

JUDICIAL REVIEW AND THE LIMITS OF ARBITRAL AUTHORITY: LESSONS FROM THE LAW OF CONTRACT

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There are two ways to conceptualize the role of an arbitrator. First, we might think of an arbitrator as a private judge, hired by the parties but tasked with performing the same sorts of functions that public judges normally perform: finding facts and applying predetermined rules (normally legal rules) to those facts in order to assign rights and obligations. The other way to conceptualize the arbitrator's role is as a "contract reader." From this perspective, the arbitrator serves as the parties' agent, designated by them in advance to supply the terms of their agreement that they did not foresee and that are necessary to resolve a conflict between them.¹ The arbitrator focuses on the parties' relationship and interests rather than on the application of rules to facts.

Of these conceptions, or models, of arbitration, the former has the longer pedigree. Arbitration has existed as a method of dispute resolution for centuries,² and for most of that time the formal courts have considered arbitrators to be minor league judges. In part, that explains their long-lived hostility to arbitration. Common-law courts saw formal adjudication as too important and too fundamental a right to be left to minor leaguers. As a consequence, they typically refused to enforce

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¹ See Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) ("Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement.")

² See 14 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 187 (A.L. Goodhart & H.G. Hanbury eds., 1964). The other reason courts were hostile to arbitration was that it cut into their pay, which was tied to court fees. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 241 (1979).

arbitration agreements that would have the effect of "ousting" a court of its jurisdiction.³

The model in which the arbitrator is viewed as a contract reader, what I call the "contractarian model,"⁴ is of much more recent vintage. It was put forward early in the twentieth century by proponents who emphasized the advantages of arbitration in commercial matters.⁵ Its most important advocate, indeed the most important advocate arbitration has ever had, was Julius Henry Cohen, the principal drafter of what would become the Federal Arbitration Act ("FAA").⁶ Probably to make arbitration more palatable to hostile courts, he stressed that his version of arbitration would not function as second-class adjudication, because it would not really involve adjudication at all:

[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.*⁷

The contractarian model made sense when applied to commercial relationships because the merchants who employed it typically subscribed to a common set of business practices. When they had disputes, they wanted neutrals grounded in those practices to make decisions based on custom and mutual interest.

³ See *Vynior's Case*, (1609) 77 Eng. Rep. 595, 595–96 (K.B.); *Kill v. Hollister*, (1746) 95 Eng. Rep. 532, 532 (K.B.); *Thompson v. Charnock*, (1799) 101 Eng. Rep. 1310, 1310 (K.B.) (Kenyon, C.J.); *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868). Judge Cardozo explained the ouster principle in *Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, 211 N.Y. 346, 105 N.E. 653 (1914):

If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.

Id. at 354, 105 N.E. at 656.

⁴ See Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, 6 (2006).

⁵ See JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 18 (1918).

⁶ See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION* 194 n.36 (1992).

⁷ Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (emphasis added).

They did not want anyone, whether a genuine judge or a minor league one, to mechanically apply fixed legal rules.

With Cohen as its champion, the American Bar Association's Committee on Commerce, Trade, and Commercial Law succeeded in pushing the FAA through Congress.⁸ The FAA was intended to overcome the judiciary's resistance to arbitration, and it seems clearly to assume a role for the arbitrator consistent with the contractarian model. That perspective comes through in the provisions for judicial review of awards. Section 10 of the FAA contains a list of four grounds for vacating arbitral awards:

- (1) [W]here the award was procured by corruption, fraud, or undue means;
- (2) [W]here there was evident partiality or corruption in the arbitrators, or either of them;
- (3) [W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) [W]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁹

Notably absent is any provision for overturning an award because the arbitrator got the law wrong. If arbitrators were understood to be applying mandatory legal rules, such as substantive statutes, it would make sense to have some way for courts to ensure the correct application of law. But if arbitrators were understood only to be carrying out the parties' agreement, the only review required would ensure that the arbitrator was in fact neutral and in fact interpreted the agreement. And that is precisely what Section 10 requires.

For many years after the passage of the FAA, the Supreme Court held dual conceptions of arbitration. As of about 1960, the Court viewed labor arbitration (which technically does not fall under the FAA but has been assumed to operate under the same rules)¹⁰ from a contractarian perspective. In *United Steelworkers*

⁸ See MACNEIL, *supra* note 6, at 41, 92–94, 101.

⁹ 9 U.S.C. § 10 (Supp. 2005).

¹⁰ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (“[T]he federal courts have often looked to the [Federal Arbitration] Act for guidance in labor arbitration cases.”).

of *America v. Enterprise Wheel & Car Corp.*,¹¹ one of the cases in the celebrated *Steelworkers Trilogy*, the Court declared:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.¹²

Labor arbitration is comparable to commercial arbitration in that the parties are often involved in a long-term relationship in which they expect disputes to be resolved by reference to past practice, custom, and general equity rather than rigid legal rules. Although the Court never heard a commercial arbitration case during this period, it seems likely it would have treated such a case much the way it treated the labor cases—by keeping its hands off and enforcing both the agreement and the award.

In other cases, however, the Court held a very different view of arbitration. The most important of these was *Wilko v. Swan*,¹³ the 1953 decision in which the Court refused to compel arbitration of a dispute between an investor and a broker arising under the Securities Act of 1933.¹⁴ The Court worried that the arbitrators would not have a judge to instruct them on the law and, even conceding their obligation to apply the law, would be under no obligation to produce a reasoned opinion allowing for meaningful judicial review.¹⁵ It unmistakably viewed arbitration as a substitute for court adjudication, and as a poor one at that.

This dichotomy of approach continued for decades, until the 1980s, when an increasingly conservative Supreme Court concluded that the right to court adjudication of mandatory legal rules wasn't such a big deal after all. The key case was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹⁶ which involved a dispute arising out of an international commercial agreement.¹⁷ As a case involving relatively sophisticated commercial trading partners, the case seemed to fit within the contractarian model. But unlike the quotidian commercial

¹¹ 363 U.S. 593 (1960).

¹² *Id.* at 598.

¹³ 346 U.S. 427 (1953).

¹⁴ *Id.* at 428, 438.

¹⁵ *Id.* at 436.

¹⁶ 473 U.S. 614 (1985).

¹⁷ *See id.* at 616-18.

disputes envisioned by Julius Cohen, it implicated important statutory legal rules: the antitrust laws.¹⁸ Paying lip service to the need for accurate determinations of statutory rights, the Supreme Court held the antitrust claims arbitrable.¹⁹ It concluded that the statutory rights at issue could be “effectively . . . vindicate[d]” in arbitration.²⁰

After *Mitsubishi*, everything changed. The door to arbitration had been cracked, and the Court then threw it open. *Mitsubishi* had provided a precedent for arbitrating statutory claims, and in a series of decisions over the next decade, the Court enforced agreements to arbitrate claims under the securities laws,²¹ the Racketeer Influenced and Corrupt Organizations Act (“RICO”),²² and the federal discrimination laws.²³ None of those cases involved commercial trading partners of the type seen in *Mitsubishi* or contemplated by the drafters of the FAA. The Supreme Court has yet to find a statutory claim that it believes is not subject to binding contractual arbitration, regardless of the parties or their relationships.

Effectively, *Mitsubishi* and its progeny killed off the adjudicative model as an important conception of arbitration. The Supreme Court simply stopped talking about the limits of arbitration as a mechanism for the adjudication of legal rights. Once the Court decided that any and all claims could be arbitrated, it funneled everything into the framework of the FAA, with its contractarian approach to arbitration. While it never expressly declared that arbitration of discrimination claims or consumer fraud claims fit within a contractarian model, as a practical matter, those claims were governed by the same rules that governed traditionally contractarian matters such as labor and commercial disputes. Most notably from my perspective, they all received the same extremely deferential standard of judicial review.

This is the issue I will address here. The expansion of arbitrability has been accompanied by a narrowing of the grounds for judicial review of arbitral awards. The Court in

¹⁸ *Id.* at 634–35.

¹⁹ *See id.* at 625, 626, 628–29.

²⁰ *Id.* at 636–37.

²¹ *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479, 486 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 222, 238 (1987).

²² *McMahon*, 482 U.S. at 223, 242.

²³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

Wilko had vaguely suggested that courts could vacate an award rendered in "manifest disregard" of the law: "[I]nterpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject . . . to judicial review for error in interpretation."²⁴ Whatever that meant, it at least indicated that courts had the power to oversee the legal decisionmaking of arbitrators to ensure some degree of adherence to legal rules. But, as the Court retreated from *Wilko*, it adopted an increasingly deferential posture toward arbitral awards. For instance, the Court said in several cases in the 1980s that awards could be vacated if they violated public policy.²⁵ Lower courts had relied on the public policy grounds to vacate awards that produced results contrary to the public interest.²⁶ In *Eastern Associated Coal Corp. v. United Mine Workers of America*,²⁷ however, the Court curbed that line of cases by suggesting that an award should be vacated on public policy grounds only if it required the parties to engage in illegal conduct.²⁸ As a result of that decision, public policy has virtually ceased to be a viable avenue for attacking awards.

The bottom line is that awards are rarely vacated by courts on any grounds. They are almost never vacated on grounds related to the substance of the award. After the Court reiterated the manifest disregard test in dicta in *First Options of Chicago, Inc. v. Kaplan*,²⁹ the number of attacks on awards on substantive grounds increased, but courts have overwhelmingly refused to vacate on those grounds.³⁰ Consistent with an approach that

²⁴ *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (emphasis added).

²⁵ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42-43 (1987); *W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).

²⁶ See Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 95-100 (2000) (collecting cases since 1960) (citing Peter Feuille & Michael LeRoy, *Grievance Arbitration Appeals in the Federal Courts*, 45 ARB. J. 34, 44 (1990)).

²⁷ 531 U.S. 57 (2000).

²⁸ See *id.* at 66, 67.

²⁹ 514 U.S. 938, 942, 943 (1995).

³⁰ I am aware of three circuit court decisions since 2000 vacating or affirming the vacatur of awards on manifest disregard grounds. See *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126, 127-28, 134 (2d Cir. 2003); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 844, 845, 849 (6th Cir. 2003); *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1062, 1069 (8th Cir. 2003). During that period, at least eighty-three published district court opinions discussed manifest disregard as a grounds for vacating an award. Not one of them resulted in a vacatur. See Kirgis, *supra* note 4, at 25-26.

sees arbitration as a contractual matter of the parties' choosing, courts simply refuse to get involved. They enforce agreements to arbitrate and they decline to review the subsequent awards. The assumption that legal rights are adequately protected in arbitration goes unexamined.

I. ADJUDICATION AND DUE PROCESS

We have a long, established tradition in this country of requiring certain procedural guarantees as a condition of adjudicating legal rights and obligations. The Fifth and Fourteenth Amendments bar the state and federal governments from depriving a person of life, liberty, or property without due process of law.³¹ Due process has been interpreted to include substantive and procedural components. Substantive due process requires that the government have a legitimate reason for the deprivation of life, liberty, or property.³² Procedural due process requires that the government follow adequate procedures when it deprives a person of life, liberty, or property.³³

*Mathews v. Eldridge*³⁴ is the primary case defining the procedures required under the doctrine of procedural due process. The Supreme Court in *Mathews* set up a balancing test requiring consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁵

³¹ U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

³² See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (stating that the Fifth Amendment requires that a deprivation be accompanied by due process, which in turn demands that there be a legitimate basis for the deprivation).

³³ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (emphasizing that "the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures").

³⁴ 424 U.S. 319 (1976).

³⁵ *Id.* at 335.

If arbitration were understood to function as a species of adjudication, the *Matthews* factors would almost certainly require some degree of judicial review. Cases involving federal discrimination and consumer fraud laws implicate important private interests under the first factor. Given the rate at which federal district courts are overturned on appeal,³⁶ we have to assume that arbitrators make errors of law with some frequency. Under the second factor, judicial review would be an effective procedural safeguard to reduce those errors. The fiscal and administrative burdens imposed on the government are no different than those required when disputes do not involve arbitration, so the third factor would not outweigh those interests.

The conclusion that due process would require some degree of judicial review of arbitral awards is bolstered by the fact that in every other adjudicative context, we provide for a level of review. Courts are universally subject to at least one level of review, even if it is available only through *certiorari*. And administrative agencies of all kinds have their decision making subjected to review by courts. In the absence of a grant of appellate-type review—as provided under the Administrative Procedures Act³⁷—individuals adversely affected by the actions of government officials have long had recourse to the courts through common-law “officer suits.”³⁸ Even where Congress has expressly attempted to preclude judicial review of administrative determinations, courts have often held that review of statutory questions and general questions of law must be available.³⁹

Of course, if arbitration does not come under the aegis of *Matthews*, all of that is irrelevant. The main argument for why due process protections, including the right to judicial review, do not apply to arbitration is that arbitration does not involve state action. Because the due process clauses apply only to deprivations of life, liberty, or property by state actors, no due process protection applies to entirely private conduct. Arbitrators are private decision makers, so the facile conclusion is that no due process protections apply to their awards.

³⁶ See Kirgis, *supra* note 4, at 36–37.

³⁷ 5 U.S.C. § 702 (2000).

³⁸ See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 332 (1993).

³⁹ See *id.* at 334–35.

But as Richard Reuben has cogently argued, there are good reasons to treat arbitrators as state actors.⁴⁰ The Supreme Court set out the test for identifying state action when quasi-judicative procedures are challenged in *Edmonson v. Leesville Concrete Co.*,⁴¹ in which the Court held that a preemptory challenge exercised by a private litigant in civil litigation could constitute state action. Relying on *Lugar v. Edmondson Oil Co.*,⁴² the Court applied a two-part test, asking "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."⁴³ The Court explained further that the second component required consideration of "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."⁴⁴

The first prong of the analysis seems easily satisfied in the arbitration context. Binding contractual arbitration would not exist without statutory authorization. And once an award is made, it is subject to judicial confirmation and then enforceable as a judgment. The right to compel arbitration and enforce the resulting award clearly derives from state authority.

Application of the second prong is more complex, but still seems to indicate state action. The first sub-test for whether an arbitrator can be considered a state actor addresses the extent of governmental assistance and benefits. Without question, arbitration depends heavily on the support of the state. Courts both compel arbitration and enforce arbitral awards. Without that assistance, arbitration would cease to exist. The *raison d'être* for the FAA was that arbitration could not function effectively without judicial recognition and enforcement. The

⁴⁰ See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 619, 625 (1997).

⁴¹ 500 U.S. 614 (1991).

⁴² 457 U.S. 922 (1982). In *Lugar*, the Supreme Court held that the attachment of private property by a private litigant under a state statute could constitute state action if the private litigant acted jointly with a state actor. *Id.* at 941.

⁴³ *Edmonson*, 500 U.S. at 620 (citation omitted).

⁴⁴ *Id.* at 621-22 (citations omitted).

FAA exists to provide governmental assistance and benefits to parties seeking to use binding arbitration.

The second sub-test is also easily resolved, as long as one adopts the adjudicative model (as I am assuming throughout this discussion). Arbitration is a substitute for public adjudication, at least in cases involving mandatory legal rules, and public adjudication is beyond doubt a traditional government function.

The third sub-test, considering the extent to which the injury is aggravated by governmental authority, is more difficult to apply, simply because it is not clear what the Court meant. In *Edmonson*, the Court found an aggravation of the discrimination against the challenged juror due to the fact that the discriminatory event happened in a public courthouse.⁴⁵ Perhaps the fact that an adverse arbitral award may be confirmed and entered as a judgment would satisfy that prong. Professor Reuben points to the fact that arbitration removes important disputes from the public realm as evidence of a broader societal harm.⁴⁶ In any event, application of this sub-test seems of less importance given the apparently strong indicia of state action under the first two sub-tests.

If this analysis seems tidy, it has not persuaded the courts. In a series of decisions at both the federal and state levels, courts have rejected arguments that either arbitration itself or the judicial confirmation of arbitral awards constitutes state action.⁴⁷ For example, in *Davis v. Prudential Securities, Inc.*,⁴⁸ the Eleventh Circuit considered whether the due process clause required judicial review of an arbitral award assessing punitive damages, under the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*.⁴⁹ Relying on Supreme Court cases holding that regulated industries and the NCAA were not state actors, the *Davis* court found that "the arbitration was a private proceeding arranged by a voluntary contractual agreement of the

⁴⁵ *Id.* at 628.

⁴⁶ See Reuben, *supra* note 40, at 633-41.

⁴⁷ See, e.g., *Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1466 (N.D. Ill. 1997); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 708 F. Supp. 95, 96, 97 (S.D.N.Y. 1989); *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423, 428 (Conn. 2005).

⁴⁸ 59 F.3d 1186 (11th Cir. 1995).

⁴⁹ 499 U.S. 1 (1991); see also *Davis*, 59 F.3d at 1190.

parties” and so did not constitute state action.⁵⁰ The court also concluded that judicial confirmation of the award did not constitute state action because confirmation amounted to nothing more than judicial enforcement of a private contract.⁵¹

Davis emphasizes the contractual nature of arbitration as a reason not to apply due process. The Seventh Circuit’s decision in *Smith v. American Arbitration Ass’n*⁵² is even more explicit in invoking a contractarian conception of arbitration to escape the logic of *Edmonson*. *Smith* held that a party to arbitration did not have a right under the equal protection clause to a panel of arbitrators containing at least one person of that party’s gender.⁵³ Writing for the court, Judge Posner emphasized that “[a]rbitration is a private self-help remedy.”⁵⁴ Tellingly, he described the arbitration process in these terms:

When arbitrators issue awards, they do so pursuant to the disputants’ contract—in fact the award is a supplemental contract obligating the losing party to pay the winner. The fact that the courts enforce these contracts, just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play.⁵⁵

Like the other courts that have addressed the state action issue, the court never seriously attempted to apply the *Edmonson* test.

As these cases make clear, courts have avoided the difficult due process issues arbitration presents by resorting to a contractarian conception of the arbitration process. If the arbitration process is simply an extension of the parties’ contractual relationship, then the award is equivalent to a contract term. Under a large body of precedent, court enforcement of private contract terms does not constitute state action. Without state action, there can be no due process violation. No further analysis is needed, and neither Judge Posner nor the other courts that have considered this question give any.

⁵⁰ *Davis*, 59 F.3d at 1191.

⁵¹ *Id.* at 1191, 1192.

⁵² 232 F.3d 502 (2000).

⁵³ *Id.* at 504.

⁵⁴ *Id.* at 507.

⁵⁵ *Id.* (emphasis added).

So let's take these courts at their word. Let's concede that arbitration is best understood as a species of contract rather than a species of adjudication so that due process does not require a heightened level of judicial review. What consequences follow? Can we then justify the extreme deference courts pay to arbitrators?

II. ARBITRATION AS THE WAIVER OF LEGAL RIGHTS

Imagine a case raising a straightforward legal issue—say, an employment discrimination case under a statute providing for an award of attorneys' fees to a victorious plaintiff. In a court of law, there would be no question about the attorneys' fees provision; if the plaintiff won, the plaintiff would get attorneys' fees. But assume that the case goes to arbitration under a clause in the employment contract. The arbitrator finds that the employer discriminated against the plaintiff and awards damages but refuses to award attorneys' fees.

Under an adjudicative conception of arbitration, this would constitute an error of law. The decision denying attorneys' fees would be reversible under either a *de novo* standard or even some lesser standard like abuse of discretion. Under a contractarian conception of arbitration, however, the arbitrator's decision is treated as a contract term agreed upon by the parties *ex ante*. The plaintiff would be understood to have waived, *in the employment agreement*, the right to recover attorneys' fees incident to a discrimination grievance.

That type of "arbitral waiver" occurs whenever an arbitrator makes a decision that would have been overturned on appeal had a court made the same decision. The attorneys' fees scenario I posited comes from a reported case, *DiRussa v. Dean Witter Reynolds, Inc.*⁵⁶ The arbitrators awarded the plaintiff compensatory damages under the Age Discrimination in Employment Act ("ADEA") but refused to grant him attorneys' fees even though the ADEA expressly mandates the award of attorneys' fees to a successful plaintiff.⁵⁷ The Second Circuit recognized that attorneys' fees should have been awarded under the statute but concluded that, because the arbitrators did not know that attorneys' fees were statutorily required, there was no manifest

⁵⁶ 121 F.3d 818, 820–23 (2d Cir. 1997).

⁵⁷ *Id.* at 822.

disregard of the law.⁵⁸ As a practical matter, the *DiRussa* court upheld the plaintiff's waiver of his right to attorneys' fees.

DiRussa is unusual in that the award made the legal error apparent on its face. Most awards contain little or no explanation for the arbitrator's decision, so usually it is impossible to know whether the arbitrator decided the case in a way contrary to one party's legal rights. For that reason, we cannot assess with any confidence the extent to which arbitrators make awards that would be overturned if rendered by a judge in a comparable court case. But we can be confident that it happens regularly. The empirical studies that exist suggest that arbitrators frequently choose not to follow the law.⁵⁹ And we know that district courts are routinely overturned by courts of appeal. My research indicated that appeals in federal discrimination cases produce a reversal and/or a remand in about twenty-five to thirty percent of the cases.⁶⁰ Even if the bulk of those are reversals on procedural grounds, a lot of district courts are making reversible legal errors. We have no reason to assume that arbitrators would make errors at a lower rate. "Arbitral waivers" must be common occurrences.

Again, courts are comfortable with arbitral waivers because the parties chose to have their contractual disagreements resolved by an arbitrator. Party autonomy and freedom of contract dictate that they should be allowed to enter into that bargain and then be held to it. Or so courts assume. In reality, though, things are not quite that simple. The problem is that freedom of contract is not as broad as the courts have tended to assume. In fact, basic principles of contract law preclude arbitral waivers in many cases that courts today refuse even to consider.

III. THE LAW OF EXCULPATORY CONTRACTS IN THE ARBITRATION CONTEXT

People waive their substantive legal rights every day. That is, after all, what settlement consists of. If I have a claim that I know would succeed in court but I choose to settle it for some amount less than I would ultimately receive in order to avoid the trauma of litigation, I have waived a legal right. For the most

⁵⁸ *Id.* at 822-23.

⁵⁹ See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719-20 (1999).

⁶⁰ See Kirgis, *supra* note 4, at 36.

part, I am entirely free to do that. There are only a handful of situations in which a court will scrutinize a settlement between competent parties.⁶¹

Superficially, arbitration looks a lot like settlement. Arbitration takes place after a dispute has arisen and serves the purpose of avoiding litigation. But under the contractarian model of arbitration, the award is treated not as an offshoot of the adjudicative process but as a term of the original contract. This makes it very different from settlement. Settlement happens *after* legal rights have matured and at a point at which parties have full information about the rights they are foregoing. In contrast, parties enter into arbitration agreements long before they even know the nature of the arbitrated dispute. Not only do they lack complete information about the rights they may forego, they may also face power imbalances that make the waiver of rights only nominally voluntary.

Arbitral waivers, under this conception, are the equivalent not of settlements, but of exculpatory contracts. An exculpatory contract is an agreement in which one party agrees to relieve another party of liability for harms resulting from the conduct of the latter. Exculpatory contracts typically take the form of releases or waivers of rights or defenses.

Exculpatory contracts have traditionally been disfavored. Courts scrutinize them to ensure that they do not compromise important rights or operate unfairly. In some circumstances, exculpatory contracts are flatly disallowed. In others, they are limited. In all cases, they must be manifested in clear and unambiguous language. Here are some of the key rules governing exculpatory contracts, with their relevance to arbitration.

Intentional torts. Exculpatory contracts that relieve a party of liability for its intentional harms are per se unenforceable. In the words of the Restatement (Second) of Contracts: "A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."⁶² The rule is not limited to physical harms, so it would

⁶¹ See, e.g., Antitrust Penalties & Procedures Act of 1974, 15 U.S.C. § 16(e) (Supp. 2005) (requiring judges to decide whether antitrust settlements proposed by the United States are "in the public interest"); FED. R. CIV. P. 23(e) (requiring court approval for settlement of class actions).

⁶² See RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981).

apply to agreements purporting to absolve a party from such intentional harms as discrimination and fraud.⁶³

Arbitration is frequently used to resolve claims of intentional harm. Ever since the Supreme Court backtracked from *Wilko*, securities fraud claims of all kinds have been subject to binding arbitration.⁶⁴ The Court has also enforced arbitration of fraud claims under RICO.⁶⁵ In *Green Tree Financial Corp.—Alabama v. Randolph*,⁶⁶ the Court ratified the arbitration of consumer fraud claims as long as the costs of the arbitration were not so great as to preclude the claimant from pursuing arbitration.⁶⁷ And in probably its most controversial arbitration decision to date, *Gilmer v. Interstate/Johnson Lane Corp.*,⁶⁸ the Court enforced an arbitration clause in a dispute involving employment discrimination claims under the Age Discrimination in Employment Act of 1967.⁶⁹ Fraud and discrimination claims are now arbitration staples.

Public services. Where a party is engaged in providing important services to the public, exculpatory contracts that relieve it of liability for its negligence are often held unenforceable. Most importantly in the arbitration context, the provision of medical services is considered a public service. In the leading case, *Tunkl v. Regents of the University of California*,⁷⁰ the UCLA Medical Center required a patient to sign a release upon admission that relieved the hospital “from any and all liability for the negligent or wrongful acts or omissions of its employees”⁷¹ When an injured patient sued, the California Supreme Court refused to enforce the release on the ground that the hospital was providing a public service.⁷² Other courts have also held that the provision of medical treatment is a public service, for which exculpatory contracts are unenforceable.⁷³

⁶³ See 15 GRACE MCLANE GEISEL, CORBIN ON CONTRACTS § 88.8 (2003).

⁶⁴ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–85 (1989); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 228–34 (1987).

⁶⁵ *McMahon*, 482 U.S. 220, 238–42.

⁶⁶ 531 U.S. 79 (2000).

⁶⁷ *Id.* at 82, 90.

⁶⁸ 500 U.S. 20 (1991).

⁶⁹ 29 U.S.C. § 621 (2000); *Gilmer*, 500 U.S. at 23.

⁷⁰ 383 P.2d 441 (Cal. 1963).

⁷¹ *Id.* at 442.

⁷² *Id.* at 447.

⁷³ See *Leidy v. Deseret Enter., Inc.*, 381 A.2d 164, 168 (Pa. Super. Ct. 1977);

Doctors and hospitals have begun to include provisions in their contracts with patients requiring arbitration of disputes, including medical malpractice claims. A study in California in the late 1990s found that nine percent of physicians and hospitals in the state used arbitration agreements but that the number was growing rapidly.⁷⁴ Health maintenance organizations have been more aggressive. The same study found that seventy-one percent of HMOs in California included arbitration clauses in their contracts with members.⁷⁵ The nation's largest HMO, Kaiser Permanente, requires all its subscribers to agree to arbitration.⁷⁶

Courts have split on the question of whether these agreements should be enforced. In *Broemmer v. Abortion Services of Phoenix, Ltd.*,⁷⁷ the Arizona Supreme Court refused to enforce an agreement requiring a patient to arbitrate her medical malpractice claim against her physician. The court found the agreement unreasonable because it appeared in a contract of adhesion and did not involve a conspicuous and explicit waiver of the right to a jury trial.⁷⁸ Earlier cases from Nevada and California had reached similar conclusions.⁷⁹ More recently, however, the Tennessee Supreme Court in *Buraczynski v. Eyring*⁸⁰ enforced an arbitration agreement in a malpractice case between a patient and her doctor.⁸¹ The court focused on the fact that the agreement was on a separate one-page document entitled "Physician-Patient Arbitration Agreement" that included a short explanation encouraging the patient to discuss questions about the agreement with the doctor.⁸² Since 2000, courts in Alabama, Colorado, Florida, and Idaho have held that arbitration

Olson v. Molzen, 558 S.W.2d 429, 430, 432 (Tenn. 1977).

⁷⁴ Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, 60 LAW & CONTEMP. PROBS. 153, 171 (1997).

⁷⁵ *Id.* at 173.

⁷⁶ Kathy L. Cerminara, *Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflict*, 33 LOY. U. CHI. L.J. 547, 552-53 (2002) (discussing Kaiser's arbitration agreements).

⁷⁷ 840 P.2d 1013 (Ariz. 1992).

⁷⁸ *Id.* at 1016, 1017.

⁷⁹ See *Benyon v. Garden Grove Med. Group*, 161 Cal. Rptr. 146, 150, 152 (Cal. Ct. App. 1980); *Obstetrics and Gynecologists William G. Wixted, M.D., Ltd. v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985).

⁸⁰ 919 S.W.2d 314 (Tenn. 1996).

⁸¹ *Id.* at 316.

⁸² See *id.* at 321.

clauses in health care contracts are enforceable under appropriate conditions.⁸³ None of these courts have acknowledged the potential for an error by an arbitrator to produce a waiver of the patient's rights that would be impermissible if framed as an exculpatory contract.

Unequal bargaining power. Unequal bargaining power used to be almost universally acknowledged as grounds for invalidating an exculpatory clause. The Restatement (Second) of Torts stated that exculpatory clauses would not be enforced "where there is such disparity of bargaining power between the parties that the agreement does not represent a free choice on the part of the plaintiff."⁸⁴ More recently, courts have rejected a per se rule of unenforceability in favor of a rule of strict construction against the drafter.⁸⁵ The Restatement (Third), reflecting that trend, provides that "[w]hen an individual plaintiff passively accepts a contract drafted by the defendant, the contract is construed strictly, favoring reasonable interpretations against the defendant."⁸⁶

This change has been accompanied by stricter scrutiny of exculpatory contractual language. Courts typically require that exculpatory language be explicit and conspicuous. The New York Court of Appeals has held that "unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts."⁸⁷ The Supreme Court of Texas has applied a broad "fair notice" requirement, which includes both a requirement that the agreement expressly disclaim liability for negligence and a "conspicuousness requirement."⁸⁸ The

⁸³ See Kathrine Kuhn Galle, *The Appearance of Impropriety: Making Agreements to Arbitrate in Health Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 992 n.151 (2004).

⁸⁴ RESTATEMENT (SECOND) OF TORTS § 496B cmt. j (Tentative Draft No. 9, 1963).

⁸⁵ See *Crandall v. Bangor Sav. Bank*, No. CV-98-239, 1999 Me. Super. LEXIS 304, at *5-6 (Me. Super. Ct. Nov. 4, 1999) ("The law in Maine appears to be that where contracts are presented on a 'take it or leave it' basis and the parties do not have equal bargaining power, the contract may be interpreted to meet the expectations of the party in the inferior bargaining position." (citations omitted)).

⁸⁶ RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 2 cmt. d (Proposed Final Draft 1999).

⁸⁷ *Gross v. Sweet*, 49 N.Y.2d 102, 107, 400 N.E.2d 306, 309, 424 N.Y.S.2d 365, 368 (1979).

⁸⁸ *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

Restatement (Third) of Torts reiterates that test, noting that “[c]ourts normally construe exculpatory contracts strictly, finding that the plaintiff has assumed a risk only if the terms of the agreement are clear and unequivocal.”⁸⁹ These requirements apply to all exculpatory contracts but are especially relevant where there is a high disparity in bargaining power.

Outside of the health care context, courts have rarely required that arbitration clauses be clear and conspicuous, even in contracts of adhesion.⁹⁰ Indeed, in *Doctor's Associates, Inc. v. Casarotto*,⁹¹ the Supreme Court held that the FAA preempted state legislation conditioning the enforceability of arbitration clauses on special notice requirements.⁹² Only California has recognized the risks posed by inconspicuous arbitration agreements in contracts of adhesion. In *Discover Bank v. Superior Court*,⁹³ the California Supreme Court refused to enforce an arbitration agreement waiving a consumer's right to participate in a class action where the arbitration clause was imposed as an amendment to the cardholder agreement in the form of a bill-stuffer.⁹⁴ The court held such agreements unconscionable where they “may operate effectively as exculpatory contract clauses that are contrary to public policy.”⁹⁵ The U.S. Supreme Court has yet to take this question up directly; California's protective approach to consumers may not last long. In any event, California is unique in recognizing the risks posed by adhesive arbitration agreements.

⁸⁹ RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 2 cmt. d, reporters note (Proposed Final Draft 1999).

⁹⁰ See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 172–75 (5th Cir. 2004) (upholding an arbitration clause in a contract between cellular-telephone customers and their service providers); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 568–69 (E.D. La. 2002) (enforcing the arbitration provision in a contract between a large retailer and its charge card customers); *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 912, 920 (N.D. Tex. 2000) (holding enforceable an arbitration provision in a contract between a bank and its credit card holders).

⁹¹ 517 U.S. 681 (1996).

⁹² *Id.* at 683.

⁹³ 113 P.3d 1100 (Cal. 2005).

⁹⁴ *Id.* at 1108.

⁹⁵ *Id.*

IV. A PRAGMATIC FRAMEWORK FOR REVIEW OF ARBITRAL AWARDS

Every time a court refuses to disturb an award that would be considered remedial legal error if issued by a judge, the court effectively sanctions the prospective waiver of a legal right. Where the effect of that waiver is to grant immunity for an intentional tort, to allow a provider of public services to escape liability, or to impose an exculpatory contract on a party with disproportionately low bargaining power and inadequate knowledge of the rights foregone, the waiver amounts to a violation of contract law. One logical conclusion to draw is that courts should review arbitral awards raising those issues on a *de novo* standard.⁹⁶ Logically, if the waiver violates contract law then the legal error producing the waiver should be reversed—no deference to the arbitrator is warranted.

That conclusion is attractive from a theoretical standpoint, but it is not practicable. Courts have shown little interest in expanding their oversight role with respect to arbitration. They have been reluctant to accept heightened standards of judicial review even where the parties expressly agreed to them in an arbitration agreement.⁹⁷ A limited increase in judicial review may be feasible; a dramatic and broad increase in judicial review is not. Even if courts were willing to take on a greater oversight role, however, an across-the-board increase in judicial review would not be desirable because it would unnecessarily constrict party autonomy in the selection of dispute resolution processes.

Although I have based my argument on the theory that an arbitrator's award is equivalent to a contract term agreed upon

⁹⁶ See Martin H. Malin, *Privatizing Justice—But by How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 628 (2001) (“*De novo* judicial review of arbitral interpretations of law is necessary to . . . ensure that arbitration does not result in contracting out of statutory compliance.”).

⁹⁷ See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001). The Seventh and Eighth Circuits have suggested in dicta that parties should not be entitled to contract for heightened review. See *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998). The Third, Fourth, and Fifth Circuits have held that parties do have a right to contract for heightened judicial review of arbitral awards. See *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292–93 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96–2261, 1997 U.S. App. LEXIS 21248, at *16 (4th Cir. Aug. 11, 1997) (per curiam); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 591–92 (5th Cir. 2001).

by the parties *ex ante*, in reality, an arbitral award is different from a true contract term in important ways. When parties agree to arbitrate, they do not agree to forego their rights—they agree to accept the *chance* that they will forego their rights. Parties go into arbitration hoping for a favorable decision, and many times they get it. When they do not, they at least had the opportunity to present evidence and argue their side. A waiver of rights under these circumstances is problematic, but it is less problematic than an express waiver of rights in an exculpatory agreement.

Furthermore, there is evidence that binding, final arbitration can benefit claimants, at least some of the time. Some studies have shown that arbitration is good for employees with discrimination claims, for example, because its low cost allows the pursuit of smaller or more speculative claims that no plaintiff's lawyer operating on a contingency fee would pursue in court.⁹⁸ That advantage could be lost if every employee who won in arbitration faced the prospect of a further round of litigation in court.

Because of the judicial lack of enthusiasm for stringent review and these mitigating practical factors, my suggestion is for a standard of review only modestly higher than the current policy of total deference. A relatively deferential standard could ensure basic compliance with legal rules while retaining the effectiveness of arbitration. Other procedural systems offer formulations for deferential standards of review that would achieve these objectives. For example, trial judges review the decisions of juries by asking whether a reasonable jury could decide the way that jury decided.⁹⁹ Appellate courts review the factual determinations of trial judges by asking whether the judge's decision was clearly erroneous and review other discretionary decisions by asking whether the judge abused her discretion.¹⁰⁰ Courts review the determinations of administrative agencies by asking whether the agency's decision is arbitrary and capricious.¹⁰¹ It is not clear what difference, if any, there is

⁹⁸ See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–64 (2001).

⁹⁹ See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 13.4 (4th ed. 2005) (describing the nature and scope of review).

¹⁰⁰ *Id.*

¹⁰¹ See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (stating

among these standards. Each requires deference to the lower decision-maker, and each applies some version of a test of rationality. Any of the three could be adopted, as could an explicit rationality standard. The exact wording of the test is not especially significant as long as the court has the power to correct clear and important errors of law.

That is the basic idea. Several implications follow. First, to re-emphasize, this heightened standard of review should apply only in cases where an exculpatory agreement would be unenforceable. Those cases include intentional torts such as consumer and securities fraud and discrimination, health care disputes, and any case with a radical imbalance of power in which the weaker party is not likely to fully understand the rights waived by agreeing to arbitration. Needless to say, that list covers the most contentious areas of arbitral expansion in recent years.

Second, the heightened standard should apply only to errors of law. The arbitrator's factual findings should be free from judicial review outside of the traditional grounds. The arbitrator's factual findings provide the background for her decision on the parties' rights and responsibilities going forward. Under a contractarian model, those findings are the equivalent of the recitals in a contract. Contract law prevents parties from bargaining away certain legal rights in certain circumstances. It says nothing about the factual premises on which the parties base their agreements.

Even though courts have no reason to review the arbitrator's factual findings, my proposal would require arbitrators to memorialize their factual findings and legal conclusions in order to allow for meaningful judicial review of the legal issues. There seems to be a trend in this direction anyway,¹⁰² but it represents

that the applicable standard of review for administrative agencies determinations is "arbitrary or capricious" standard); *Neiman v. Sec'y of Dep't of Health & Human Servs.*, 722 F. Supp. 954, 957 (E.D.N.Y. 1988) (reviewing the administrative agency's determination under the arbitrary standard).

¹⁰² Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 394-95 (1998) (citing recommendations for written opinions in at least some types of arbitrations); see also Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 287-88 (2000) (arguing for written, publicly available opinions in cases involving issues of public law).

a change from traditional practice in which arbitrators were expressly encouraged not to create a reviewable record. From my perspective, this change would be a positive one. The requirement of writing a reasoned opinion has long served as an important guarantor of adjudicative fairness. When arbitrators are called on to decide the sorts of statutory issues traditionally reserved for courts, and the parties' relationship indicates an intention to apply legal rules to the dispute, the arbitrators should provide reasons for their decisions.

Finally, the heightened standard of review I propose should apply regardless of the terms purportedly agreed upon in the arbitration clause. To ensure that arbitration does not function as the imposition of impermissible exculpatory contracts, parties must not be permitted to prospectively waive their rights to the application of legal rules in these cases. Therefore, they should not be able to contract away judicial review even if they attempt to do so expressly in the agreement. On the other hand, once the rights in question have matured and the parties have reached the point of arbitration, the waiver calculus changes. A waiver of rights after a legal cause of action has matured is simply a settlement. If the parties mutually decide to give an arbitrator the freedom to disregard the law at that point—or if they simply want to guarantee that their dispute will not reach a court—their wishes should be honored unless a settlement in similar circumstances would be disallowed.¹⁰³ The heightened standard of review, then, should apply presumptively only. Courts should assume that they have an obligation, in the appropriate cases, to review arbitral awards for irrationality (or some comparable standard) unless the parties expressly agree to a different standard after their dispute reaches the point of arbitration.

CONCLUSION

When arbitrators decide questions raising mandatory legal rules, such as statutory fraud and discrimination laws, they engage in something very close to adjudication. If that practice is deemed equivalent to adjudication, there is no logical reason to exempt it from the procedural guarantees that apply in every

¹⁰³ *Accord* Ware, *supra* note 59, at 728–29. Professor Ware argues for de novo review of awards implicating mandatory legal rules, but not for post-dispute agreements to arbitrate. Stephen J. Ware, *Interstate Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 88, 114 (Edward Brunet et al. eds., 2006).

other adjudicative context. One of those guarantees is a right to some level of meaningful review.

Courts avoid facing the due process implications arbitration raises by applying the same standards to all arbitrations, whether they arise out of labor disputes, commercial arrangements, or consumer fraud claims. The standards they apply assume a model of arbitration rooted in contract rather than adjudication. They assume that arbitrators act as the parties' agents tasked with interpreting the parties' agreements rather than as private adjudicators taking the place of public judges. Seeing arbitration as purely a voluntary, contractual enterprise, courts decline to exercise any meaningful review.

My objective here is to show that this sleight of hand will not accomplish what the courts have assumed it will. Even if arbitration is a form of contract, there are limits on arbitrators' authority that must be enforced by courts. Parties are not permitted to insulate themselves from liability for their intentional harms or from their obligations in the provision of public services. They also cannot impose waivers of rights in contracts of adhesion without clear and conspicuous notice. Arbitrators should not be permitted to achieve the same results after the fact. Some modest level of judicial review is required to ensure that they do not.