discrimination Research: Rights And Realities 35, 54-55 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) ("The worry [of Fiss and others] is that ADR... is necessarily private, non-norm generating . . . . However, it is important to separate critiques of current practice from normative theories . . . . With judicial involvement in assessing and publicizing adequacy criteria, [ADR] has the potential to be norm generating.") (citations omitted); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. Disp. Resol. 1, 3 (disputing the assumption of Fiss and others "that informal conflict resolution is necessarily non-normative, and that it cannot yield more general public values"); Georgios I. Zekos, *Maritime Arbitration and the Rule of Law*, 39 J. Mar. L. & Com. 523, 543 (2008) (discussing "ADR's power to produce responsible public norms").

[34]Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 Yale L. J. 950, 997 (1979).

[35]Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. Pa. L. Rev. 1, 22 (1992) ("The resistance to constitutionally entrenched social rights on the grounds of institutional competence is often summarized in the view that social rights are said to be positive rights and therefore requiring time to realize; vague in terms of the obligations they mandate and involving complex polycentric, and diffuse interests in collective goods.")

[36]Fiss, *Foreword: The Forms of Justice*, 93 Hare. L. Rev. 1, 12-13 (1979).

dient in the process that legitimates judicial function or arbitration expressing and developing the content and meaning of constitutional values.

The central role of adjudication is to generate public policy through the creation of rules and standards, thereby creating behavioural norms for those similarly situated, and so courts provide guidance for future disputes. Could this role be played by a co-equal and independent arbitration? Fiss argued that, unlike adjudication, dispute resolution derives its legitimacy from the principle of individual consent.[37] A country's constitution and all public laws are in force as long as they have the consent and acceptance of the governed people and their legitimacy and legality are not gained by their formality or written type. Arbitration is based on the consent of parties as expressed in an accepted contract, and so arbitration is constitutionally valuable. Courts are legitimate, not because those who come before them accept their procedural rules and/or substantive outcomes, but because they distribute justice.[38] Courts are legitimate provided that they hand out justice within the confines of a democratic political system. It is not certain that judges are the only ones who can distribute justice because it is not universally accepted that litigation is a superior system. Taking into account that the authority of judgment arises from the law, arbitration awards arise from the same laws as a judgment.[39] Ohio Supreme Court Chief Justice Thomas Moyer writes, "Courts exist as forums for the resolution of disputes. Ideally, parties involved in litigation are able themselves to negotiate a settlement of their disputes, through mediation or otherwise. When that does not occur, it is the responsibility of the court to render a final judgment."[40]

Does arbitration distribute justice in a similar manner as do the courts? State legislatures granted individuals the right to resort to alternative methods to resolve their disputes, of which the most important method is commercial arbitration.[41] Moreover, the reason for the dominance of commercial

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[37]Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085-87 (1984); Owen Fiss, *Law Is Everywhere*, 117 Yale L.J. 256, 259 (2007).

[38]William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems To Cut The Costs Of Conflict*, 17 (1988) ("Although reconciling interests is generally less costly than determining rights, only adjudication can authoritatively resolve questions of public importance."); Lawrence Susskind & Jeffrey Cruikshank, *Breaking The Impasse: Consensual Approaches To Resolving Public Disputes*, 17 (1987) ("When fundamental constitutional rights are at stake, we properly turn to our judicial system.")

[39]Judith Resnik, *For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. Miami L. Rev. 173, 176 (2003) (arguing that our contemporary generation of judges is suspicious of adjudication and prefers processes sometimes styled alternative dispute resolution (ADR) and sometimes dispute resolution (DR), which are committed to the utility of contract and look to the participants to validate outcomes through consensual agreements).

[40]DeRolph v. State, 780 N.E.2d 529, 536 (Ohio 2002) (Moyer, C.J., dissenting).

[41]Lowenfeld, Andreas F., *Can Arbitration Coexist with Judicial Review? A Critique of LaPine v. Kyocera*, ADR Current, American Arbitration Association, Vol. 3 (1998), p.1.

arbitration is the prevalent acceptance and recognition of it by institutions of a civil society as well as the three powers of the state, the legislative, judicial and executive, as a suitable method that matches up to judicial action.[42] Furthermore, the courts have become more and more responsive toward permitting civil rights disputes to be decided by arbitration.[43]

The legitimacy of arbitral power is based on an act of delegation to which the parties have unreservedly consented. It has to be taken into consideration that arbitration has been gradually institutionalized over the past five decades and rules and procedures have been to a large extent codified by the key arbitration institutions.[44] An arbitrator makes law by way of interpretation, reason-giving, and application and this lawmaking is retrospective, applying only to a dispute involving a pre-existing contract between two parties.

IV
CONSTITUTIONS AND ARBITRATION

A constitution describes rights for people in addition to the workability of a state in order for the people to have rights and be protected.[45] Owen Fiss describes the U.S. Constitution as "the embodiment of the public morality of the nation . . . , laden with a special normative value that derives from the role it plays in defining our national identity-what it means to be American-and in articulating the governing principles of our society."[46] In addition, the Constitution is premised on the doctrine of separation of powers.[47] The Constitution verifies a tripartite system of government in which the legislative, executive, and judicial branches are equal and must in general abstain from intruding upon each other's sphere.[48] For instance, no citizen of the

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[42]Riskin, Leonard L. and James E. Westbrook., *Dispute Resolution and Lawyers*, St. Paul West Publishing Company (1987) 250.

[43]Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitration Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law & Contemp. Probs. 55, 56 (2004) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001)).

[44]Alec Stone Sweet, *Arbitration and Judicialization*, Oñati Socio-Legal Series, Vol. 1, n. 9 (2011).

[45]G. Zekos, *Constitution, Arbitration and Courts*, 2013 www.novapublishers.com.

[46]Owen Fiss, *Law Is Everywhere*. 117 Yale L.J. 256, 259 (2007).

[47]John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 3.5, at 129 (5th ed. 1995); *The Declaration of Independence*, para. 1 (U.S. 1776); U.S. Const. amend. XIV, § 1 (From the Declaration of Independence's claim that "all men are created equal" to the Fourteenth Amendment's guarantee of "equal protection of the laws," our democracy has displayed a deep commitment to the principle of equal treatment. By adhering strictly to their own precedents, the courts help to strengthen that commitment.)

[48]Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816 (1969) (arguing that "it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation" of Article III); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 400–07 (1996) (relying extensively on Blackstone and English legal authorities in exploring Founding-era attitudes toward the separation of powers and the judicial role).

United States may be denied the equal protection of the laws.[49] The U.S. Constitution vests the judicial power in Article III courts by this means, strictly limiting Congress' capacity to choose the individuals and kind of institutions by which its laws will be applied.[50] The issue of a government's relationships to its courts is distinct, not only because of the constitutional charter running to courts, but also because of the dependence of the state on courts to maintain order in its society.[51] Moreover, article III of the United States Constitution states: "The judicial power of the United States shall be vested in a supreme court and in such inferior courts as the congress may, from time to time, ordain and establish."[52]

The right to a jury trial is an underlying common-law right sealed by the Framers of the Constitution.[53] Moreover, the Framers rejected the English division between law and equity, choosing instead to broaden the jurisdiction of federal courts to include both areas.[54] The total segregation of the courts from the legislature was itself a departure from an English tradition in which the House of Lords both wrote the laws and served as the supreme appellate court.[55] U.S. courts' decisions cannot be reversed by the legislature.[56] *Marine Transit Corp. v. Dreyfus*[57] held that the enforcement of arbitral awards was constitutional, but did not deliberate questions of the investment of judicial power or whether enforcement would undermine the purposes of Article III. According to Judith Resnik, the constitutional charter running to courts is interrelated with the dependence of the state on courts to order its society.[58] Is

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[49]U.S. Const. amend. XIV ("[N]or shall any State . . . deny to any person within its jurisdiction the equal Protection of the laws.")

[50]U.S. Const. art. III, § 1. As Justice Marshall long ago recognized in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the law, whenever he receives an injury." 5. U.S. 137, at 163 (1803); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 102 (1992).

[51]Judith Resnik, *Fairness In Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 2011 Harvard Law Review, Vol. 125:78.

[52]U.S. Const. art. III, § 1, cl. 1; Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 Colum. L. Rev. 833, 842 (2007) (arguing that international trade tribunals "raise no serious problems under Article III" because they are "only a recent instantiation of an age-old practice: the use of arbitration to resolve disputes by American nationals against foreign states and their nationals.")

[53]Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St. J. On Disp. Resol. 669, 671 (2001) (The Seventh Amendment right to a trial by jury has historically been one of the fundamental elements of our judicial system.)

[54]U.S. Const. art. III, § 2, cl. 1 (stating that "[t]he judicial Power shall extend to all Cases, in Law and Equity").

[55]Sotirios A. Barber, *The Constitution of Judicial Power*, 50 (1993).

[56]Dickerson v. United States, 530 U.S. 428, 443-44 (2000); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[57]284 U.S. 263, 279 (1932).

[58]Judith Resnik, *Fairness In Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 2011 Harvard Law Review, Vol. 125:78; Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 Law & Ethics Hum. Rts. 1 (2011).

justice the genuine basis or background of constitutionality, or is the need to control society dependent on criteria other than justice? Is it illegal to have a second co-equal and informal dispute method to order society as well?

Is arbitration constitutional or unconstitutional? In order to answer this question, we need to decide if only courts can provide and promote justice, or does arbitration distribute justice as well? In defining "justice," Chief Justice Burger observed that, in order to "fulfil our traditional obligation means that we should provide mechanisms [ADR] that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum stress on the participants. That is what justice is all about."[59] Moreover, Chief Justice Burger said that the U.S. legal system is too expensive, destructive, and inefficient.[60] Besides, arbitration cannot violate public policy. It is worth mentioning here that legal rights come from doctrines that first ascended in arbitrations centuries ago and common law courts gave these private rights a more public character by adopting privately adjudicated commercial doctrines.[61]

Does contractual arbitration threaten the constitutional right to take a dispute to court by giving parties a choice?[62] The Seventh Amendment to the U.S. Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[63] In England, jury trials were warranted to parties litigating legal claims, but not to equitable or admiralty claims.[64] The Fifth and Fourteenth Amendments ensure due process of law in federal and state court proceedings.[65] Specifically, mandatory arbitration has been challenged on the ground that it violates separation of powers, in particular the constitutional right to take a dispute to court.[66] The argument in such challenges is that the legislative branch has intruded upon the power of the judicial branch by creating a system that seizes judicial authority. For instance, in *McKim v Thompson*[67] the court held that "[b]y referring a case to arbitration, the court

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[59]Warren E. Burger, *Isn't There A Better Way?* 68 A.B.A. J. 274, 275 (1982).

[60]Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

[61]William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and The United States*, 25 U. Chi. L. Rev. 445, 447 (1958).

[62]Sen. Russell D. Feingold, *Mandatory Arbitration: What Process is Due*, 39 Harv. J. on Leg. 281, 288 (2002) ("One reason that mandatory, binding arbitration has become so troubling is because it threatens a fundamental principle of our justice system: the constitutional right to take a dispute to court.")

[63]U.S. Const. amend. VII.

[64]Capital Traction Co. v. Hof, 174 U.S. 1, 8-9 (1899).

[65]U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); Id. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[66]Sen. Russell D. Feingold, *Mandatory Arbitration: What Process is Due*, 39 Harv. J. On Leg. 281, 288 (2002).

[67]1 Bland's Ch. Rep. 150, 175 (Md. 1827).

divests itself of its judicial power." Moreover, the right to a jury trial attaches in the framework of judicial proceedings after it is ascertained that litigation should proceed before a court.[68] In *Phoenix Ins. Co. v. Zlotky*[69] the court held that to enforce contracts to arbitrate would "open a leak in the dike of constitutional guaranties which might some day carry all away."

According to article 20 of the Greek Constitution every person has the right of legal protection by courts and courts exercise the judicial function. The Greek constitution makes positive reference to the rights of persons to waive or oust the jurisdiction of national courts, and only voluntary arbitration is legalized by the Constitution. It is worth mentioning that according to article 8§1 of the Greek Constitution the legitimate judge is not only the state judge (87 Greek Constitution) but also the arbitrator of article 867 CCP.[70] In Brazil, in December 2001, the debate on the constitutionality of the Brazilian Arbitration Law was finally over, when the Brazilian Supreme Court issued a decision upholding the constitutionality of the Brazilian Arbitration Law.[71]

The Bulgarian Constitution does not require a three-instance judicial system as an overriding mandatory constitutional principle.[72] Moreover, there is no constitutional barrier preventing the resolution of particular selected civil and criminal matters within the framework of another system. The jurisdiction of courts in civil cases can be excluded by an arbitration agreement pursuant to Section 9(3) of the CPe. The existence of such an arbitration agreement constitutes a procedural impediment which prevents the court from ruling on any substantive issues, including issues on which the court would otherwise be obliged to rule *sua sponte*.[73] Characteristically, the Indian

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[68]Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 307 (4th Cir. 2001); Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916) (stating that the Amendment applies only to proceedings brought in federal court).

[69]Phoenix Ins. Co. v. Zlotky, 92 N.W. 736, 737 (Neb. 1902).

[70]See chapter 5 G. Zekos, *International Commercial and Marine Arbitration*, 2008 Routledge-Cavendish Publishers London.

[71]S.T.F., SE 5206 AgR, Relator: Min. Sepulveda Pertence, 12.12.2001, D.J. 30.04.2004, S.T.F.J. [referred to as M.B.V. Commercial and Export Management Establishment v. Resil Industria e Comercial Ltda].

[72]Decision of Constitutional Court of Republic of Bulgaria No.9, Constitutional Case No. 15/2002 of October 24, 2002. CCP [Bul], Article 9 -(Paragraph 1, amended [by an act promulgated in:] 55 Statet Gazette (1992) (approximate translation, ciL) ("The parties to a dispute over property can agree that the dispute will be submitted to arbitration; this shall not apply to disputes over rights in rem or ownership of real property, maintenance or rights arising from labor relationships."); Judgment of Bulgarian Supreme Court No. 327, Civil Case No. 257/92 of January 14,1993: Apis 7 Pravo legal information system; Case law, 2 (14) Bulletin of Supreme Court of Republic of Bulgaria J2 (1993).

[73]Judgment of Bulgarian Supreme Court No. 508, Civil Case No. 817/95 of June 6,1995: Apis 7 Pravo Case law, 9 Bulletin of Supreme Court of Republic of Bulgaria, 20 (1995); Judgment of Bulgarian Supreme Court No. 630, Civil Case No. 1832/2003 of July 28, 2004 (in H.T.E.K.Co.V.L.L., [Kuwait] v. T. EAD [Bul]): Apis 7 Pravo, 4 Bulgarski Zakonnik Magazine 93 (2005).

Constitution also specifies settlement of international disputes by arbitration as a Directive Principle of State Policy [(Article 51(d)].[74] Thus, the choice of parties for arbitration seems to be a constitutional right.

V
CONSTITUTIONALITY OF ARBITRATION

Does arbitration violate Article III?[75] Is there "arbitration hegemony" over federal statutory claims?[76] The "jurisdictional ouster" claim found its roots in contract law, in essence treating the arbitration agreement as a void contract that offended public policy.[77] Congress made available a quasi-judicial mechanism through which willing parties may, at their option, choose to resolve their differences.[78] Article III unreservedly authorizes substantial private ordering. Indeed, historical treatments of the pre-Revolutionary period imply that what we now call "alternative dispute resolution," was the norm rather than the exception in the colonies.[79] It has to be remembered that arbitration as the central dispute mechanism brought justice to the establishment of modern democracies. In other words, arbitration contributed to the emergence and establishment of all the principles expressed by constitutions in modern states. Judith Resnik said that, "federal judges who once had declined to enforce *ex ante* agreements to arbitrate federal statutory rights now generally insist on holding parties to such bargains, thereby outsourcing an array of claims."[80]

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[74]K.D. Raj, *Alternate Dispute Resolution System: A Prudent Mechanism Of Speedy Redress In India*, www.ssrn.com, at 2 ("When we go to court, we know that we are going to win all or lose all. Whereas, when we go to any method of ADR or for informal settlement with different expectations, we know that we may not get all that we want, but we will not lose everything. In India, arbitration and domestic or in-house tribunals are alternatives to formal courts.")

[75]G. Zekos, *Constitution, Arbitration and Courts*, 2013 www.novapublishers.com.

[76]Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 393-96 (2005) (describing the ascendancy of an "arbitration hegemony" over federal statutory claims); Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[77]Macneil, Speidel, & Stipanowich, *Federal Arbitration Law* § 4.3.2.2 (Supp. 1999); Nebraska v. Nebraska Ass'n of Public Employees, 477 N.W.2d 577 (Neb. 1991) (holding that state authorizing binding arbitration violated "open courts" provision of Nebraska Constitution).

[78]CFTC v. Schor, 478 U.S. 848 (1986).

[79]Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, Winter/Spring, 2004, Law And Contemporary Problems Vol. 67, at 279; Peter B. Rutledge, *Arbitration and Constitution Advocate*, 45 Ga. Law Advocate, 4 (2011).

[80]Resnik J, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 597 (2005).

Rule 38 of the Federal Rules of Civil Procedure provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."[81] The Supreme Court has considered the right to trial by jury in a civil action as a "basic and fundamental" right that is "sacred to the citizen" and therefore "should be jealously guarded by the court."[82] Mandatory binding arbitration threatens a basic principle of any justice system, the constitutional right to take a dispute to court,[83] but parties to a contract can agree that, in the event a dispute arises, they waive their right to a jury. Democratic theory commands that power should only be exercised with the consent of the governed. It thus legitimizes the power of arbitrators to settle the dispute, at least as far as the parties are concerned. It should be taken into account that arbitrators are private individuals exercising a power which is generally assigned to state officials acting with publicly accepted authority.

It could be said that the consent to arbitration is itself an exercise of sovereignty, signifying that arbitral tribunals firmly apply the law.[84] Locke and Cohen believed that public authority was needed to make arbitration more effective,[85] and this author argues that arbitrators should be provided with public authority to deal with arbitration. In 1697, Locke drafted two legislative proposals to consolidate the functioning and autonomy of arbitration. One proposal made private arbitration agreements enforceable in courts and a "submission"— a private agreement to present a dispute to arbitration— would function like a court reference, a procedure by which courts ordered arbitration.[86] It is worth mentioning that John Locke recognized that arbitra-

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[81]Fed. R. Civ. Pro. 38.

[82]Jacob v. New York City, 315 U.S. 752, 752–53 (1942); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (stating that the right to jury trial "is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care").

[83]Sen. Russell D. Feingold, *Mandatory Arbitration: What Process is Due*, 39 Harv. J. on Leg. 281, 288 (2002) ("One reason that mandatory, binding arbitration has become so troubling is because it threatens a fundamental principle of our justice system: the constitutional right to take a dispute to court."); Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1210 (2002).

[84]W. Michael Reisman, *Reflections on Economic Development, National Sovereignty and International Arbitration*, 16–20 (Apr.13,2006) (unpublished manuscript, available at http://www.law.yale.edu/documents/pdf/Bogota.4.13.06.pdf) (observing that the consent to arbitration is itself an exercise of sovereignty, suggesting that arbitral tribunals strictly apply the law, and commenting that countries can then take steps to accommodate concerns about sovereignty through the normal political process).

[85]Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L. J. 147 (1921) ("For over three hundred years, a dictum of Lord Coke has held sway over the minds of America. It is now on its fair way to a decent burial.")

[86]Henry Horwitz & James Oldham, *John Locke, Lord Mansfield and Arbitration during the Eighteenth Century*, 36 The Historical J. 137, 138 (1993).

tion was valuable for resolving trade disputes and needed to be "decisive without appeal" so as to be final and binding.[87] Thus, the need for an independent arbitration is emphasized by Locke and Cohen.

Freedom of contract was presented as a sort of philosophical counterweight, and a justification with a constitutional connotation, for limiting parties' right to bring suit in court, whereas in contrast Congress was in reality principally motivated by its practical concern for judicial efficiency. Some rights, however, including the right to trial by jury, are alienable. Consent is a common way of alienating, or waiving, one's rights.[88] While consent is a way of waiving rights in many areas of law, these areas fluctuate in their required standards of consent. For example, the standard of consent governing jury-waiver clauses in general tends to be higher than the standard governing contracts.[89]

A contractual right to arbitrate may be waived explicitly or unreservedly.[90] Courts must scrutinize the entirety of the circumstances and "determine whether based on all the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate."[91] There is a common, three-part test for determining whether a right to arbitrate has been waived; (1) a party knew of an existing right to arbitration; (2) acted contradictorily with that right; and (3) prejudiced the other party by these inconsistent acts.[92] Moreover, courts routinely decide that a party has waived

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[87]Id.

[88]Grafton Partners L.P. v. Price Waterhouse Coopers L.L.P., 116 P.3d 479, 490–93 (Cal. Super. Ct. 2005) (breaking from the majority of courts in refusing to enforce a pre-dispute jury waiver); 1 Thomas H. Oehmke, *Commercial Arbitration*, §§ 23:11, 23:56 (3d ed. 2008) (stating that submitting a claim does not waive right to arbitration); Michael D. Fielding, *Navigating the Intersection of Bankruptcy and Commercial Arbitration*, 27 No. 2 Banking & Fin. Services Pol'y Rep. 13, 16 (2008) (noting "courts have effectively elevated the statutory right to compel arbitration above the constitutional right to a jury trial"); Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (explaining that when exercising in rem jurisdiction over property, same test applied for exercise of in personam jurisdiction); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (in order to subject defendant to in personam jurisdiction minimum contacts must exist); Central. Va. Community College v. Katz, 546 U.S. 356, 362 (2006).

[89]Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St. J. on Disp. Resol. 669, 674 (2001).

[90]Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 756 (7th Cir. 2002) (affirming lower court decision denying motion to compel arbitration and finding appellant had impliedly waived its right to arbitrate); Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986) (setting out three requirements party seeking arbitration must demonstrate in order to successfully compel arbitration); Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968) (reaffirming strong "federal policy favoring arbitration" and thus finding waiver "is not to be lightly inferred").

[91]Sharif v. Wellness Int'l Network, Ltd., 376 F.3d 720, 726 (7th Cir. 2004) (quoting Cabintree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995) (supporting finding party has implicitly waived its right to arbitrate when it has chosen judicial, rather than arbitrary forum, to adjudicate matter).

[92]Thomas H. Oehmke, *Commercial Arbitration*, § 23:30 (3d ed. 2008) (illustrating constraints and limitations of waiving one's right to arbitration); Gay v. CreditInform, 511 F.3d 369, 379 (3d Cir. 2007) ("A party seeking to avoid arbitration for a statutory claim has the burden of establishing that Congress intend

its right to arbitrate, even though this issue involves a flexible, multi-factored balancing test.[93]

One way in which the jury-trial right can be waived is if a party consents to a contract containing an arbitration clause—that is, a clause asserting to waive the right to have disputes resolved in litigation and to generate the right to have them resolved by arbitration.[94] An enforceable arbitration clause involving a dispute denotes that arbitration replaces litigation with regard to that dispute. The term "waiver" is utilized to refer only to *giving* away one's rights. Standard accounts of contract law cautiously differentiate the "waiver" of contractual rights, which does not demand consideration, from the "modification" of contractual rights, which does.[95] It is argued that by agreeing to arbitration, parties in fact waive the right to assert procedural due process and other constitutional rights that would be involved if a state actor were involved.[96]

Does this mean that there is no due process[97] in arbitration? It could be said that an arbitration agreement means waiving many of the procedural rights guaranteed in litigation.[98] Arbitration agreements require that parties waive their right to sue, and agree to substitute a court with arbitration.[99]

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ed to preclude arbitration of the claim."); Mintze v. Am. Gen. Fin. Servs., Inc. (In re Mintze), 434 F.3d 222, 229 (3d Cir. 2006) (finding arbitration enforcement can be overcome when party opposing arbitration establishes congressional intent to create exception to FAA mandate regarding statutory claims); Mirant Corp. v. The Southern Co., 337 B.R. 107, 121 (N.D. Tex. 2006) (noting the court will not presume that a litigant has knowingly and willfully surrendered its constitutional right to a jury trial for the resolution of disputes that are only incidentally related to the bankruptcy process.)

[93]Capitol Const. Services, Inc. v. Farah, LLC, — N.E. 2d —, 2011 WL 1119023, at *4 (Ind. Ct. App. 2011).

[94]Charles Alan Wright, *Federal Practice And Procedure* § 3721, at 97 (2009) ("The modern view . . . is that, in advance of suit, a defendant can contractually waive his right to remove to federal court an action brought against him in a state court, unless the Constitution or a federal statute grants the federal courts exclusive jurisdiction over that action.")

[95]E. Allan Farnsworth, *Contracts* § 8.5 (3d ed. 1999).

[96]Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 216 (2006).

[97]Flores v. Evergreen at San Diego, LLC, 55 Cal. Rptr. 3d 823, 832 (Ct. App. 2007) ("arbitration agreements waive important legal rights"); Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 216 (2006) ("[C]ourts addressing this issue hold that, by agreeing to arbitration, parties effectively waive the right to insist upon procedural due process and other constitutional rights that would be required if a state actor were involved.")

[98]Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in the UDRP*, 6 J. Small & Emerging Bus. L. 129, 153 (2002).

[99]Jean Sternlicht, *Creeping Mandatory Arbitration*, 57 Stan. L. Rev. 1631, 1654 (2005); Baldeo v. Darden Rest., Inc., 2005 WL 44703 (E.D.N.Y. 2005), at * 2; Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 146 (2d Cir. 2004); Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 216 (2006) ("[C]ourts addressing this issue hold that, by agreeing to arbitration, parties effectively waive the right to insist upon procedural due process and other constitutional rights that would be required if a state actor were involved."); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 102 (1992) ("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."); Stephen

Additionally, an arbitration agreement means a waiver of many of the procedural rights assured in litigation.[100] Therefore, in an arbitration, the parties waive the following; (1) their rights to a fact finding by a jury of their peers; (2) a trial presided over by a judge who is an elected or appointed public official; and (3) full-blown discovery.[101]

Parties who consent by contract to arbitration explicitly waive their constitutional rights by opting out of the judicial system with its rigid substantive rules.[102] It is a constitutional right of parties to choose their dispute mechanism, such as arbitration, which is established by law and is not an illegal creation. It is worth mentioning that no country has adopted any law impairing the obligations of contract.[103] Professor Rubin said that "the contract standard cannot be used to justify those waivers that involve constitutional rights since such rights necessarily take precedence over the contract policy of honoring private agreements,"[104] although this argument was not specifically directed at section 2 of the FAA. The traditional theory used to rationalize arbitration's compatibility with Article III rests on the principle of waiver. Parties entering into an arbitration agreement have waived their right to a federal forum, thereby eliminating any claim of a breach of their Article III rights.

Even if an arbitration clause has been inserted into a contract of adhesion on a 'take-it-or-leave-it' basis, its acceptance means consent. It can be argued that enforcement of adhesive arbitration agreements benefits society by reducing procedural costs, thereby benefiting consumers, employees and

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J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in the UDRP*, 6 J. Small & Emerging Bus. L. 129, 153 (2002) ("An arbitration agreement . . . is a waiver of many of the procedural rights guaranteed in litigation."); Flores v. Evergreen at San Diego, LLC, 55 Cal. Rptr. 3d 823, 832 (Ct. App. 2007) ("arbitration agreements waive important legal rights.")

[100]Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in the UDRP*, 6 J. Small & Emerging Bus. L. 129, 153 (2002); Paul H. Dawes. *Alternative Dispute Resolution*, 1136 PLI/Corp. 599, 603 (1999) ("The risks [of arbitration], broadly speaking, can be grouped into three major concerns: lack of appeal rights, waiver of other procedural and substantive rights and, ironically, a perception that like jurors, arbitrators can be unpredictable, under-qualified and swayed by emotion.")

[101]Mark E. Budnitz, *Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 Ohio St. J. On Disp. Resol. 267, 283 (1995); Ryan Griffitts, *Steering Clear of the Runaway Jury*, 68 Tex. B.J. 320, 320 (2005) ("By executing arbitration agreements, the parties waive their right to have their case decided by a judge, and, more important, a jury.")

[102]Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 102 (1992); Mark E. Budnitz, *Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 Ohio St. J. On Disp. Resol. 267, 283 (1995); Ryan Griffitts. *Steering Clear of the Runaway Jury* 68 Tex. B.J. 320, 320 (2005).

[103]U.S. Const. art. I, § 10.

[104]Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478 (1981).

[105]Stephen J. Ware. *The Case for Enforcing Adhesive Arbitration Agreements— With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am Arb. 251 (2006).

other parties.[105] Moreover, the mere fact that there is a disproportion in bargaining power does not necessarily make the contract unconscionable.[106] In cases of voluntary (contractual) arbitration the FAA reduces the power of the federal judiciary by requiring that federal courts confirm arbitral awards as judgments, conditional on a few non-substantive exceptions. Article III of the Constitution protects federal judges by providing them with life tenure, eliminating job security as an issue which could be influenced by the other branches of government.[107] Has job security for judges resulted in a powerful justice worldwide, or does society still have to be on alert? Can the coexistence of an equal and independent alternative dispute mechanism to courts, such as arbitration, actually augment justice?

Reilly makes it clear that in addition to waiving their right to trial by judge or jury, people who agree to submit disputes to arbitration waive the following:

> (1) their rights under Article I and Article III of the Constitution; (2) their rights under the 5th, 7th, and 14th Amendments; (3) their rights to demand that federal statutory claims be adjudicated in a federal district court under the Federal Rules of Civil Procedure and the Federal Rules of Evidence by a judge, appointed under Article III of the Constitution, who will provide instruction as to the applicable law to a jury chosen in a fair, objective, and non-discriminatory manner; and (4) their right to appeal an adverse verdict to a U.S. Court of Appeals or to petition for certiorari to the U.S. Supreme Court.[108]

Arbitration-law standards of consent are contract-law standards of consent. As a result, as the Supreme Court explained in *Doctor's Associates v. Casarotto*,[109] generally applicable contract defenses, such as unconscionabil-

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[106]Faber v. Menard, Inc., 367 F.3d 1048, 1053 (8th Cir. 2004); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 158, 194 (2004) ("[A]s the use of arbitration agreements has increased, claims of unconscionability have also increased . . . ."); Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 Fordham L. Rev. 2035, 2067 (2011) (even judges faced with a flagrantly unconscionable arbitration clause "must 'grit their teeth' and compel arbitration."); Brewer v. Missouri Title Loans, __ S.W.3d __, 2012 WL 716878, at *1 (Mar. 6, 2012) (en banc).

[107]U.S. Const. art. III, § 1. ("The Judges . . . shall hold their Offices during good Behavior, and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.")

[108]Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1210 (2002); ENSCO Int'l, Inc. v. Certain Underwriters at Lloyd's, 579 F.3d 442, 443–44 (5th Cir. 2009) ("There are three ways in which a party may clearly and unequivocally waive its removal rights: '[1] by explicitly stating that it is doing so, [2] by allowing the other party the right to choose venue, or [3] by establishing an exclusive venue within the contract.'") (quoting City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 1991)).

[109]17 U.S. 681 (1996).

ity, duress or fraud, may be applied to invalidate arbitration agreements without contravening section 2 of the Federal Arbitration Act.[110] Contract law in general considers consent as an objective, rather than a subjective, phenomenon. In particular, the formation of a contract entails, not mutual assent, but mutual *manifestations* of assent.[111] There is consent to arbitrate according to FAA if the contract law doctrine of mutual assent is satisfied. According to David S. Schwartz "[i]f an arbitration clause has been inserted in a contract of adhesion on a 'take-it-or-leave-it' basis, it is difficult to characterize it as the product of 'consent, 'agreement' or 'bargaining.'"[112] Jean Sternlight argues for a standard "sufficient to protect ignorant employees and consumers from unwittingly waiving their rights to a jury trial, an Article III judge, and due process."[113] Moreover, if a claim is appropriately before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.[114] Thus, waiving the right to trial by judge is a constitutional right which legalizes the existence of contractual arbitration as a second and co-equal pole of justice.

VI
THE FAA AND CONSTITUTIONALITY

The FAA requires courts to apply a contract-law standard of consent to arbitration agreements, but certain commentators argue that courts are instead constitutionally required to apply the higher standard of consent governing jury-waiver clauses. Stephen Ware argues that the FAA's contract-law standard of consent is required by the constitution.[115] Waivers of constitutional rights not only must be voluntary, but must also be deliberate, and Ware argues that the acceptance of an arbitration agreement must meet both tests.[116]

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[110]First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state law principles that govern the formation of contracts.")

[111]Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 113 (1996).

[112]David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 58.

[113]Jean Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 Tul. L. Rev. 1, 59 (1997).

[114]Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir. 2002); Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1471 (N.D. Ill. 1997).

[115]Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, Winter/Spring 2004 http://www.law.duke.edu/journals/67LCPWare.

[116]Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St. J. on Disp. Resol. 669, 674 (2001); Brady v. United States, 397 U.S. 742, 748 (1970).

Is the FAA unconstitutional? The constitutionality of the Federal Arbitration Act is beyond doubt; the FAA, which provides for the enforceability of arbitration agreements, derives its constitutionality from Congress' Article I power to regulate interstate commerce.[117] The FAA and the other national arbitration laws do not strip courts of jurisdiction entirely, but simply defer the courts' consideration of the dispute by limiting the extent of their review. If federal district courts are stripped of their power to review arbitral awards[118] will a constitutional infirmity arise? It is argued that the constitutionality of arbitration is based on the chance for federal courts to conduct a *de novo* review of questions of law.[119] On the other hand, arbitration is a voluntary process which is supposed to be independent, final and equal to courts. Moreover, federal courts are precluded from conducting a *de novo* review of the arbitrator's legal errors.[120] Arbitration, as a constitutionally guaranteed adjudication method, is subject to the primary rules of fair hearing/due process, and neutrality and impartiality of arbitrators, which apply to state courts.[121] Furthermore, the capacity of parties to choose their

[117]Satomi Owners Ass'n v. Satomi, L.L.C., 159 P.3d 460, 467 (Wash Ct. App. 2007) ("The Congress shall have the power to regulate commerce with foreign nations, and among the several states . . . ."); U.S. Const. art. I, § 8, cl. 3; Satomi Owners Ass'n v. Satomi, L.L.C., No. 80480-0, 2009 WL 4985689, at *16 (Wash. Dec. 24, 2009); Preston v. Ferrer, 552 U.S. 346, 359 (2008) ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.")

[118]Johnson v. Robinson, 415 U.S. 361 (1974) (precluding judicial review of certain Veteran's Administration determinations); Morris v. Gressette, 432 U.S. 491 (1997) (finding that the Attorney General's failure to make timely objection under the Voting Rights Act of 1965 is not subject to judicial review); Block v. Community Nutrition Inst., 467 U.S. 340 (1984) (consumers of dairy products could not obtain judicial review of milk market orders); Webster v. Doe, 486 U.S. 592 (1988) (holding CIA director's decision to discharge employee was not subject to judicial review); Crowell v. Benson, 285 U.S. 22 (1932); United States v. Raddatz, 447 U.S. 667 (1980); Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986).

[119]Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915, 918-26 (1988); United States v. Meade, 533 U.S. 218 (2001) (discussing degrees of judicial deference to agency statutory interpretations); D Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 2004 Or. L Rev 541; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 1 (1997) (arguing that the current pro-arbitration policy neglects the contractual principle of consent and often leads to the violation of constitutional rights); J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 Rev. Litig. 593, 632 (2002) ("Since 1999, courts have arguably reached too far to find an agreement to arbitrate.")

[120]Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. Kan. L. Rev. 47, 57 (2010) ("Enforcing these mandatory-arbitration agreements negatively affects perceptions of procedural justice. It seems unfair that a party can design a process that limits basic procedural rights and impose it on another, particularly if that process limits judicial review.")

[121]T. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 Tulane L Rev. 1945 (1996); F. Kessedjian, *Principe de la contradiction et arbitrage*, Rev. Arb. 381 (1995); AT & T v. Saudi Cable Company, [2000] 2 Lloyd's Rep 127 (CA).

judge brings arbitration as a coercive dispute system into line with the constitution of any state.[122] It is worth mentioning that *Henderson v. Beaton*[123] upheld the constitutionality of a Texas statute enacted in 1879 that provided for a board of referees or arbitrators to dispose of civil actions by the consent of parties.

Will the United States increasingly have a privatized system of justice[124] by favoring the right of parties to choose arbitration? The Courts' interpretation of the FAA has ignited an "arbitration war": "a battle over whether the United States will increasingly have a privatized system of justice."[125]

Do not arbitrators possess legal expertise?[126] The Supreme Court in *Marbury v. Madison*[127] stated that the interpretation of constitutional provisions was the province of judges.[128] Moreover, Andrei Marmor argues that "courts tend to possess legal expertise, they are the best kind of institution to be entrusted with constitutional interpretation."[129] The constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people of the entire nation. As discussed earlier, arbitration is deep-rooted in ancient Greek and Roman laws and since the French Revolution, arbitration was considered a *droit naturel*,[130] but in modern days the established *fora* for all disputes are national courts existing and maintained by the state to offer a dispute settlement

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[122]The Greek Constitution is an illustration of modern standards where the constitutional text makes positive reference to the rights of persons to waive or oust the jurisdiction of national courts. Article 8 of the Greek Constitution (1975/1986/2001) provides "No person shall be deprived of the judge assigned to him by law against his will." Article 20(1) provides "Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law."

[123]52 Tex. 29 (Tex. 1879).

[124]Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

[125]*The Arbitration War*, N.Y. Times, Nov. 26, 2010, at A18.

[126]Alexander v. Gardner-Denver, 415 U.S. 36, 57 (1974) (stating that parties select a particular arbitrator "because they trust his knowledge and judgment concerning the demands" and customs of the field from which the dispute originates); Ian Macneil, *Federal Arbitration Law*, § 2.6.2 (1994) (stating that an arbitrator is expected to be an expert in the norms governing the resolution of the dispute); Michael Pryles, *Reflections on Transnational Public Policy*, 24 J. Int'l Arb. 1, 4 (2003) ("Arbitrators have an obligation to apply internationally accepted norms of procedure. . . .")

[127]5 U.S. (1 Cranch) 137 (1803).

[128]David Boies, *Judicial Independence and the Rule of Law*, 22 Journal of Law & Policy 57.

[129]Andrei Marmor, *Constitutional Interpretation*, USC Public Policy Research Paper No. 04-4, at 10.

[130]"Le droit des citoyens de terminer définitevement leurs contestations par la voie de l'arbitrage, ne peut recevoir aucune atteinte par les acts du Pouvoir législatif." (The legislative power [Parliament] cannot by any means hinder the right of the citizens to settle their disputes by means of arbitration.) Title III, Chap V, Article 5, Constitution of 3 September 1791. "Il ne peut être porté aucune atteinte au droit de faire prononcer sur les différends par les arbitres du choix des parties", Constitution, 22 August 1795; Constitution of Greece 1827, Article 139.

service for parties. States make certain that courts exist as an expression of state prerogative and power. Arbitration is not a national court procedure, but rather a private proceeding with public consequences. According to John O. McGinnis and Ilya Somin, "Judges thus often put aside their political and public policy preferences to enforce the law according to a set of rules."[131] On the other hand, voting patterns in the Supreme Court back a "political" or "attitudinal" model which posits that judicial votes abide by political ideology.[132] Moreover, according to Richard C. Reuben, "Courts have a vested institutional interest in managing the size of their dockets, and individual judges may have ideological preferences that would cause them to steer certain cases or classes of cases into arbitration rather than permitting them to proceed before judges or juries."[133] It could be argued that arbitrators also put aside their political preferences and enforce the law and customs as well.

Do judges make errors? Professor Chris Guthrie argues that judges *Misjudge*.[134] Wrong judging/misjudging implicates such things as incompetence, bias, and corruption.[135] Is it possible to predict the frequency or consequences of judges' errors in the real world? It could be said that parties underestimate judges' fallibility, expecting that judges will not make any

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[131]John O. McGinnis, Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, Research Paper No. 04-08, at 48.

[132]Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 Justice Sys. J. 219 (1999) (citing studies and concluding that voting patterns support a "political" or "attitudinal" model which posits that judicial votes follow political ideology); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision making*, 151 U. Pa. L. Rev. 1639, 1640-41 (2003) ("These scholars invariably ignore the many ways in which collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions.")

[133]Richard C. Reuben, *Process Purity and Innovation in Dispute Resolution: A Response to Professors Stempel, Cole, and Drahozal*, Legal Studies Research Paper Series, Research Paper No. 2007-14 at 36-37; Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization*, (1992) at 172-73 (U.S. Supreme Court's arbitration jurisprudence based on its vested interest in "docket-clearing pure and simple."); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 S. Ct. Econ. Rev. 1, 2 (1993) ("[J]udges have a vested interest in reducing the workload of the courts, and they may attempt to advance that agenda without sensitivity to the impact on the system as a whole, particularly the impact on the attorney-client relationship.")

[134]Chris Guthrie, *Misjudging*, 7 Nev. L.J. 420 (2007); Chris Guthrie, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001); Andrew J. Wistrich, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251 (2005); Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 Iowa L. Rev. 601 (2003); Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 Mo. L. Rev. 853, 904–05 (1998) ("we expect judges, as unbiased arbiters, to set personal beliefs aside.").

[135]Geoffrey P. Miller, *Bad Judges*, 83 Tex. L. Rev. 431, 432-33 (2004); Thomas A. Lambert, *Two Mistakes Behavioralists Make: A Response to Professors Feigenson et al. and Professor Slovic*, 69 Mo. L. Rev. 1053, 1054 n.6 (2004) (collecting criticisms of over-generalization of research on decision making).

mistakes. Guthrie thinks that "there is a "still-dominant assumption that the courthouse is the proper locus of dispute resolution" and the "legal system implicitly assumes that judicial error is infrequent, random, and often 'harmless.'"[136] Moreover, according to John Lande, "[m]any judges, lawyers, and other knowledgeable observers ...discover that judges are fallible as they would be to find out that gambling takes place in casinos."[137] Even though judges were perfect or made only few or unsystematic errors, some parties value other aspects more than decision accuracy.[138] While judges aim to arrive at a correct interpretation, arbitrators do the same as well.[139] Judges should not be regarded as angels and gods. Guthrie argues that "disputants might decide to place a primacy on other values in disputing, like self-determination, creativity, improved relationships, speedier and cheaper resolutions, and so forth."[140] To that extent, parties think that arbitration instead of court adjudication shows the diversity of values that may outweigh technical decision making.

On the one hand, it is argued that arbitrators are not compelled to determine the dispute according to legal precedents or principles. On the other hand, arbitrators can apply not only legal precedents or principles, but also standards of the industry, their contractual understanding, or merely what they regard as appropriate and fair.[141] In addition, standards of the industry, contractual understanding, and various norms create precedent and legal principles. Presently arbitration does not exist without statutory authorization and the right to force arbitration and enforce the resulting award clearly derives from state authority,[142] In other words, the parties' right to choose arbitration instead of litigation derives from the law and the constitution and so the parties' right does not appear from a vacuum. According to Paul F. Kirgis "Arbitration is a substitute for public adjudication, at least in cases involving mandatory legal rules, and public adjudication is beyond doubt a

[136]Chris Guthrie, *Misjudging*, 7 Nev. L.J. 420 (2007), at 448, 421.

[137]John Lande. *Judging Judges and Dispute Resolution Processes*, 2007 Nevada Law Journal 457, 461.

[138]John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280 (2004); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Neg. J. 49 (1994).

[139]Owen Fiss, *Between Supremacy and Exclusivity*, 57 Syracuse L. Rev. 187, 204 (2007) (arguing that judges aim to arrive at a correct interpretation [, not] the one that most or all people agree with.... [or] accept).

[140]Chris Guthrie, *Misjudging*, 7 Nev. L.J. 420 (2007), at 448.

[141]Luca G. Radicati di Brozolo. *Res Judicata and International Arbitral Awards*, ASA Special Series (2011).

[142]Edmonson v. Leesville Concrete Co. 500 U.S. 614 (1991); Lugar v. Edmondson Oil Co. 457 U.S. 922 (1982).

traditional government function."[143] Moreover, courts insist that arbitrators "follow the law."[144]

R. Reuben explains that binding dispute resolution, predominantly arbitration, is "traditionally an exclusive public function."[145] However, the Supreme Court in *Boddie v. Connecticut*,[146] stated that the state has a "monopoly over techniques for binding conflict resolution." An arbitral award is enforceable only after a judge enters the award as a judgment in accordance with FAA or other national arbitration laws and so arbitration does not operate autonomously from the state. Courts have expressed the view that the fact that the court enforces arbitration agreements and awards does not turn the arbitrator or the parties to the arbitration into state actors.[147] Thus, Courts have rejected arguments that either arbitration itself, or the judicial confirmation of arbitral awards, constitutes state action.[148] On the other hand, the right to compel arbitration and enforce the award derives from state authority. The *raison d'etre* for the FAA was that arbitration could not function successfully without judicial recognition and enforcement providing governmental assistance and benefits to parties in search of binding

[143]Paul F. Kirgis, *Judicial Review and The Limits of Arbitral Authority: Lessons from The Law of Contract*, 2007 St. John's Law Review 99, 108; Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 2007 St. John's Law Review 123.

[144]Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) ("[T]here is no reason to assume at the outset that arbitrators will not follow the law. . . .") (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 & n.19 (1985)); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001) ("[T]he arbitrator is bound to follow the law in the absence of a valid and legal agreement not to do so."); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1459–60 (11th Cir. 1997) ("When a claim arises under specific laws . . . the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so. As the Supreme Court has stated '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'") (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)); Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 Yale L.J. 1927, 1946 (1996) (noting that the Supreme Court's view that arbitration does not alter substantive rights "is in keeping with the courts' expectation that arbitrators will follow applicable legal rulings . . . .").

[145]Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 997–98 (2000); Southland Corp. v. Keating, 465 U.S. 1, 11, 16 (1984) (holding Federal Arbitration Act applies in state courts and preempts conflicting state law); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L. Rev. 101, 103 (2002) ("the Court's decision in *Southland Corp.* is widely held to be an illegitimate exercise in judicial lawmaking, flatly inconsistent with congressional intent in enacting the FAA. Commentators have lined up behind Justice O'Connor, whose dissent derided the [Chief Justice Burger's] majority opinion as an "exercise in judicial revisionism" that ignored the "unambiguous" legislative history of the FAA as a procedural statute applicable only in federal court.")

[146]401 U.S. 371, 375 (1971).

[147]*Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Lugar v. Edmonson Oil Co.* 457 U.S. 922 (1982).

[148]MedValUSA Health Programs, Inc. v. Member Works, Inc., 872 A.2d 423, 428 (Conn. 2005); Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

arbitration. Richard Reuben considers arbitrators as state actors.[149] Paul F. Kirgis states that "[a]rbitration has existed as a method of dispute resolution for centuries, and for most of that time the formal courts have considered arbitrators to be minor league judges."[150] It is worth presenting here that Canadian law considers the arbitrator as an integrated part of the general legal system.[151] Lord Justice Denning said that "[t]here is not one law for arbitrators and another for the court, but one law for all."[152] Furthermore, David A. Wright argues that "Canadian arbitrators do have an important role as public officials in interpreting and enforcing public policies and public rights. Canadian arbitrators frequently interpret human rights codes and other statutes and are increasingly adjudicating constitutional issues. The view of Lord Denning that there should be "one law for all" has contributed to the view of arbitrators as part of the general legal system."[153]

The Supreme Court moved from suspicion,[154] to a whole-hearted acceptance of arbitration as an alternative to the judicial process,[155] and so there is a doctrinal change that has enhanced the role of arbitration as a substitute for judicial decision-making. According to Michael C. Grossman, "[a] "symbiotic relationship" exists between the lucrative arbitration industry and the economizing of judicial resources leading to reciprocal profiting."[156] Court

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[149]Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577, 589–91 and 609–10 (1997) (critiquing American courts' consensus that private arbitration does not constitute state action subject to constitutional requirements).

[150]Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 2006 Legal studies Research Paper Series Paper #06-0057, 1.

[151]David A. Wright, *"Foreign to the Competence of Courts" Versus "One Law For All": Labor Arbitrators' Powers and Judicial Review in the United States and Canada*, Comp. Labor Law & Pol'y Journal Vol. 23: 967, at 1005 ("Canadian law's willingness to allow arbitrators to determine issues up to and including constitutional claims has stemmed from the view that they are public decision-makers, part of the general legal system.")

[152]Taylor (David) and Son, Ltd. v. Barnett, [1953] 1 All E.R 843 (C.A.), cited in Douglas College, 3 S.C.R. at 597 and Weber, 2 S.C.R. at 958.

[153]David A. Wright, *"Foreign to the Competence of Courts" Versus "One Law For All": Labor Arbitrators' Powers and Judicial Review in the United States and Canada*, Comp. Labor Law & Pol'y Journal Vol. 23: 967, 1004 ("Canadian law demonstrates that a nuanced approach is possible, giving the arbitrator a broad role to determine nearly all workplace disputes in unionized environments, including determining when a matter is arbitrable and adjudicating human rights claims. The arbitrator acts as a decision-maker of first instance in the workplace. Most significantly, this means that arbitrations are not delayed with trips to court to determine arbitrability.")

[154]Wilko v. Swan, 346 U.S. 427 (1953).

[155]Southland Corp. v. Keating, 465 U.S. 1 (1984); Allied-Bruce Terminix v. Dobson, 513 U.S. 249 (1995); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 679 (1995); Sherk v. Alberto-Culver, 417 U.S. 506 (1974).

[156]Michael C. Grossman, *Is this arbitration? Religious Tribunals, Judicial Review, and Due Process*, 107 Columbia Law Review 169, 200; Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 Ohio St. J. On Disp. Resol. 291, 313–15, 371 (2005) (discussing how manufacturers' use of form arbitration agreements has privatized dispute resolution in the mobile home industry).

enforcement gives tribunal awards under the FAA *res judicata* effects. A major disadvantage of arbitration is the arbitral tribunal's lack of coercive power necessary to support the process. This author thinks that access to courts or arbitration has been deemed an essential right guaranteed by the Constitution. In consensual arbitration, parties have waived their right to court access, precluding due process challenges later,[157] but parties' rights to conclude arbitration agreements are constitutional. The Supreme Court of the United States has embraced arbitration as a valid alternative to judicial resolution of disputes, but not "without regard to the wishes of the contracting parties."[158] To that extent an arbitration co-equal and independent to courts as a dispute mechanism will avoid the current differences between the procedures of courts and arbitration which damage both poles of justice whose authority is based on the same source, the Constitution and the peoples' acceptance.

VII
CONCLUSION

Parties can only submit to arbitration to the extent expressly allowed by the law. Arbitrators exercise a public function to the extent that law allows them to do so. On the other hand, courts' confirmation is needed to enforce arbitral decisions.[159] Moreover, Justice emanates from sovereignty and imposes itself upon obedience, and arbitration has its source in liberty.[160] Chief Justice Burger championed arbitration in his speeches as a way to advance competence.[161] Additionally, Marc Galanter says that in our society

[157]Kovacs v. Kovacs, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993) ("[P]arties expressly waived application of Maryland law . . . when they agreed to arbitration under Jewish substantive and procedural law.")

[158]Mastrobuono v. Shearson Lehman-Hutton, Inc., 514 U.S. 52, 56–57 (1995); Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. University, 489 U.S. 468, 479 (1989); Green Tree Financial Corp.–Alabama v. Randolph, 531 U.S. 79 (2000). ("It may well be that the existence of large arbitration costs could prevent a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum."); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 664 (6th Cir. 2003) (The costs of arbitration should be compared to the costs of litigation "in a realistic manner," by which the court evidently meant considering only the upfront forum costs of each.); Cooper v. MRM Inv. Co., 367 F.3d 493 (6th Cir. 2004); Pro Tech Indus., Inc. v. URS Corp., 377 F.3d 868, 873 (8th Cir. 2004) ("Under Texas law, we only consider the circumstances at contract formation to determine if a contract is unconscionable, rendering Pro Tech's current inability to afford the costs of arbitration irrelevant to the conscionabilty determination."); Shipping Limited v. Harebell Shipping Limited [2004] EWHC 2001 (Comm).

[159]Paul M. Hummer, *Reinsurance Arbitrations from Start to Finish: A Practitioner's Guide*, 63 Def. Counsel J. 228 (1996).

[160]Sutcliffe v. Thackrah [1974] AC 727 HL.

[161]Warren E. Burger, *Isn't There a Better Way?, Annual Report on the State of the Judiciary at the Midyear Meeting of the American Bar Association*, 68 A.B.A. J. 274, 277 (1982) (proposing to relieve overburdened courts with a system of arbitration).

specific "indigenous forums" survive that work by "codes of conduct" independent of the law.[162]

Law provides justice, but justice is a concept with a broader and deeper meaning than law and law can be one of the instruments that can be used to achieve justice. An independent arbitration can be used to achieve justice in a deeper and more socially acceptable way than formal law.[163] Levin states that in recent years the private sector has begun to use binding arbitration as the favourite method of dispute resolution and the payback appears to be that arbitration is a "quicker, less expensive and more private alternative to litigation."[164] Jean Sternlight argues that it is unsuitable for a society to establish completely private dispute resolution processes.[165] Kyron Huigens argues that Aristotle maintains that it is a rule of law that only governance by reason can be impartial and equitable which reflects the way that arbitration deals with the disputes.[166]

Informality[167] can make the created norms, soft or formal law more accessible and applicable to disputes.[168] Formal law strictly interpreted can desta-

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[162]Marc Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 Denv. U. L. Rev. xi, xiii (1989).

[163]Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 Nev. L.J. 289 (2002–2003) (urging that a proper system of justice should resolve societal as well as individual interests, seek societal harmony, and that both litigation and ADR can serve such goals); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 Tul. L. Rev. 1401 (2004) (examining tensions between using formal and informal systems to resolve employment discrimination complaints in the United States, Great Britain, and Australia).

[164]Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105 (1997), at 106.

[165]Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?* Stanford Law Review, Vol. 57, at. 1631 (2005).

[166]Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 Wm. & Mary L. Rev. 943, 1033 (2000) ("Aristotle insists on the rule of law, not of men, on the ground that only governance by reason can be impartial and even-handed."); Aristotle, *The Politics*, 219–24, 226 (T.A. Sinclair trans., rev. ed. 1981) ("Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetit[e].")

[167]Carrie Menkel-Meadow, *Exporting and Importing ADR: "I've Looked at Life from Both Sides Now"*, Disp. Resol. Mag., Spring 2006, at 5 (explaining that ADR's legitimacy can be established by values other than the rule of law, such as treaties, consent, and economic and trade values).

[168]Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 Yale L.J. 1675, 1714 (2005) (reviewing Zhu Suli, *Sending Law To The Countryside: Research On China's Basic-Level Judicial System* (2000), describing justice in rural China and urging that "[t]he solution [to the tension], therefore, may be to institutionalize the dialectic that Zhu describes between formal and informal, modern and customary, center and periphery in a manner designed to make the norms created more accessible to the public while also being respectful of local practices."); Lan Cao, *Introduction to Symposium, The "Rule of Law" in China*, 11 Wm. & Mary Bill Rts. J. 539, 542 (2003) (noting that the Chinese may have a very different attitude toward the rule of law than Americans do, and that "rule of law" translates into Chinese as "rule *by* law," which implies a more authoritarian approach); Pat K. Chew, *The*

bilize norms that are already operating effectively and successfully.[169] While formal rule-based systems such as courts/litigation can offer more certainty and transparency leading to justice and satisfaction, an informal approach such as arbitration can also lead to justice and satisfaction of a different degree, which in many occasions might be better than a formal system in taking into account other factors such as costs, speed and publicity. It has to be taken into account that an arbitrator's role is "creative more than interpretive,"[170] with arbitrators having wider autonomy than a judge.

Do judges have a paternalistic attitude that only they could make certain that individual plaintiffs would be afforded a fair opportunity to challenge corporate defendants?[171] Dean Larry Kramer thinks that courts force the "judicial supremacy"[172] and have embraced a "judicial sovereignty."[173] It is characteristic that under German law[174] infringements of essential procedural rights in arbitration court proceedings are to be reviewed by ordinary courts in setting aside proceedings or enforcement proceedings, and if the reviewing court itself infringes a party's vital rights then the party is entitled to file a constitutional complaint. Moreover, constitutional courts in Central

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Rule of Law: China's Skepticism and the Rule of People, 20 Ohio St. J. On Disp. Resol. 43, 48–54 (2005) (discussing China's ongoing tension between the Western rule of law approach and the traditional Chinese preference for rule of people.)

[169]Richard H. Pildes, *The Destruction of Social Capital through Law*, 144 U. Pa. L. Rev. 2055, 2057 (1996); Haini Guo & Bradley Klein, *Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs*, 20 Ohio St. J. On Disp. Resol. 825, 885–86 (2005) (stating that in China, formal law is "muddy" and more unpredictable than social norms).

[170]Harry Shulman, *Reason, Contract, and Law in Labor Relations, Address at the Oliver Wendell Holmes Lecture at Harvard Law School* (Feb. 9, 1955), 68 Harv. L. Rev. 999 (1955).

[171]Preston D. Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. Rich. L. Rev. 1499, 1502 (1995).

[172]Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 Harv. L. Rev. 4, 6 (2001) ("the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone."); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1921 (2003) (dismissing "judicial supremacy" as "a term of splendidly indefinite content"); Henry Hansmann, *Corporation and Contract*, Am. L. & Econ. Rev.1, 14-15 (2006) (arguing that states are superior at providing norms in part because they are more likely to adjust these norms to changing circumstances in a manner that is not biased towards any of the parties involved).

[173]Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 Harv. L. Rev. 4, 13 (2001); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. of Disp. Resol. 1 (2007) (exploring ADR's potential to generate public norms); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum. L.Rev. 319, 400-02 (2005) (exploring how arbitration could function as a meaningful component of a system of monitored self-regulation); John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998) ("[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the 'language and workings of the shop,' may best serve the interest of the parties." (citations omitted)).

[174]Roderich C. Thommel, *Zivilprozessordnung und Nebengesetze: Grosskommentar*, 471 (Walter de Gruyter 1995).

Europe have regularly been faced with attempts to evade the finality of arbitral awards and to have awards reviewed by constitutional courts.[175] Does the involvement of another court such as a constitutional court undermine the principle of finality of arbitral awards?

The above concise analysis shows the constitutionality of arbitration, and allows us to argue that the development of arbitration into a mechanism co-equal to, but independent from, the courts' dispute mechanism under a state administration, will strengthen justice in a country because it allows parties to have two co-equal ways of dispute resolution, each with its own characteristics leading to a much better justice. In other words, the establishment[176] of a National Authority Management Arbitration (NAMA) and an appellate arbitral tribunal for review of awards without any intervention from courts in *ad hoc* commercial/maritime and institutional arbitrations, will create a fully independent, alternative and co-equal system to the courts' dispute mechanism, and consequently two parallel civil law dispute systems will exist each keeping their own advantages. Finally, the existence of an appellate arbitral tribunal for review of awards will eliminate the worries such as those expressed by Margaret L. Moses[177] that when arbitrators are deciding claims under public law or any other law, there is a high likelihood for negative externalities because of incorrect decisions.

[175]Gyarfas, Juraj, *Constitutional Scrutiny of Arbitral Awards: Odd Precedents in Central Europe*, Journal of International Arbitration 29, no. 4 (2012): 391–404.

[176]G. Zekos, *Constitution, Arbitration and Courts*, 2013 www.novapublishers.com.

[177]Margaret L. Moses, *Arbitration Law: Who's in Charge?* 40 Seton Hall L. Rev. 147, 181 (2010) ("[W]hen arbitrators are deciding claims under public law, there is a high potential for negative externalities. For example, if an arbitrator makes a wrong decision in a matter arising under the antitrust laws, that decision may negatively affect not only the claimants but the rights of everyone else affected by the anti-competitive behavior.")