

2002

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Recommended Citation

David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. Rich. L. Rev. 1085 (2002).

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CIVIL PROCEDURE BY CONTRACT: A CONVOLUTED CONFLUENCE OF PRIVATE CONTRACT AND PUBLIC PROCEDURE IN NEED OF CONGRESSIONAL CONTROL

David H. Taylor*
Sara M. Cliffe**

*"More than mere contract law, however, is involved here."*¹

I. INTRODUCTION

There is great appeal to the notion that parties to a contract may provide in their agreement for how certain aspects of any dispute that may subsequently arise will be resolved. The appeal is so great, in fact, that both parties and courts have embraced the use and enforcement of pre-litigation agreements ("PLAs").²

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1. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 183 (1972) (emphasis added).

2. To the best of the authors' knowledge, Professor Linda Mullenix coined the phrase "consensual adjudicatory procedure" in her insightful exploration of the topic. See Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 294 (1988). The authors admit that "consensual adjudication procedure" has a much nicer "ring" than does "pre-litigation agreement." Nevertheless, the authors have chosen to use "PLA" because it is important to distinguish between litigation agreements that waive certain procedural rights before a conflict arises from waivers made during the course of the litigation. Courts have improperly conflated the two concepts, causing resultant confusion in their consideration of the enforcement of PLAs. Using venue as an example, we will argue that waiving an objection to improper venue during the course of litigation should not be equated with agreeing to an otherwise improper venue in a PLA for two simple reasons. First, the waiver of an objection to venue during litigation is done at a time when the party is better aware of its ramifications in terms of expense and convenience relative to the specific dispute at hand. Second, during litigation there is no danger of unequal bargaining power forcing a party to accept an awkward or inconvenient venue as there is with a PLA, where a party may have to either accept or forgo the contract altogether. During litigation, the bargain has been

These agreements take a variety of forms. Parties may agree to the forum in which their dispute will be resolved.³ They may designate the law that will be applied to the resolution of the dispute.⁴ Parties may designate what evidence may or may not be presented as proof of their respective positions and what burden of proof should govern the weighing of the evidence presented.⁵ Parties may designate who will resolve their dispute, in terms of judge or jury.⁶ And they even may designate that the dispute will not be heard by a judicial tribunal at all, but rather will be resolved outside the courts by means of some form of alternative dispute resolution ("ADR").⁷

long since struck and breached. If desired, the question of venue is able to be addressed without the potential benefits of the attendant bargain coloring the decision.

3. By means of the forum selection clause, parties can designate the forum in which their dispute will be heard. This may include designating a venue in a contractual provision that will render any other venue improper, even though it is a proper venue within the venue statute, codified at 28 U.S.C. § 1404 (1994 & Supp. V 1999). See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–89 (1991) (dismissing an action filed in the Western District of Washington, arguably a proper venue, because of a forum selection clause designating that "all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country"); *accord* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

Additionally, contractual provisions have been considered to be consents to personal jurisdiction that would otherwise not pass constitutional scrutiny because of the lack of connection between the defendant and the designated forum. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (holding that a contractual provision designating the wife of one of the owners of plaintiff company as agent for service of process in New York submitted defendants, farmers from Michigan, to personal jurisdiction in New York).

4. The choice of law provision allows parties to designate the law that will be applied to their dispute, even though that choice would not be that which choice of law principles would indicate should control. For further discussion of choice of law provisions, see *infra* Part VI.B.2.

5. For example, a contract may specify that evidence in the form of hearsay that would otherwise be admissible pursuant to a hearsay exception would be inadmissible unless the declarant were unavailable to testify. See John Kobayashi, *Too Little, Too Late: Use and Abuse of Innocuous Yet Dangerous Evidentiary Doctrines*, in 2 ALI-ABA COURSE OF STUDY: TRIAL EVIDENCE, CIVIL PRACTICE, AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1127, 1141–45 (1991); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932).

6. With a jury waiver provision, parties to a contract "agree" that if litigation results from the contractual agreement, each will forgo their Seventh Amendment right to trial by jury. For further discussion of jury waivers, see *infra* Part VI.A.2.

7. Contractual provisions stating that any resultant disputes will be submitted to arbitration are the PLAs subject to the most congressional control. As will be discussed, although in the Federal Arbitration Act Congress sought to limit the use of arbitration agreements in order to preserve a sense of fairness for the parties involved, judicial decisions have eviscerated those protections and extended the legitimate use of arbitration agreements well beyond what Congress intended. See *infra* Parts III.B.1 & VI.B.1 (dis-

When all goes well, and the parties remain satisfied with their original agreement, much pre-trial maneuvering is avoided.⁸ Party and judicial economies and efficiencies are protected, and contractual autonomy is preserved.⁹ These benefits create an extremely attractive notion in an era of ever-increasing privatization of many previously public functions.¹⁰ Nevertheless, there is a certain disquietude when one party seeks to resist the PLA, especially when that party claims to have had no knowledge of the provision or no actual choice in assenting to the agreement.

At first glance, it may seem well and good for two corporate entities to agree to a PLA as the result of arm's length bargaining, most likely with the assistance of counsel. At the same time, there is a great opportunity for unfairness when the PLA is on the back of a passenger ticket, in an employment contract, or in a consumer contract, especially where there are inherent disparities in the bargaining power of the parties to the contract. Therefore, any decision to enforce a PLA must balance private contractual autonomy and the attendant efficiencies of PLAs against the desire to maintain an aura of fairness, which by necessity must be the hallmark of a system of public dispute resolution. It is the authors' contention that this balance has been, at best, ineptly struck. The result is a hodge-podge approach to the enforcement of PLAs and an erosion of concerns for fundamental fairness in the courts.

This article will examine the basic nature of our public system of dispute resolution and consider what role, if any, there is for private contracts that alter that system. This article will begin by tracing the evolution of PLAs from their initial disfavorment by courts to their wide spread present day acceptance. Also, this article will compare the standards for recognition and enforcement of PLAs that have been given life by courts to those that are the creations of deliberative bodies. The main emphasis will be on discussing how effective the various approaches have been in pre-

cussing arbitration agreements).

8. See Michael J. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 51-52 (1992) (stating that forum selection clauses "have many virtues," including the promotion of "orderliness and predictability in contractual relationships").

9. See *id.* at 52.

10. See *id.*

serving fundamental fairness in dispute resolution. It will be the authors' contention that courts have rushed to embrace most forms of PLAs, and in so doing have overlooked, if not forsaken, an underlying concern for fundamental fairness in favor of preservation of contractual autonomy. Though the PLAs created by deliberative bodies have sought to better protect fundamental fairness, this article will discuss how judicial action has largely eliminated the checks on the utilization of PLAs intended by Congress. The arbitration clause will be our prime example. Further, this article will discuss how the favor with which the judiciary embraces PLAs has afforded them a status of "super contract," a status that transcends traditional rules of contract law and results in near-automatic enforcement by means of specific performance. Additionally, this article will argue that the recognition and the enforcement of parameters lies in the province of the legislature. Moreover, because of the mess that the courts have made out of the question, it is well past time for Congressional action defining the manner and the extent to which the system of public dispute resolution may be altered by private agreement. Not only is legislative action long overdue, by tracing the history of the Federal Arbitration Act, which established recognition of the arbitration clause, the authors will argue that it is only Congress, through its Article III power, that has the constitutional authority to create PLAs. The authors will conclude with some brief suggestions for what Congress should address in the event it chooses to heed this call to action made in the name of the preservation of the fundamental fairness of our system of procedure.

II. A FUNDAMENTAL QUESTION: THE NATURE OF A SYSTEM OF CIVIL PROCEDURE

"It is arguable that the proceedings in courts are not there solely for the convenience of the parties and that it is important for social reasons to maintain the solemnity and dignity of judicial proceedings regardless of the wishes of the parties."¹¹

There is a fundamental question lurking at the heart of any

11. 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 7a, at 605 (Peter Tillers rev. 1983) (emphasis added) [hereinafter WIGMORE].

consideration of the propriety of pre-litigation agreements: that is, what is the basic nature of a court-based system of public dispute resolution, and is it such that it should be altered by the private agreements of parties seeking redress through it? PLAs of every kind, arbitration agreements, forum selection clauses, choice of law provisions, and waivers of trial by jury, have been examined from nearly every angle. They have been both decried as mechanisms of oppression of the common man¹² and hailed as efficient cures for the curse of litigation that wastefully consumes the time and money of courts and litigants.¹³ Those who have questioned whether various manifestations of PLAs have led or can lead to unfairness to the party who wishes to resist enforcement have considered many questions. In what situations is it appropriate to enforce a specific PLA, that is: are there categories of parties or cases to which enforcement of PLAs should be confined?¹⁴ What should be the standard for determining if and when an effective waiver of a procedural right has occurred?¹⁵ It has even been debated as to what is the proper typeface for a PLA or the proper placement in the contract.¹⁶

All of these questions presume that procedural rules and statutes of the public system of dispute resolution may be privately altered by contract.¹⁷ Perhaps this question is so fundamental

12. See, e.g., Linda Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 354–58, 370 (1992) (criticizing the Supreme Court's enforcement of forum selection clauses in consumer contracts without giving consideration to whether the contract contained elements of adhesion or unconscionability).

13. See, e.g., Solimine, *supra* note 8, at 51–52 (stating that forum selection clauses increase efficiency by “obviating a potentially costly struggle” over jurisdiction and venue issues at the outset of litigation).

14. See, e.g., Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 110 (1992) (proposing that forum selection clauses should be enforceable only in contracts in excess of \$50,000 in value and should not be enforceable when contained in contracts for employment or contracts for goods and services that are outside the scope of the business or trade of either of the parties).

15. See, e.g., Mullenix, *supra* note 12, at 372 (criticizing the judicial doctrines of enforcement of PLAs and calling for needed clarification).

16. See, e.g., *Marek v. Marpan Two, Inc.*, 817 F.2d 242, 243 (3d Cir. 1987) (holding valid a limitation of action clause on a cruise ticket folder, in part because of the typeface and the placement of the clause within the contract).

17. See WIGMORE, *supra* note 11, § 7a, at 563 n.2 (stating that “courts have not directly confronted the tension between the values of party autonomy and factfinding reliability,” and, therefore, the proper role of private contract in the public dispute resolution system has never been sufficiently examined because “the scope to be given to the princi-

that the answer is considered to be obvious. However, the authors must confess that they do not find this obvious.¹⁸ As will be discussed herein, it was also not obvious to courts which, prior to the present heyday of PLA enforcement, viewed them as unenforceable as contrary to public policy.¹⁹ The judicial embrace of PLAs quickly glossed over that question, as well as the question as to whether it is more properly within the province of the courts or the legislature to determine the proper role of PLAs within the judicial system. As use and enforcement of PLAs appears to be proliferating and ready to expand into new and creative areas, this presumption warrants examination. Certainly a court would not enforce an agreement to resolve a dispute by judicial coin toss, the parties not trusting each other to flip the coin fairly. It is simply too ridiculous and makes a mockery of why the court is there. But courts will enforce an agreement that the court not hear the case in favor of arbitration, or enforce an agreement that determines which court will hear the case or perhaps determines how the case will be heard in terms of redefining the burden of proof or the forms of evidence that may or may not be considered. So where is the line between mockery and efficiency? Or, should there be any line at all? That is, should a public dispute resolution system be altered by private agreement?

The rules governing public dispute resolution presumably seek to strike some adversarial balance between the parties in order to achieve fairness in process and procedure.²⁰ That balance is continually being adjusted in order to fine tune how it has been struck. The notion of notice pleading has sought to keep access to a judicial remedy from being blocked by cumbersome, arcane procedures and a necessity to set forth detailed facts that may only be available from the opposing party.²¹ This relative ease of com-

ple of party autonomy usually remains altogether unexplained”).

18. *See id.*

19. *See infra* Part III (discussing the “ouster doctrine” and the view that parties could not alter the judicial system by contract).

20. *See, e.g.*, FED. R. CIV. P. 8(a)(2) (requiring that a pleading need only contain “a short and plain statement of the claim for relief”); FED. R. CIV. P. 11(c) (providing for the discretionary imposition of sanctions); FED. R. CIV. P. 26(a)(1) (requiring certain discovery disclosures be made “without awaiting a discovery request”); FED. R. CIV. P. 33(a) (limiting the number of interrogatories that may be served upon another party).

21. *See* FED. R. CIV. P. 8(a)(2) (providing that a pleading setting forth a claim for relief contain only “a short and plain statement of the claim. . . .”); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (containing the oft quoted phrase that a complaint drafted pursuant to Rule 8 “should not be dismissed for failure to state a claim unless it appears beyond doubt

mencing a lawsuit has been counterbalanced by a requirement that every pleading must be well grounded in law and fact.²² Sanctions may follow for a pleading that falls short of this standard,²³ but the concept of when sanctions should be imposed, by whom they may be sought, and for what behavior has been subject to continual adjustment.²⁴ That adjustment has sought an adversarial balance between the interests of plaintiff and defendant. In recent years the concept of discovery has undergone significant changes in order to make the process less of a game and to prevent one party from gaining an unfair advantage by making a game of the disclosure of obviously relevant information and documents²⁵ or burying the other party in discovery requests.²⁶ These changes have not been made without much thought and debate by all involved in the rulemaking process. It seems troublesome, therefore, that a private agreement may alter, with court sanction, a balance that has sought to be so carefully attained by rulemakers and the legislature.

Yet, as will be discussed, the history of judicial enforcement of PLAs shows an ever-increasing deference to them as matters of private contractual autonomy, and a decreasing concern for their

that plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

22. See FED. R. CIV. P. 11(b)(2)–(3).

23. See FED. R. CIV. P. 11(c).

24. The current version of Rule 11 provides that the imposition of sanctions for violating the rule is discretionary with the court. See FED. R. CIV. P. 11(c) (providing that “the court may . . . impose an appropriate sanction”). The sanction may only be imposed after the party alleged to have violated the pleading requirement of Rule 11 has been afforded notice of its alleged violating conduct and given an opportunity to withdraw the offending pleading during a twenty-one day safe harbor period. See FED. R. CIV. P. 11(c)(1)(A).

Under the 1983 version of Rule 11, the imposition of sanctions was mandatory, rather than discretionary. See FED. R. CIV. P. 11 (1983) (revised 1993) (providing that the court “shall impose . . . appropriate sanctions” when the rule has been violated). The intention was to draw attention to the need to impose sanctions to discourage frivolous pleading and to encourage their imposition. See Advisory Committee Notes to Rule 11, 97 F.R.D. 165, 199–200 (1983). Additionally, there was no provision for a safe harbor period in the 1983 version of Rule 11.

25. See FED. R. CIV. P. 26(a)(1)(A)–(D) (requiring the following disclosures to the opposing party, “without awaiting a discovery request”: (A) the names and locations of persons “hav[ing] discoverable information”; (B) copies of documents relevant to disputed facts; (C) “computation of . . . damages” and copies of relevant documents; and, most interestingly, (D) copies of insurance agreements, even though such agreements would most likely not be admissible into evidence pursuant to FED. R. EVID. 411).

26. See FED. R. CIV. P. 33(a) (limiting the number of interrogatories to twenty-five that a party may serve upon another party).

effect on the public system of dispute resolution,²⁷ even though their enforcement may result in a lawsuit proceeding in a way that is outside the directives of applicable legislation and rules.²⁸ Further, PLAs now lead a charmed life as “super contract,” always subject to specific performance, capable of redefining the dispute resolution system in a single bound, and, paradoxically enough, enforced in a fashion that takes away the autonomy of the parties to breach the contract and pay the resultant price.²⁹

III. THE ADVENT OF THE PRE-LITIGATION AGREEMENT

A. *The Ouster Doctrine: What Was It That Was Being Ousted?*³⁰

The idea of a pre-litigation agreement that alters the course of seeking a judicial remedy was originally met in American courts with antipathy.³¹ Most frequently cited is language from *Home Insurance Co. v. Morse*,³² in which the “ouster doctrine” was born:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights.

. . . [A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.³³

In refusing to enforce a statutorily recognized agreement not to seek removal of a case to federal court, the opinion made several other sweeping pronouncements about the inability of parties to contractually alter the judicial system prior to litigation:

27. See discussion *infra* Parts III.B.2, VI.A.1, B.1.

28. See discussion *infra* Parts III.B.2, VI.A.1, VI.B.1.

29. See discussion *infra* Part VII.

30. For a detailed history of the ouster doctrine as it relates to the forum selection clause PLA, see David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 793–99 (1993).

31. For a discussion of the treatment of PLAs for alternative dispute resolution by English and early American courts, see Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599–601 (1997).

32. 87 U. S. (20 Wall.) 445 (1874).

33. *Id.* at 451.

He [a potential litigant] cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

....

... The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced.³⁴

Taken either individually or together, these passages speak to a view of a public system of dispute resolution that may not be privately altered by contract in advance of the litigation. The courts are viewed as a neutral arbiter of disputes that must follow a mandated set of rules and procedures to ensure a fundamentally fair forum for public dispute resolution.³⁵ This view of the “ouster doctrine” was, perhaps, expressed most clearly twenty years prior by Chief Justice Shaw in *Nute v Hamilton Mutual Insurance Co.*³⁶

The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of the parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute.³⁷

“The rules” of which Chief Justice Shaw spoke flow from constitutional authority in Article III, as given effect by legislative action.³⁸ Private agreement had no place to alter what constitution and legislature had established.³⁹ This view of the judicial system was relied upon to deny enforcement to pre-litigation arbitration agreements and forum selection clauses, for example.⁴⁰

34. *Id.* at 451–52.

35. *See* Reuben, *supra* note 31, at 600 (noting that, when declining to enforce pre-litigation arbitration agreements, “American judges seemed to be motivated by concerns for fairness of the judicial process”).

36. 72 Mass. (6 Gray) 174 (1856).

37. *Id.* at 184.

38. *See* *Morse*, 87 U.S. (20 Wall.) at 453.

39. *See* *Nute*, 72 Mass. (6 Gray) at 183–84.

40. *See, e.g.,* *Carbon Black Export, Inc. v. The S.S. Monrossa*, 254 F.2d 297, 300–01 (5th Cir. 1958) (holding that private agreements made prior to a dispute that oust a court of jurisdiction are contrary to public policy and unenforceable).

B. *Brushing Aside the Ouster Doctrine*

Whether one agrees with the ouster doctrine's view of the relationship between private agreements and the public dispute resolution system, the ouster doctrine is not an insignificant concept. Rather, it defines a fundamental view of the nature of the judicial system. What is most interesting about arbitration agreements and forum selection clauses is the very different path each took to effectuate a shift away from the ouster doctrine's view of the judicial system. Arbitration agreements were given life by legislative action, essentially negating previous resistance by courts to the concept of a pre-litigation arbitration agreement.⁴¹ Forum selection clauses found recognition and enforcement by way of judicial decision, apparently allowing a contract to overcome the legislatively determined venue scheme.⁴² This divergent approach raises an interesting question as to whether it is appropriate for courts, legislatures, or both to redefine such a fundamental view of the nature of procedure. Another interesting point becomes apparent when comparing legislatively created PLAs to judicially created PLAs. It is apparent that judicially created PLAs recognize enforcement on an almost "all or nothing basis."⁴³ Few, if any protections for the unwitting consumer, employee, or the like have found their way into the judicially created doctrines.⁴⁴ In contrast, the doctrines borne from legislative action have tried to offer such protections, though not always successfully.⁴⁵ Certainly this speaks to a consideration of whether the propriety of PLAs should be within the province of the courts or the legislature.

1. Recognizing Arbitration Agreements: A Product of Legislative Action

Arbitration clauses remained unenforceable under the principle of the "ouster doctrine" until such time as legislative action

41. See *infra* Part III.B.1 (discussing the passage of the Federal Arbitration Act, which provided for the recognition and enforcement of arbitration agreements).

42. See *infra* Part III.B.2 (discussing Supreme Court decisions giving effect to forum selection clauses).

43. See discussion *infra* Part VI.A.

44. See discussion *infra* Part VI.A.

45. See discussion *infra* Part VI.B.

made them enforceable in the U.S. Arbitration Act of 1925,⁴⁶ now the Federal Arbitration Act (“FAA”).⁴⁷ That the legislature should make the determination that arbitration agreements in advance of litigation should be enforced by courts is entirely consistent with the ouster doctrine’s view of procedure.⁴⁸ Parties could not, by way of private agreement, alter the system of procedure as authorized by Article III and established by Congress.⁴⁹ The legislature may, however, choose to alter the procedural system it has established.⁵⁰ That is, of course, unless some other constitutional principle is violated by that action. Commentators have argued that arbitration clauses do just that, violating notions of Due Process⁵¹ and the Seventh Amendment right to trial by jury.⁵²

2. Recognizing Forum Selection Clauses: Courts Get into the Act as Well

Forum selection clauses took a very different route around the ouster doctrine. Though the legislature had defined and refined where a lawsuit may be maintained⁵³ and how and when a suit could be moved to a more convenient forum in terms of the interests of justice,⁵⁴ no legislative action was taken to recognize and give judicial enforcement to forum selection clauses. Rather the Supreme Court did it itself in *The Bremen v. Zapata Off-Shore Co.*⁵⁵ This was a sea-change in the way private agreement is viewed in relation to procedure. Yet it was accomplished with lit-

46. The United States Arbitration Act was modeled extensively after the New York Arbitration Act. See New York Arbitration Act, N.Y. C.P.L.R. §§ 7501–7514 (Consol. 1988 & Cum. Supp. 2000). For a discussion of the relationship between the New York act and the U.S. act, see Reuben, *supra* note 31, at 601.

47. 9 U.S.C. §§ 1–16 (2000).

48. See *id.* § 3.

49. See U.S. CONST. art. III, § 1; *supra* Part III.A; *infra* note 68 and accompanying text.

50. See U.S. CONST. art I, § 18, cl. 8.

51. See Thomas Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1962 (1996).

52. See Jean 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, 69 (1997).

53. See 28 U.S.C. § 1391 (1994 & Supp. V 1999).

54. See 28 U.S.C. §§ 1404, 1406 (1994 & Supp. V 1999).

55. 407 U.S. 1 (1972). The court determined that forum selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *Id.* at 10.

tle, if any discussion.⁵⁶ Though encompassing an entirely different view as to the relationship between private agreement and public procedure, *The Bremen* simply discarded the old view as a "hardly more than a vestigial legal fiction."⁵⁷ The Court went on to explain how no actual "ouster" of jurisdiction was effectuated by a forum selection clause.⁵⁸ Rather, the court maintained that it was in fact exercising its jurisdiction by giving effect to the forum selection clause which necessitated declining to hear the case.⁵⁹ Obviously, whether giving effect to the contract amounts to an "ouster" is mostly a semantic game. But within that game lurks two fundamental questions that must be addressed in order to give validity to forum selection clauses: May parties by private contractual agreement alter the public procedural system established by the legislature, and may the courts recognize and enforce such contracts without legislative approval?

One hundred and fifty years prior to *The Bremen*, in *Cohens v. Virginia*,⁶⁰ Chief Justice Marshall pronounced a view of procedure that is consistent with that of the ouster doctrine.⁶¹ The Court stated, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."⁶² Treason is perhaps an overstatement. Nonetheless, the basic notion from the ouster doctrine persists. The legislature, through Article III, defines the functioning of the courts, and an agreement between private individuals should not redefine what the legislature has established.⁶³ The Court in *The Bremen* simply missed the point. It viewed the "ouster doctrine" as "judicial resistance" against attempts to reduce the power of the courts.⁶⁴ The decision in *The Bremen* invades legislative power, and in doing so, the door is opened for the current wholesale reworking of the procedural system by private agreement. The opinion fails to recognize that the

56. *See id.*

57. *Id.* at 12.

58. *Id.*

59. *Id.*

60. 19 U.S. (6 Wheat.) 264 (1821).

61. *Id.*

62. *Id.* at 404.

63. *See* U.S. CONST. art. III, § 1; *supra* Part III.A; *infra* note 68 and accompanying text.

64. *The Bremen*, 407 U.S. at 12.

power of the courts is not self-defining.⁶⁵ Rather, it is defined by the legislature.⁶⁶ As will be discussed, the legislative history of the Federal Arbitration Act reveals that Congress held that view in enacting it, and believed it was acting pursuant to its Article III power.⁶⁷

IV. WHO MAY ALTER THE STRUCTURE OF PROCEDURE?

*"[W]e have an old-fashioned belief that the forms of justice should not be bartered and sold and since, in addition, we have grave doubts as to whether almost any agreement concerning evidentiary matters entered into before any dispute has arisen is likely to be substantively fair."*⁶⁸

Whether one is a supporter or detractor of PLAs, it cannot be disputed that their effect can cause a litigated dispute to proceed to resolution in a manner other than that provided for in the statutes and rules that dictate the procedures of the public system of dispute resolution. If those procedures are altered, an important question arises: Who should have the power to cause such alteration? If separation of powers is to remain vital, the answer to this question is the legislature and not the courts. Furthermore, if the goal of the current procedural scheme is to foster notions of fundamental fairness,⁶⁹ the answer should not be the contracting parties, unless it can be assured that the agreement was freely entered by the parties without coercion and with knowledge as to how the agreement would effect the resolution of a future dispute.

65. *See id.*

66. *See infra* note 68 and accompanying text.

67. *See* discussion *infra* Part VIII.A.1.

68. WIGMORE, *supra* note 11, at 563 n.2 (emphasis added). In fairness it must be noted that Wigmore subscribed to the belief that private contractual autonomy trumped concerns for procedural fairness and, therefore, that agreements to alter rules of evidence and/or procedure should be enforced by the courts. *See id.* at 562 n.2.

69. *See* FED. R. CIV. P. 1 (providing for the "Scope and Purpose of Rules" and stating that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

A. *Not the Courts, If Separation of Powers Is Alive and Well*

*"It is most true, that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline to exercise jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."*⁷⁰

It is within the sole province of Congress to define the jurisdictional reach of the federal courts.⁷¹ Article III sets the fundamental parameters of the system of procedure in terms of the permissible structure of the system of courts and the types of cases that are within the subject matter jurisdiction of those courts.⁷² Congress is vested with the authority to enact laws that establish the court system and jurisdiction to reach within the constitutionally allowable framework.⁷³ Moreover, Congress has established the court system and has defined how it operates in the judicial code.⁷⁴ In so doing, Congress has not chosen to extend the jurisdiction of the federal courts to the full extent authorized by Article III.⁷⁵ By means of the Rules Enabling Act, Congress has chosen to delegate to the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence."⁷⁶ However, it seems beyond argument that only Congress has the constitutional authority to define the subject matter jurisdiction of the courts, and it would be a violation of basic notions of separation of powers if the courts were to seek to define or expand their jurisdictional reach beyond that provided by Congress.⁷⁷

70. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added).

71. *See* U.S. CONST. art. III.

72. *See id.*

73. *See id.*; U.S. CONST. art. I, § 8, cl. 18; *Bank of the United States v. Halsted*, 23 U.S. (10 Wheat.) 51, 53 (1825); *see also* *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 21 (1825).

74. 28 U.S.C. §§ 1-4001 (1994 & Supp. V 1999).

75. *See, e.g.*, 28 U.S.C. § 1332 (1994 & Supp. V 1999). While Article III, § 2 provides for no monetary limit on cases based on diversity of citizenship, Congress has not chosen to extend diversity jurisdiction that far and has imposed a minimum requirement for the amount in controversy of such disputes, presently in excess of \$75,000. *See id.*

76. 28 U.S.C. § 2072(a) (1994); *see also* *Halsted*, 23 U.S. (10 Wheat.) at 61; *Wayman*, 23 U.S. (10 Wheat.) at 42.

77. *See* *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (holding that federal courts may not extend their judicial power beyond the intentions of Article III); *see also* *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (holding Rule 28A(i) of the Eighth Circuit, which provides that unpublished opinions are not precedent, unconstitu-

What has been lost from the discussion surrounding PLAs is the notion that courts must exercise their jurisdiction in situations where jurisdiction exists. If it violates separation of powers for courts to expand their jurisdictional reach, it is logical that not exercising their jurisdictional reach in certain categories of cases is equally repugnant to the Constitution.

This argument has been raised in the context of the abstention doctrine, where courts decline to exercise jurisdiction if a constitutional issue rests on an unsettled interpretation of state law or may be unnecessary for the ultimate determination of the action.⁷⁸ It has additionally been argued in dissent that the Court appears to be restricting the availability of habeas corpus review provided by Congress.⁷⁹ As discussed, this view of the proper roles of Congress and the courts was at the heart of the original rejection of PLAs as evidenced by the ouster doctrine.⁸⁰ Unfortunately, the courts have never bothered to resolve, nor even address the separation of powers question lurking within the ouster doctrine.⁸¹ Rather, they simply chose to ignore it by declaring that no declination of jurisdiction was occurring, thus saddling themselves to the fiction that it was merely the parties that were “waiving” their jurisdictional opportunities.⁸² As will be discussed, that fiction is false, and the separation of powers question remains unaddressed.⁸³

Even if the constitutional scheme of separation of powers did not give Congress the sole power to define what cases the courts should or should not hear, the policy considerations lurking within the enforcement of PLAs would be better addressed by a deliberative body engaged in public debate. When Congress

tional as a violation of separation of powers because it “expand[s] the judicial power beyond the bounds of Article III”), *vacated*, 235 F.3d 1054, 1056 (8th Cir. 2000) (vacating and remanding to the district court to vacate judgment as moot and noting that the constitutionality of Rule 28A(i) remains an open question).

78. See generally Martin H. Redish, *Abstention, Separation of Powers, and the Limits of Judicial Function*, 94 YALE L.J. 71 (1984). But see Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

79. See *Stone v. Powell*, 428 U.S. 465, 515 (1976) (Brennan, J., dissenting) (stating that the Court’s decision restricting habeas review “is nothing less than an attempt to provide a veneer of respectability for an obvious usurpation of Congress’ [sic] Art. III power to delineate jurisdiction of the federal courts”).

80. See discussion *supra* Part III.A.

81. See *supra* Part III.B.2.

82. See *supra* Part III.B.2.

83. See *infra* Part IV.B.

makes laws that define the functioning of the courts, it presumably acts with the full powers of a deliberative body, pondering, debating, and considering how the legislation should best be shaped. When the Supreme Court fashions rules of procedure or evidence, it is done through the Judicial Conference of the United States.⁸⁴ Most typically a rule finds its beginning in the Advisory Committee; is reported to the Standing Committee, which solicits public comments and most likely holds public hearings; is forwarded to the Supreme Court; and finally is transmitted to Congress.⁸⁵ The proposed rule takes effect unless Congress acts to amend or reject it.⁸⁶ While this description of the statutory and rulemaking process is an oversimplification, the point is simply that the statutes and rules defining the operation of the public system of dispute resolution are crafted after public debate and deliberation by public bodies.

The judicial enforcement of a PLA redefines a segment of that public system.⁸⁷ The system then operates outside of the publicly crafted rules.⁸⁸ Instead, its operation is governed by a privately constructed agreement.⁸⁹ In doing so, whatever wisdom gained from public debate is subverted, or at least ignored. More importantly, the statutes and rules crafted by the bodies constitutionally charged with doing so are rendered inoperable.

It is only in the area of arbitration clauses, where courts refused to enforce arbitration agreements prior to their congressional approval in the Federal Arbitration Act, that the courts have properly looked to Congress before altering the basic notion that an aggrieved party may seek redress in the courts.⁹⁰ How-

84. See 28 U.S.C. §§ 2071–74 (1994 & Supp. V 1999).

85. See *id.*

86. See generally WINIFRED R. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* (1981); Thomas E. Baker, *An Introduction to Federal Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323 (1991); Benjamin Kaplan, *Amendments to the Federal Rules of Civil Procedure 1961–1963*, 77 HARV. L. REV. 601 (1964); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993).

87. See *infra* Part IV.C.

88. See *infra* Part IV.C.

89. See *infra* Part IV.C.

90. See *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1010 (S.D.N.Y. 1915); see also *infra* Part VI.B.1. The authors address choice of law agreements in the context of an enactment by a deliberative body or legislature. See *infra* Part VI.B.2. Nevertheless, choice of law agreements differ from arbitration agreements in that they were recognized and enforced by courts prior to any legislative enactment. See EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 18.2, at 860–62 (3d ed. 2000) (discussing the history of

ever, as will be discussed, the courts have gone far beyond what Congress authorized.⁹¹ With other PLAs, courts have not awaited congressional action.⁹² Rather, they have taken it upon themselves to alter the procedural scheme defined by statute and rule.⁹³ A court simply should not, and does not, have the constitutional authority to re-craft the court system.

Somewhat analogously, this rule is echoed by the narrow extent to which local rulemaking by courts is allowed, through the use of Rule 83,⁹⁴ to authorize each district to make rules governing practice.⁹⁵ Those local rules, however, must be consistent with the Federal Rules of Civil Procedure and Acts of Congress.⁹⁶ If there is no controlling rule on a matter of practice, Rule 83 authorizes a judge to regulate practice “in any manner consistent with” federal law or rules governing procedure.⁹⁷ Unfortunately, a clear picture of what constitutes inconsistency in a federal rule or law has not been drawn by the Court.⁹⁸ Nevertheless, Rule 83 reflects the notion that there is something of value in the procedural scheme enacted by Congress and the Supreme Court that, pursuant to its delegated rulemaking authority, is to remain un-

recognition of choice of law agreements, including lack of universal acceptance of the concept of party autonomy and judicial enforcement of the enactments of the Restatement (Second) of Conflict of Laws § 187 and the UCC § 1-105).

91. See *infra* Part VIII.A.

92. See *supra* Part III.B.2; *infra* Part VI.A.

93. See *supra* Part III.B.2; *infra* Part VI.A.

94. See FED. R. CIV. P. 83.

95. *Id.*

96. FED. R. CIV. P. 83(a)(1) (providing that “[a] local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072, 2075”); see also FED. R. CIV. P. 83 advisory committee’s note (1995 amendment) (stating that “[t]his rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress”).

97. FED. R. CIV. P. 83(b).

98. The Court has twice considered whether a local rule is “inconsistent” with the federal rules or statutes. The decisions themselves appear to be inconsistent. In *Miner v. Atlass*, 363 U.S. 641 (1960), the Court struck down a local rule providing for discovery depositions in admiralty actions as being inconsistent with the General Admiralty Rules, which at that time did not provide for such depositions. *Id.* at 647. The Court stated that the local rule was a “basic procedural innovation” that should be left to the rulemaking authority of the Supreme Court. *Id.* at 650. Thirteen years later in *Colgrove v. Battin*, 413 U.S. 149 (1973), the Court upheld a local rule that reduced the number of jurors from twelve to six, stating that the rule “plainly does not bear on the ultimate outcome of the litigation.” *Id.* at 163–64 n.23. *Colgrove* appears to be subject to criticism for conflating the notions of inconsistency and being outcome determinative.

altered by both local court rule and judicial interpretation and decision.⁹⁹

When a court enforces a PLA, its order allows a private agreement to alter the procedural system established by statute and rule in a manner that is frequently inconsistent with the publicly constructed system. For example, a suit may be filed in a contractually provided-for venue other than the one provided for by the applicable venue statute.¹⁰⁰ The authority for the venue becomes the private contract rather than the public statute.¹⁰¹ Courts have taken the position that enforcing the contract simply allows parties to waive rights they have in that system,¹⁰² as they would during the course of litigation.¹⁰³ As will be discussed below, that reasoning is not sound, because a pre-litigation waiver is simply not the equivalent of a waiver made during the course of litigation.¹⁰⁴

At the most fundamental level, a PLA that provides for a lawsuit to proceed in any manner different from that which is provided for in the Federal Rules of Civil Procedure would contravene Rule 1, which provides that “[t]hese rules govern the procedure in the United States district courts in all suits of a civil

99. See *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (holding that discovery provisions of the Federal Rules did not apply to habeas corpus proceedings and stating that courts “have no power to rewrite the [r]ules by judicial interpretations”).

100. See, e.g., *Northwestern Nat’l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) (holding that a forum selection clause that designated venue to be in a specified county acted so as to confer personal jurisdiction in that court though defendant lacked any contacts with that forum); *Alexander Proudfoot Co. World Hqtrs. v. Thayer*, 877 F.2d 912 (11th Cir. 1989) (upholding the exercise of personal jurisdiction on the basis of a forum selection clause).

101. See *Donovan*, 916 F.2d at 375.

102. Pursuant to Federal Rule of Civil Procedure 12(h)(1), an objection to improper venue is deemed waived unless the defense is raised in the defendant’s answer or motion filed prior to the defendant’s answer. FED. R. CIV. P. 12(h)(1); see also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.15, at 83 (3d ed. 1999) (discussing that “objections to the venue of a particular court are waived if not asserted promptly”).

103. See *Donovan*, 916 F.2d at 375 (relying on the argument that “since a defendant is deemed to waive . . . objections to personal jurisdiction or venue simply by not making them in a timely fashion, a potential defendant can waive such objections in advance of suit by signing a forum selection clause”); *Thayer*, 877 F.2d at 921 (stating that “[b]ecause the nonresident defendant in the present case contractually agreed to personal jurisdiction in Florida, the usual due process analysis need not be done”); *Heller Financial, Inc. v. Midway Powder Co.*, 883 F.2d 1286, 1292 n.4 (7th Cir. 1989) (stating that “[o]bviously, a valid forum-selection clause, even standing alone, can confer personal jurisdiction”).

104. See *infra* Part IV.B.

nature."¹⁰⁵ A PLA that addresses an area governed by the rules makes it, and not the rules, govern the procedure in the district courts.¹⁰⁶ Interestingly, it is this private control of the public dispute resolution system that is troublesome. The Federal Rules were enacted, in large part, to establish national uniformity in procedure and to eliminate technical traps of many then-existing procedural codes.¹⁰⁷ Unfortunately, PLAs undermine both goals.

First, enforcement of PLAs that vary established judicial procedures defeats the goal of uniformity by allowing for privately tailored procedure for individual suits.¹⁰⁸ Procedure in the federal courts does not vary from state to state;¹⁰⁹ however, PLAs allow for variation from suit to suit.¹¹⁰ Secondly, the Federal Rules were intended to facilitate judicial resolutions based upon the merits of the case and with a sense of fundamental fairness, rather than procedural technicalities.¹¹¹ It would seem that the creative use of a PLA provides the same opportunities for technical advantage and sharp practices by attorneys that the Federal Rules were intended to prevent.¹¹² The PLA merely shifts the timing so that these sharp practices occur prior to the dispute rather than during the course of litigation.

Nonetheless, the PLA provides opportunities for procedural advantage not contemplated by rule or statute, turning procedure away from being the "handmaid" of justice and toward being the "mistress" of justice.¹¹³ While the rules seek to provide a framework for dispute resolution that is fundamentally fair and even-

105. FED. R. CIV. P. 1.

106. See *supra* notes 100–05 and accompanying text.

107. See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rule-making*, 137 U. PA. L. REV. 1969, 1972–78 (1989) (providing a history of the enactment of the Federal Rules of Civil Procedure).

108. See *supra* notes 3–7 and accompanying text.

109. That is, of course, except to the extent that local rule provides for variation. However, as discussed, it is the intent of Rule 83 that local rules be consistent with the nationally uniform procedural system. See *supra* notes 94–99 and accompanying text.

110. See *supra* notes 3–7 and accompanying text.

111. See FED. R. CIV. P. 1; 2A JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 8.02 (2d ed. 1996) ("The real importance of the pleading rules is that they make pleadings, in and of themselves, relatively unimportant. Cases are to be decided on the merits.")

112. See *infra* Part V.

113. See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) ("The relation of the rules of practice to the work of justice is intended to be that of a handmaid rather than mistress." (quoting *In re Coles*, 1 K.B. 1, 4 (1907)).

handed, PLAs can be used by a party to subvert that goal and gain strategic advantage by way of contract.

B. *Not the Parties, If Waiver Is Recognized as the False Analogy That It Is*

There is a false analogy that is frequently relied upon as justification for enforcing PLAs: Parties to litigation may waive procedural protections afforded by the procedural system by not raising them at all.¹¹⁴ For example, though the plaintiff may have chosen an improper venue or a forum that lacks personal jurisdiction over a party, any objection to the improper venue or lack of personal jurisdiction is waived if the objection is not raised.¹¹⁵ Further, a request for a trial by jury must be made at the outset of the litigation or it is waived.¹¹⁶ Similarly, a timely objection must be made to inadmissible evidence in order for the admission of the evidence to be considered reversible error.¹¹⁷ It is therefore analogized that a PLA that designates a venue for the action that otherwise would not be proper under the general venue statute, or selects a forum that would not have personal jurisdiction over the defendant absent the PLA, is simply the same as a waiver made during litigation by failing to object.¹¹⁸ The analogy is false for several important reasons.¹¹⁹

First, in each situation above, the waiver in question is specifically authorized by the established rules of the procedural system.¹²⁰ The concept of waiver by failing to object during litigation is part of the adversarial balance that has been struck through

114. See FED. R. CIV. P. 12(h)(1) (providing for the waiver of the defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process if not made both timely and properly).

115. See *id.*

116. FED. R. CIV. P. 38(d) (providing that the failure to make a timely and proper demand for trial by jury operates as a waiver).

117. See FED. R. EVID. 103(a)(1) (providing that a ruling admitting or excluding evidence cannot be considered error unless it affects a substantial right and a timely objection appears on the record).

118. See *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990).

119. See, e.g., *Kobayashi*, *supra* note 5, at 1145 (stating that stipulations made during litigation must be distinguished from contracts to alter rules of evidence because, in part, the stipulations are within judicial control, including the power to relieve parties from their stipulations).

120. See FED. R. CIV. P. 12(h)(1).

the development and continued refinement of procedural rules.¹²¹ The PLA, in which waiver occurs prior to litigation, operates outside of that adversarial balance. The rulemakers and statute drafters may eventually wish to incorporate the PLA concept into the system, but they have not done so. As discussed, it is not the place of the courts to do it for them.¹²²

Second, the timing of the “pre-litigation” and “litigation” forms of waiver make the situations so different that any possible analogy between the two is destroyed. The litigation waiver occurs when the party is likely to be represented by counsel so the decision to waive an objection by not raising it is more likely to be an informed decision made as part of an overall litigation strategy.¹²³ The pre-litigation waiver, made when the precise nature of the dispute and the parties’ goals in resolving the dispute are unknown, cannot be part of any litigation strategy.¹²⁴

Equally important is the fact that the pre-litigation agreement may not be an informed decision at all.¹²⁵ One of the more troubling aspects of PLAs is that they may seem like good ideas when they are the product of arm’s-length bargaining by informed parties with equal bargaining power.¹²⁶ However, when the opportunity for bargaining is not realistically present, such as in employment contracts, franchise agreements, and consumer transactions, where one party is largely at the disposal of the other in entering the contract, the coercive aspect of PLAs makes them seem less a mechanism for efficient resolution of disputes and more a potential tool for gaining strategic advantage.¹²⁷ This concern has been raised by commentators calling for limitations on the types of transactions in which forum selection clauses or arbitration agreements should be enforced.¹²⁸

121. See *infra* notes 123–24 and accompanying text.

122. See *supra* notes 70–77 and accompanying text.

123. See generally Arvo Van Alstyne, Annotation, *Monograph, Tactics and Strategy of Pleading*, 3 AM. JUR. TRIALS § 681 (1965 & Supp. 2001).

124. See *id.*

125. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 642–43, 675–80 (1996).

126. *Id.*

127. *Id.*

128. See, e.g., 143 CONG. REC. E407 (Mar. 6, 1997) (statement of Rep. Edward J. Markey) (introducing the Civil Rights Procedures Protection Act of 1997 by calling for measures to prevent employment discrimination claims from being involuntarily sent to

The timing of the litigation waiver removes this coercive aspect from the litigation waiver. If the party does not wish to waive its objection to venue, for example, it may seek relief from the court, a neutral arbiter, by way of motion.¹²⁹ The party need not risk forgoing the benefit of an employment contract or a business opportunity in order to avoid suit in a far-away forum to resolve any resulting dispute. Furthermore, the party need not return the computer he or she has just opened, or return the non-refundable cruise tickets he or she has just purchased, because of a clause in computer paperwork,¹³⁰ or language on the back of the ticket limiting the manner or place in which disputes can be resolved.¹³¹ The bargain has already been struck in the circumstance of the litigation waiver. In contrast, choosing not to raise an objection during litigation does not put the entire agreement into jeopardy as it may in the PLA situation.¹³² That is, if the party to the agreement containing a PLA has any opportunity at all to try and bargain themselves out of the PLA.

The litigation and pre-litigation waivers are also very different in terms of dynamics. This significant distinction was recognized by courts called upon to enforce arbitration agreements.¹³³ For instance, an agreement to arbitrate that was made in the course of litigation was recognized and enforced, but a PLA containing a similar agreement was not.¹³⁴ Hence, legislative action was necessary to make a public policy decision as to whether the arbitration PLA should be enforced, and, if so, under what circumstances.¹³⁵

The FAA arguably tries to accommodate the potentially more coercive nature of the PLA by proscribing limitations as to types of cases and parties to which the FAA applies.¹³⁶ Unfortunately,

binding arbitration).

129. See FED. R. CIV. P. 12(b)(3).

130. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

131. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 587–95 (1991) (enforcing a forum selection clause contained in twenty-five paragraphs of boiler-plate language on the back of non-refundable tickets received after payment by the consumer, which required an injured citizen of the state of Washington to seek redress only in Florida for injuries suffered in waters off Mexico).

132. See *supra* notes 129–31 and accompanying text.

133. See, e.g., *Sternlight*, *supra* note 125, at 644–45.

134. *Id.*

135. See *supra* Part III.B.1.

136. See 9 U.S.C. § 1 (2000) (“[N]othing herein contained shall apply to contracts of

as commentators have decried, the courts have not felt compelled to restrict the enforcement of arbitration PLAs to those situations delineated by the legislature.¹³⁷ Arbitration PLAs have been enforced in situations which, arguably, are far afield from any situations contemplated by the FAA.¹³⁸ However, the fact that the courts have extended enforcement of arbitration PLAs does not relieve Congress of the need to make important policy decisions about whether it is appropriate for courts to give effect to other PLAs. Rather, as the courts have gone too far in their affection for arbitration PLAs, it is even more compelling for Congress to legislate in this area.

C. *And What About Private Contractual Alteration of the Public Procedural System?*

The extent to which parties should be allowed to alter the scheme of procedure, especially by means of a PLA, has not received much examination. No one would argue that parties can give subject matter jurisdiction to the courts by means of private agreement.¹³⁹ But the notion that the same type of agreement may divest a court's jurisdiction appears to have been assumed after the ouster doctrine was discarded.¹⁴⁰ It appears to have been accepted as a given, albeit silently, that the enforcement of PLAs by courts may result in courts declining to hear cases they would otherwise be required to hear. Also, it seems odd that this notion has not been more fully addressed, for rights conferred upon private parties in the public interest may not be waived or released if such would contravene public policy.¹⁴¹ As discussed, PLAs certainly present the opportunity to disrupt the adversarial balance sought in a public system of dispute resolution.¹⁴² Yet, the question remains largely unaddressed.

employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”)

137. See *Sternlight*, *supra* note 52, at 19.

138. See *infra* Part VI.B.1.

139. See, e.g., *Beers v. N. Am. Van Lines, Inc.*, 836 F.2d 910, 913 (5th Cir. 1988); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1186 (7th Cir. 1985); *Riggins v. Riggins*, 415 F.2d 1259, 1261 (9th Cir. 1969).

140. See *supra* Part III.B.2.

141. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704–05 (1945).

142. See *supra* text accompanying notes 120–22.

Although one might expect the Federal Rules to address whether private alteration was within the scheme of public procedure, the commentary surrounding their adoption does not reveal any clues as to whether PLAs were contemplated.¹⁴³ Rule 29,¹⁴⁴ however, stands out as somewhat of a puzzlement, especially for those inclined to support the modification of the procedural scheme by means of private agreement. Similarly, the manner in which courts respond to party stipulation reflect an attitude toward private agreement that is very different than that evidenced by the near wholesale enforcement of PLAs. Rule 29 provides that parties may enter stipulations that modify discovery procedures provided for in the Federal Rules.¹⁴⁵ In its present formulation, the rule allows parties to enter written stipulations that vary deposition procedures as well as other procedures regarding discovery.¹⁴⁶ After its original formulation in 1938, the

143. See *O'Neil*, 324 U.S. at 704–05 (“[W]hether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.”).

144. FED. R. CIV. P. 29.

145. *Id.* See generally Jay E. Grenig, *Stipulations Regarding Discovery Procedure*, 21 AM. J. OF TRIAL ADVOC. 547 (1998) (discussing the history and function of Rule 29 in depth).

146. FED. R. CIV. P. 29 provides:

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

Id. The Advisory Committee Notes are interesting in the view they reflect as to the ability of private agreement to alter rules of procedure.

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

FED. R. CIV. P. 29 advisory committee's note (1970 amendment).

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery,

rule was amended in both 1970 and 1993 to provide greater breadth concerning what the parties may modify and to require less judicial approval for discovery modification by way of stipulation.¹⁴⁷

In one respect, Rule 29 could be read as if the rulemakers considered that special authorization needed to be provided for parties to alter the procedural scheme.¹⁴⁸ While recognizing that “[i]t is common practice for parties” to enter private agreements that alter the discovery scheme contained in the Federal Rules, the 1970 amendment states that it “recognizes such agreements and provides a formal mechanism . . . for giving them effect.”¹⁴⁹ It is

eliminate the need for a special motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

FED. R. CIV. P. 29 advisory committee's note (1993 amendment).

147. See FED. R. CIV. P. 29 advisory committee's note (1970 amendment).

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

Id.

148. Rule 29 is not the only instance in the Federal Rules where stipulations by parties relative to procedure are contemplated. Rule 15(a) provides that a party may amend its pleading: (1) after the service of a responsive pleading, or the passage of twenty days if no responsive pleading is permitted; (2) upon leave of court; or (3) with the consent of the adverse party. FED. R. CIV. P. 15(a). Similarly, Rule 26(a) provides for initial discovery disclosures to be made at or within ten days of the Rule 26(f) discovery conference. FED. R. CIV. P. 26(a). Rule 26(f)(1) and (3) provide for party agreement changing the timing of initial disclosures and other limitations on discovery. See FED. R. CIV. P. 26(f)(1), (3).

While one might be tempted to distinguish the stipulation contemplated by Rule 29 from those contemplated by Rules 15(a) and 26(a) as to breadth or impact on the structure of the procedural system, the scheme of all three rules seems consistent. That is, express authorization by the rules seems to be required in order to allow parties to alter their procedural structure.

The scheme of authorizing party stipulations to alter procedure is not unique to the Federal Rules. The Illinois Supreme Court Rules governing discovery, for example, provide for limitations on length of depositions, ILL. SUP. CT. R. 206(d), number of interrogatories, ILL. SUP. CT. R. 212(c), and timing of initial disclosures, ILL. SUP. CT. R. 222(c), all of which may be subject to alteration by stipulation or agreement of the parties.

149. FED. R. CIV. P. 29 advisory committee's note (1970 amendment).

odd that Rule 29 is needed for litigation waivers if it is already accepted that parties may reorder any or all procedures by means of a PLA. Within the Rule is the notion that, although it was common practice for parties to enter such agreements, the Rules needed to "recognize" them and to provide a "formal mechanism . . . for giving them effect."¹⁵⁰ This is the same view of the procedural system reflected in the ouster doctrine.¹⁵¹ That is, the public system of dispute resolution is established by the legislature to provide a neutral forum for resolution of disputes, and the parties may not alter that system without doing injustice to the neutrality sought by the rules and statutes that govern it.¹⁵²

If the drafters and revisers of the Federal Rules of Civil Procedure felt that Rule 29 was needed to clarify that parties could by written stipulation modify discovery procedures,¹⁵³ how can the courts believe that other aspects of procedure can be privately modified without similar authorization? Of course, when one of the parties to the PLA chooses to ignore it and seek relief in a court, even though an arbitration agreement specifies otherwise, or files an action in a venue other than that specified by a forum selection clause, the party seeking to enforce the PLA must resort to a court to have the PLA enforced.¹⁵⁴ However, the difference between the PLA situation and Rule 29 is the degree of scrutiny given the agreement of the parties. As will be discussed, PLAs, especially forum selection clauses, are given near automatic enforcement.¹⁵⁵ Stipulations under Rule 29 need not be recognized by the court and may be superseded.¹⁵⁶

Even if one were not inclined to read as much into the reason for the presence of Rule 29, it must be acknowledged that, at least, the rule stands for the notion that private, procedure-altering agreements should be subject to some recognition and enforcement under the rules. By so doing, the Rules can set the parameters for enforcement. Even though the 1993 amendment to Rule 29 eliminated the requirement for court approval of all dis-

150. *Id.*

151. *See supra* Part III.A.

152. *See supra* Part III.A.

153. *See supra* notes 143-47 and accompanying text.

154. *See generally* Joel E. Smith, Annotation, *Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein*, 98 A.L.R. 3d 767 (1980).

155. *See infra* Part V.

156. *See* FED. R. CIV. P. 29 advisory committee's note (1970 amendment).

covery stipulations,¹⁵⁷ the enforcement of these stipulations is not limitless. Court approval is expressly required for particular types of stipulations, such as those that alter established time schedules.¹⁵⁸ Rule 29 at least instructs that, even in a climate that encourages private agreements for expediency purposes, it is important to set parameters for those agreements.¹⁵⁹ Their scope and use should not be limitless and should be the subject of reasoned debate by a deliberative body.

It is only in the area of arbitration that Congress has legislated the judicial enforcement of PLAs and set parameters for so doing.¹⁶⁰ It would follow that without legislative authorization for enforcement of PLAs in other areas, the courts are overstepping their boundaries in enforcing them.¹⁶¹ Equally puzzling is the extent to which courts are willing to defer to private agreement when they do enforce PLAs.¹⁶² In some respects, it seems unparalleled. In considering stipulations made during the less coercive setting of litigation, the general rule is that courts will enforce stipulations as to facts.¹⁶³ As to matters of law, however, courts do not defer to party wishes.¹⁶⁴ It is difficult to imagine what could be more a matter of law than the basic functioning of the procedural system. Nevertheless, courts have granted nearly wholesale enforcement to PLAs related to many significant aspects of the procedural system. Consequently, the proper role of PLAs within the judicial system is simply in a highly confused state at the moment.

157. *See id.* advisory committee's note (1993 amendment).

158. *See id.* advisory committee's note (1970 amendment).

159. *Id.*

160. *See supra* Part III.B.1.

161. *See Hosking v. Carrier Corp.*, 58 Cal. Rptr. 2d 617 (Cal. Ct App. 1996), where the court stated:

The adoption of judicial procedures for the resolution of litigation is patently among the "sovereign powers" of the state, the reservation of which must be read into every contract "as a fundamental principle of law." Therefore, except where the Legislature has granted contracting parties the power to determine procedural matters—as it has done with agreements to arbitrate—they lack that power. Nor can they reasonably expect otherwise.

Id. at 624.

162. *See infra* notes 167–71 and accompanying text.

163. *See generally* 73 AM. JUR. 2D *Stipulations* § 18 (1974 & Supp. 2001) (discussing court enforcement of stipulations of facts and issues).

164. *See id.* § 5 ("It has generally been stated that the resolution of questions of law rests upon the court, uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective.") (footnote omitted).

V. PROCEDURE IS NOT WITHOUT IMPORTANCE

*"[E]videntiary rules are in some sense inappropriate 'commodities' for bargaining between private parties and that in some sense rules of evidence involve fundamental aspects of justice that may not be bargained away."*¹⁶⁵

Lurking not so subtly behind the judicial embrace of PLAs is the notion that procedure is not really that important. When considering enforcement of a forum selection clause, a conflicting statutory venue requirement often has been referred to by courts as "merely a venue requirement."¹⁶⁶ The use of the word "mere" implies a judicial disparagement for a statutory scheme designed to place a lawsuit in a court that bears some relationship to the lawsuit and is convenient or fair for the parties. For the defendant hailed into a distant, inconvenient court, venue provisions would not be viewed as "mere" requirements. Nevertheless, if the courts view procedure as a lesser body of law than substantive provisions it is easier for a court to enforce a PLA that alters the procedural landscape.

Such a view of procedure, however, is mistaken.¹⁶⁷ Even considering litigation outside the context of PLAs, an attorney with superior knowledge of procedure can gain a strategic advantage for his or her client. Adding PLAs to the consideration can allow a

165. WIGMORE, *supra* note 11, at 600 (emphasis added).

166. F.D. Rich Co. v. Indust. Lumber Co., 417 U.S. 116, 125 (1974); *accord* United States *ex rel.* B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co., 70 F.3d 1115, 1117 (10th Cir. 1995) ("Three circuits have addressed forum selection clauses that conflict with the Miller Act's venue provisions. All three have held that as a mere venue requirement, 270b(b) is subject to contractual waiver by a valid forum selection clause."); FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995) (holding that the Miller Act's venue requirement could be waived by defendants); United States *ex rel.* Pittsburgh Tank & Tower, Inc. v. G & C Enters., 62 F.3d 35, 36 (1st Cir. 1995) (holding that the Miller Act's venue provision is subject to contractual waiver through a valid forum selection agreement); *In re* Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979) (holding that the case for overriding the Miller Act was particularly strong where forum selection clause was suggested by defendants, the parties for whom the act was designed to protect).

167. *But see* CHARLES MCGUFFEY HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA & ENGLAND* 20 (1897) (stating that civil procedure is adjective law that "exists for the sake of something else").

party to gain advantage by definition.¹⁶⁸ Two oft-cited quotes support this view:¹⁶⁹

[W]hat substantive law says should be means nothing except in terms of what procedure says that you can make real.¹⁷⁰

I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time.¹⁷¹

Enforcing a PLA does not simply give effect to a private agreement for the sake of efficiency. Rather, enforcing a PLA can give a party a distinct strategic advantage that can change or perhaps dictate the outcome of a case. It should not be done lightly, nor without deliberation as to the scope of propriety of recognition and enforcement. It should not be done as inartfully as it has been done.

VI. COMPARING TWO INARTFUL ATTEMPTS AT FAIRLY BALANCING CONTRACT AND PROCEDURE: THE JUDICIAL AND LEGISLATIVE APPROACHES TO RECOGNITION AND ENFORCEMENT OF PLAS

Enforcement of PLAs has largely devolved from a question of whether such private agreements improperly impinge upon the structure of the public procedural system to a question of enforcement of a contract. As a result, civil procedure has taken a backseat to contract. However, contract law does not provide an avenue for sufficient considerations of fairness that a procedural system requires. Of course, standard contract defenses such as fraud and overreaching are available to a party seeking to avoid the enforcement of a PLA.¹⁷² As the shift of emphasis to contract law has occurred, consideration about whether a PLA is fundamentally fair and equitable for the resolution of a given dispute has been given short shrift.

168. See Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 391 (1992).

169. See, e.g., *id.* at 387.

170. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 18 (1960).

171. *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Administrative Law and Regulatory Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 312 (1983) (statement of Rep. Dingell).

172. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (discussing that a forum selection clause would not be enforced if it "was invalid for such reasons as fraud or overreaching").

That is not to say, however, that considerations concerning fairness in enforcement have been entirely forgotten. Different PLAs reflect various approaches as to how to account for some sense of procedural fairness—some the product of judicial decision,¹⁷³ some from the legislature,¹⁷⁴ and some imposed by the Constitution.¹⁷⁵ A survey of these approaches demonstrates that they are very inconsistent and not very satisfactory in terms of preserving a sense of procedural fairness. Of course, one can argue that because PLAs address a wide range of aspects of procedure, ranging from venue, to right to a jury, to whether a party may resort to a court at all, and because PLAs touch upon statutory rights, constitutional rights, and rights established by rule, that consistency is neither warranted nor desirable. What is consistent, however, is that each involves the same fundamental questions—whether parties alter the procedural system by means of a pre-dispute agreement, and, in so doing, whether faith in the fundamental fairness of the system can be preserved. Those questions necessitate a consistent answer for the PLA dilemma. At present, the answers are a convoluted confluence of contract and procedure that has not satisfactorily addressed, let alone answered, those fundamental questions.

A. *Two Judicial Creations: One Constitutionally Restrained, One With No Restraint*

1. Forum Selection Clauses: The Free-Wheeling Judicial Model

The judicially created doctrine for determining when it is appropriate to enforce a forum selection clause offers the least procedural protection in terms of fundamental fairness of any of the PLAs. In *The Bremen*, the Court held forum selection clauses to be “prima facie valid and [they] should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”¹⁷⁶ Presumably, somewhere within the concept of “unreasonable” exists the notion that fundamental fairness deserves at least some protection. For two reasons, the

173. See *supra* Part III.B.2.

174. See *supra* Part III.B.1.

175. See *supra* notes 70–77 and accompanying text.

176. *The Bremen*, 407 U.S. at 10.

specter of that protection has fallen within the shadows. First, the Court placed the burden on the party “resisting” the clause to show it would be “unreasonable” to do so.¹⁷⁷ Second, the Court explained that a forum selection clause was unreasonable when the contractually designated forum was “so gravely difficult and inconvenient that he [the resisting party] will for all practical purposes be deprived of his day in court.”¹⁷⁸ Indeed, this has proven to provide little protection for basic procedural fairness because forum selection clauses are routinely enforced in near automatic fashion,¹⁷⁹ and without apparent regard for fairness.¹⁸⁰

This lack of judicial concern for fairness was well demonstrated in *Carnival Cruise Lines, Inc. v. Shute*.¹⁸¹ In that case, the Court enforced a forum selection clause found among twenty-five paragraphs of boilerplate language on the back of a non-refundable cruise ship ticket.¹⁸² The plaintiff, though found by the court below to be “physically and financially incapable”¹⁸³ of pursuing her suit in the contractually designated forum of Florida, was nevertheless held to the agreement and required to do just that if she wanted to pursue a judicial remedy.¹⁸⁴

It is difficult to view this decision as anything close to fair,¹⁸⁵ yet the Court found fairness based on the conservation of judicial

177. *Id.*

178. *Id.* at 18.

179. *See, e.g.,* Solimine, *supra* note 8, at 52 (noting that the judicial trend is for almost invariable enforcement of forum selection clauses); Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U L. REV. 422, 432 (1991) (contending that lower courts enforce forum selection clauses “almost reflexly”).

180. *See* Spradlin v. Lear Siegler Mgmt. Servs. Co., 926 F.2d 865, 869 (9th Cir. 1991) (enforcing a forum selection clause in a contract for employment designating Saudi Arabia as the exclusive forum in a suit between an American former employee and a Delaware corporation filed after termination of employee’s contract in Saudi Arabia and his orders to leave the country, because the employee did not demonstrate that it would be gravely difficult for him to file suit in Saudi Arabia).

181. 499 U.S. 585 (1991).

182. *Id.* at 585.

183. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 389 (9th Cir. 1990).

184. *Carnival Cruise Lines*, 499 U.S. at 585.

185. The decision has been soundly criticized. *See, e.g.,* Mullenix, *supra* note 12, at 342 (referring to the case as a “patently bad . . . decision” and stating that “each rationale the Court offered in support of its holding cannot withstand legal analysis or intuitive common sense”); Richard A. Ganter, Note, *Absent Bad Faith, Fraud or Overreaching, A Reasonable Forum Selection Clause in a Commercial Cruise Form Contract is Enforceable*, 22 SETON HALL L. REV. 505, 539 (1992) (stating that “it is difficult to support the Court’s determination to allow the cruise line’s interests in convenience and lowered costs to inter-

and litigant resources and the fact that the predictability afforded to Carnival Cruise Lines because of the forum selection clause would result in reduced cruise ship fares.¹⁸⁶

An illusory reduction in fares to all passengers is hardly the type of fairness intended by the statutes and rules that comprise the structure of the procedural system. Although the legislature had enacted a statutory scheme for determining a convenient and presumably fair forum for this action,¹⁸⁷ the Court enforced a one-sided private contract that ignored the structure of the public court system as determined by the legislature.¹⁸⁸ This is an inadequate protection of fundamental fairness.

2. Jury Waiver: A Judicial Creation Tempered by Constitutional Restraint

Recognition and enforcement of PLAs providing for a waiver of right to trial by jury¹⁸⁹ follows a history very close to that of the forum selection clause. One significant difference, however, is that judicial doctrine surrounding jury waivers has incorporated a constitutional dimension, thereby requiring an enforceable waiver to be the product of a knowing, voluntary, and intelligent decision by the parties to the agreement.¹⁹⁰ Therefore, the Seventh Amendment right to trial by jury¹⁹¹ has injected a consideration for fundamental fairness into the recognition and enforcement analysis. A party is not held to its waiver unless that party knew and appreciated what it was doing by executing the waiver.¹⁹² This stands in sharp contrast to the forum selection clause. Though frequently hidden within boilerplate language, the contract provision fixing the location of subsequent lawsuits is given enforcement in situations where it could not be said that

fere with the Shutes' lawful and valid interest in pursuing their legal claim").

186. See *Carnival Cruise Lines*, 499 U.S. at 593-94.

187. See *id.* at 595.

188. See *id.* at 597.

189. Jury waivers are pre-dispute contractual provisions that waive the rights of the parties to the agreement to seek a trial by jury to redress subsequent disputes related to the contract.

190. See *infra* notes 194-207 and accompanying text.

191. See U.S. CONST. amend. VII.

192. See *infra* notes 194-207 and accompanying text.

the agreement was part of a knowing, voluntary, and intelligent decision.¹⁹³

The jury waiver, like the forum selection clause, was first discussed by the Supreme Court in *Home Insurance Co. v. Morse*.¹⁹⁴ The Court stated that “[t]here is no sound principle upon which such agreements [pre-dispute contracts that waive the right to a subsequent jury demand] can be specifically enforced.”¹⁹⁵ The ability to waive the right to trial jury in an existing dispute was clearly distinguished from attempts to waive such rights in pre-dispute agreements:

In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.¹⁹⁶

Recognition of the difference between waivers made during the dispute and those made pre-dispute is critical, especially for purposes of assessing whether a given waiver was “intelligent.” When made during the dispute, that party waiving the right to object to an improper venue or waiving the right to demand a trial by jury does so with knowledge of the precise nature of the dispute. The party has the opportunity to assess how the given waiver will impact the ability of the party to seek redress in the courts. When the waiver is made prior to the dispute, both the nature of the dispute and the impact of the waiver are obviously unknown. The failure to recognize and appreciate this difference has plagued the development of a meaningful judicial approach to PLAs.¹⁹⁷

The enforcement of PLA jury waivers in the federal courts,¹⁹⁸ as with forum selection clauses, finds its origins in *National Equip-*

193. See *supra* Part VI.A.1.

194. 87 U.S. (20 Wall.) 445 (1874).

195. *Id.* at 450.

196. *Id.* at 451.

197. See *supra* notes 118–32 and accompanying text.

198. Because the right to trial by jury is rooted in the Seventh Amendment, which is not binding upon the states, recognition of jury waivers in the states is not consistent with that in the federal courts, but rather, must account for whatever right to jury trial exists in the applicable state constitution. For example, the California Constitution has been

ment Rental, Ltd. v. Szukhent,¹⁹⁹ in which the Supreme Court upheld the enforcement of a contractual waiver of service of process.²⁰⁰ In a different case, *National Equipment Rental, Ltd. v. Hendrix*,²⁰¹ involving the same party²⁰² and relying upon the prior decision involving it, the Second Circuit overcame the judicial antipathy expressed in *Morse* toward pre-dispute jury waivers, yet nevertheless refused enforcement in the situation before it.²⁰³ The constitutional dimension to the right to trial by jury caused the Second Circuit to view this as being "far more fundamental than the right to personal service [of process]."²⁰⁴ Therefore, the jury waiver was not enforced because it was not established that "its relinquishment [was] knowing and intentional."²⁰⁵ Interestingly, the Second Circuit quoted Justice Black's dissent in *Szukhent* objecting to the PLA having been hidden within the terms of the contract in language a layperson might not appreciate nor fully comprehend:

[T]his printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard . . . it exhausts credulity to think that they or any other layman reading these legalistic words would have known or even suspected that they amounted to [such] an agreement.²⁰⁶

It is this concern for whether all parties to the agreement know and appreciate the effect of the agreement that is at the heart of concern for the judicial rush to embrace PLAs. But absent the constitutional dimension of the right to jury trial, that concern has remained secondary to the interest in private autonomy of contract. It is curious, however, that the right to service of process, rooted in fundamental due process, is somehow viewed as be-

held to not prohibit contractual jury waivers. *Trizec Props., Inc. v. Superior Court*, 280 Cal. Rptr. 885, 886 (Cal. Ct. App. 1991). The Supreme Court of Georgia has held that the Georgia Constitution and applicable statutes prohibit enforcement of pre-dispute jury waivers. *Bank South, N.A. v. Howard*, 444 S.E.2d 799, 800 (Ga. 1994).

199. 375 U.S. 311 (1964).

200. *Id.* at 314.

201. 565 F.2d 255 (2d Cir. 1977).

202. The legal staff at National Equipment Rental, Ltd. must have been extremely prescient in anticipating the future for PLAs in American public dispute resolution.

203. *Hendrix*, 565 F.2d at 258.

204. *Id.* at 258 n.1.

205. *Id.*

206. *Id.* at 258 (quoting *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 322-33 (1945) (Black, J., dissenting)) (alteration in original).

ing less of a right deserving of protection than the Seventh Amendment right to trial by jury.²⁰⁷

Pre-dispute jury waivers have yet to receive Supreme Court scrutiny. The decisions of lower courts addressing enforcement have followed the *Hendrix* approach requiring a waiver that is something more than part of boilerplate language hidden among other terms.²⁰⁸ How the knowing, voluntary, and intelligent standard is applied, however, is not without variations. Questions exist as to whether the standard encompasses two or three elements, as well as what factors are within the consideration of those elements.²⁰⁹ There also exist differences as to which party, the one seeking enforcement or the one seeking relief from the jury waiver, bears the burden as to the question of enforcement.²¹⁰ In *Hendrix*, the Second Circuit placed the burden upon the party seeking enforcement,²¹¹ but the circuits are split on the issue.²¹²

Despite these unsettled issues, it can be stated generally that for a jury waiver to be enforced there must be some assent to the agreement by the parties that involves a more knowing and voluntary decision than is required for enforcement of a forum selection clause or an arbitration agreement.²¹³ The significant differ-

207. See *id.* at 258 n.1.

208. See *id.*; see also *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832–33 (4th Cir. 1986) (knowing and intentional, voluntary, and informed); *Phoenix Leasing, Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (knowing, voluntary, and intelligent), *aff'd*, 89 F.3d 846 (9th Cir. 1996) (unpublished decision); *Okura & Co. v. Careau Group*, 783 F. Supp. 482, 488–89 (C.D. Cal. 1991) (knowing, voluntary, and intelligent); *Standard Wire & Cable Co. v. Ameritrust Corp.*, 697 F. Supp. 368, 375 (C.D. Cal. 1988) (knowing, voluntary, and intelligent).

209. See Deborah J. Matties, Note, *A Case for Judicial Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 449–52 (1997) (analyzing how courts have interpreted and applied the knowing, voluntary, and intelligent standard to jury waivers differently).

210. See Debra T. Landis, Annotation, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688, 694–97 (1989 & Supp. 2000) (listing how the circuits have applied the burden).

211. See *Hendrix*, 565 F.2d at 258.

212. See *Coop. Fin. Ass'n v. Garst*, 871 F. Supp. 1168, 1171–72 (N.D. Iowa 1995) (outlining the circuit split).

213. See, e.g., *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906, 910–11 (S.D.N.Y. 1995) (holding a jury waiver in a passenger ticket was not knowing in circumstances similar to that of the forum selection clause held enforceable in *Carnival Cruise Lines*); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105–06 (N.D. Ill. 1994) (holding a jury waiver not knowing because the waiver was not conspicuous enough, though the waiver was contained in capital letters and more conspicuous than the forum selection clause on

ence in these judicially created PLAs is justified by the difference between the express Seventh Amendment right to trial by jury and the more vague due process right to personal service of process. Although both have been held to be subject to waiver, the express constitutional right appears to require a more knowing and intelligent waiver.²¹⁴ This distinction is simply not justified. Waiving the right to object to an inconvenient forum can put a party at a greater procedural disadvantage than having a case relegated to a bench trial instead of a jury trial. At least the dispute has a hearing somewhere that the party can attend. It also may be overlooked that, ultimately, each situation results in the public dispute resolution system being altered by private agreement in a way that may greatly disadvantage one party in favor of another. In order to preserve public faith in that system, the standard for enforcement of such alterations should be the more strict standard of "knowing, voluntary, and intelligent." Unfortunately, the judicially created doctrine has missed the mark in developing a consistent approach to PLAs.

B. The Approaches of Two Deliberative Bodies: One Run Amuck, One Reasonable

1. Arbitration Clauses: A Legislative Creation Judicially Run Amuck

*"[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."*²¹⁵

Arbitration clauses, agreements entered prior to the existence of a dispute by which the parties agree to resolve any resultant dispute by means of arbitration rather than litigation,²¹⁶ were given congressional sanction by the FAA.²¹⁷ Therefore, they stand

the ticket in *Carnival Cruise Lines*).

214. See *Hendrix*, 565 F.2d at 258.

215. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (emphasis added).

216. See 9 U.S.C. § 2 (2000).

217. See *id.* §§ 1-16 (2000). The heart of the FAA lies in section 2, which provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereaf-

out as an example of PLA that is the product of debate by a deliberative body, rather than the creation of judicial decision. Those legislative debates included considerations of ensuring fundamental fairness for parties affected by arbitration clauses.²¹⁸ As discussed below, this was sought to be accomplished by limiting the circumstances in which arbitration agreements could be utilized. One could hope that reviewing the use of the FAA might shed light on how effectively legislation has been used as a mechanism to ensure fairness in the use of PLAs. Unfortunately, the subsequent seventy-plus years of arbitration clause enforcement by the courts has only demonstrated that judicial embrace of PLAs is so great that the courts have obliterated whatever restraints the legislature sought to impose.

Although the FAA was originally intended to be limited in scope so as to recognize and enforce arbitration clauses only in commercial situations where parties of equal bargaining power make a knowing decision to utilize arbitration,²¹⁹ the Supreme Court has greatly extended the scope of the FAA far beyond the original intent of Congress to the point where arbitration clauses are recognized as valid and enforceable in almost every kind of transaction.²²⁰ The experience of the FAA demonstrates that if Congressional control is to be exercised, it must be done very tightly.²²¹ Furthermore, the experience of the FAA, when viewed in conjunction with judicial recognition of forum selection clauses, indicates that there is little hope of the courts imposing any kind of limitations on the use of PLAs, especially limitations that could be effective in preventing unfairness.²²²

ter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2.

218. *See infra* Part VIII.A.1.

219. *See Sternlight, supra* note 125, at 647.

220. *Id.* at 660–66.

221. *Id.* at 705. Professor Sternlight argues that if the Court does not attain some balance between arbitration and litigation, Congress should step in to protect persons of lesser bargaining power from unfair arbitration agreements. *Id.* at 711–12.

222. *Id.* at 687–88.

Professor Jean Sternlight has traced the history of judicial interpretation and application of the FAA.²²³ She identifies an initial “[p]eriod of [o]riginal [i]ntent” where the FAA was interpreted as applying to situations of true voluntary consent between two merchants of equal bargaining power.²²⁴ During this period, the FAA was not thought to apply to a customer’s securities fraud action against a brokerage house because of a lack of knowledge on the part of the customer.²²⁵ The FAA was also inapplicable to a discharged employee’s action against his former employer.²²⁶ Professor Sternlight states that “[a]lthough the Court did not explicitly reference a policy of protecting consumer choice, the Court was concerned with protecting the employee from a result he had not anticipated when signing the agreement.”²²⁷ Thus, the FAA was interpreted as limiting the situations to which it should apply, in part, to preserve some notion of fundamental fairness.

Current judicial interpretation of the FAA has evolved to the point where arbitration is viewed by the Court as the equivalent of litigation.²²⁸ This is evidenced by a judicial preference for arbitration that has manifested itself in the notion that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”²²⁹ Additionally, as stated by Professor Sternlight, “[t]he Supreme Court dramatically increased the scope of the FAA during this third period [1983 to present] by expounding the dual myths that the FAA applies to actions brought in state court and that the FAA prohibits states from enacting legislation hostile to arbitration.”²³⁰

An extremely important question lies within Professor’s Sternlight’s assertion: How was the Court able to increase the scope of an act of Congress? Having created the recognition of forum selection clauses, it makes some sense that the Court could

223. *Id.* at 644–74.

224. *Id.* at 647.

225. *Id.* at 648 (analyzing *Wilko v. Swan*, 346 U.S. 427, 429, 435, 438 (1953)).

226. *Id.* at 648–49 (discussing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200–01, 205 (1956)).

227. *Id.*

228. *Id.* at 672–73 (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

229. *Id.* at 660 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

230. *Id.* at 664.

extend their enforcement to whatever situations it felt appropriate. However, as seen with jury waivers, constitutional concerns impose a limitation on the circumstances in which courts may hold a waiver to be effective.²³¹ However, when the legislature has acted and imposed some limitations on the situations in which arbitration agreements may be enforced, how did the Court extend their usage beyond that which Congress authorized? Additionally, how did the Court extend the FAA into the states and preempt any state action intended to limit the use of arbitration agreements?

Nevertheless, arbitration clauses are most often enforced with notions of fundamental fairness overlooked in favor of allowing arbitration whenever possible. The protections for consumers envisioned to be within the original intent and the limitations on the scope of the FAA have been brushed aside or expanded by judicial interpretation. The result is that while the courts can rely on the *Carnival Cruise Lines*²³² decision as the forum selection clause high-water mark, allowing reliance upon a PLA without regard for underlying fairness, the *Hill v. Gateway 2000, Inc.*²³³ decision can be used as such for arbitration clauses. In *Hill*, an arbitration clause contained in paperwork shipped with a computer was enforced even though the only way the consumers could have avoided the agreement would have been to return what had been paid for and delivered to their home.²³⁴ Consequently, the protections for basic fairness that were envisioned in the FAA in 1925 have now been swept away by judicial fiat.

While the authors agree with Professor Sternlight's analysis of the history of the judicial treatment of the FAA, the authors somewhat disagree with her conclusion as to what it all means. She argues that congressional control of arbitration clauses may be needed if the Supreme Court does not change its course concerning its overwhelming preference for arbitration over litigation.²³⁵ She states, however, that "Congress need not enact its

231. See *supra* Part VI.A.2.

232. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991).

233. 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997).

234. *Id.* at 1148; see also Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, 71 FLA. B.J. 8 (1997) (discussing the impact of *Hill v. Gateway 2000, Inc.*).

235. See Sternlight, *supra* note 125, at 712.

own laws directly regulating arbitration."²³⁶ Instead, she argues that Congress "should simply restore to state legislatures and courts their power to protect consumers and other little guys."²³⁷

The authors disagree for two reasons. First, experience with judicial treatment of PLAs, whether forum selection clauses created from court opinion or arbitration clauses authorized by statute, shows that judicial preference for them will never result in a body of law that adequately ensures fundamental fairness.²³⁸ Second, not only is it advisable for Congress to act, it is solely within the authority of the legislature pursuant to Article III to regulate PLAs as procedural mechanisms that regulate access to and aid the functioning of the courts.²³⁹

2. Choice of Law Provisions: A More "Reasonable" Legislative (Deliberative Body) Approach

Parties to a contract, by means of a choice of law provision, may also designate the law to be applied to their contract in any later dispute that may arise.²⁴⁰ These provisions are PLAs in the sense that prior to any existent dispute, the parties are seeking to order how the resolution of that dispute will take place.²⁴¹ The choice of law provisions are different than the other PLAs in that what they seek to reorder is the source of substantive law under which their agreement will be construed, rather than the procedural system within which the dispute will be resolved. Forum selection clauses determine venue and perhaps personal jurisdiction. Jury waivers determine who shall be the trier of fact. Arbitration agreements remove the dispute from the courts. Accordingly, choice of law provisions do not seek to strategically place one party at a procedural disadvantage. Additionally, because they address substantive law, choice of law provisions help interpret the contract whether or not a later dispute is litigated. Nevertheless, in this article, the authors have included choice of law provisions as PLAs because they allow a party to gain an ad-

236. *Id.*

237. *Id.*

238. *See supra* Part VI.A.1.

239. *See supra* Part IV.A.

240. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-87 (1988).

241. *See id.*

vantage by contractually designating a source of law and because they provide that party with a substantive right that might not otherwise be available. Given this potential for advantage, the concerns for a party with less bargaining power, knowledge, or meaningful choice are equivalent to those of parties to the other PLAs previously discussed.

Choice of law PLAs are instructive to this discussion because there is a body of law developed around provisions adopted by legislatures or other deliberative bodies.²⁴² The Uniform Commercial Code (the "UCC") and the Restatement (Second) of Conflict of Laws (the "Restatement") each contain a provision that governs when a choice of law should be given effect.²⁴³ Both provisions seek to offer protection to less advantaged parties by restricting the scope of what law may be contractually designated.²⁴⁴

The UCC provides that if a transaction bears a reasonable relationship to more than one forum, the parties may contract as to which law will apply.²⁴⁵ Similarly, the Restatement requires that the contracted source of law have a "substantial relationship" to the transaction.²⁴⁶ If the contracted choice of law does not meet the substantial relationship test, there must be a "reasonable basis" for the choice.²⁴⁷ Additionally, the contracted choice of law cannot be "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."²⁴⁸ Therefore, the choice of law cannot be unrelated to the suit.²⁴⁹ Furthermore, a contractual choice of law cannot allow one party to accomplish, by means of a PLA, that which would be prohibited by the substantive law.²⁵⁰

242. The Uniform Commercial Code, drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, has been adopted in some form by all fifty states and the District of Columbia. *See* U.C.C., 1 U.L.A. XVI, 1-2 (1989 & Supp. 2001). The Restatement (Second) of Conflict of Laws is the product of the American Law Institute.

243. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988); U.C.C. § 1-105(1) (1989 & Supp. 2001).

244. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988); U.C.C. § 1-105(1) (1989 & Supp. 2001).

245. U.C.C. § 1-105(1) (1989 & Supp. 2001).

246. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1988).

247. *Id.*

248. *Id.* § 187(2)(b).

249. *See id.*

250. *See id.*

This sense of restraint in both the UCC and the Restatement is wholly lacking in the judicially created doctrine enforcing forum selection clauses. The contractually designated forum need not bear any relationship to the dispute at hand, but rather must not be "so gravely difficult and inconvenient that he [the resisting party] will for all practical purposes be deprived of his day in court."²⁵¹ This provides little, if any, prohibition on what forum may be designated. It was argued previously that a better approach to forum selection clauses would be to limit the forum that the parties may designate by contract to those that applicable venue statutes would designate.²⁵² By so doing, the concern for procedural fairness that underlies the venue statutes would not be subject to wholesale avoidance or alteration by the parties.²⁵³ It is consideration and discussion of this type of issue that should occur surrounding PLAs generally. It has been lacking from judicial decisions that have embraced forum selection clauses largely on an all or nothing basis.

Several states' legislative enactments give effect to choice of law PLAs, but do so with an eye toward protecting consumers or other potentially unwitting parties to a provision.²⁵⁴ A common formulation applies only to contracts in excess of a specified dollar amount, frequently \$250,000.²⁵⁵ Furthermore, contracts for personal services are excluded.²⁵⁶ This protective restraint in application is similar to that which was originally intended by the FAA.²⁵⁷ But as discussed previously, judicial decisions, for all practical purposes, have eliminated the FAA's intended protection.²⁵⁸ Congress would serve potential parties to PLAs well by determining their scope and applicability. As discussed, while PLAs have their place, at the same time they can be used to gain unfair advantage of one party over the other.

251. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).

252. *See Taylor, supra* note 30, at 850-53 (arguing that the holding in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), is the preferable approach for enforcement of forum selection clauses).

253. *Id.* at 833.

254. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2001); N.Y. GEN. OBLIG. LAW § 5-1401 (Consol. 2001).

255. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2001).

256. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1401 (Consol. 2001).

257. *See infra* Part VIII.A.1.

258. *See supra* Part VI.B.1.

VII. SUPER CONTRACT

The question of PLA enforcement has been approached by the courts largely as one of deference to private contractual autonomy. It is only when considering the jury waiver PLA, where there is a constitutional dimension to the contractual waiver, that courts inquire whether the waiver was “knowing, voluntary and intelligent.” Otherwise, in the context of the other PLAs, parties are largely held to their bargain, and PLAs are enforced as a matter only of contract. Their effect on the underlying fairness of the public procedural system is mostly ignored.²⁵⁹ But the contract law applied to PLAs somehow becomes fundamentally different than the law applied to the enforcement of “normal” contracts. The approach taken by the courts has turned PLAs into a hybrid form of “super contract.”²⁶⁰ Traditional defenses to contract formation afford little, if any, relief to a party seeking to avoid having a PLA enforced.²⁶¹ Furthermore, once found to be valid, courts in near knee-jerk fashion provide automatic specific performance without acknowledging any necessity for first examining the prerequisites for specific performance or injunctive relief required for a “normal” contract.²⁶²

A. *Traditional Contract Defenses Fall by the Wayside*

The Bremen standard for enforcement of forum selection PLAs contains some restraints upon the circumstances in which PLAs are given effect. PLAs are considered “invalid for such reasons as fraud or overreaching”²⁶³ and must have been “freely negotiated”²⁶⁴ by “experienced and sophisticated businessmen,”²⁶⁵ persons at “arm’s-length.”²⁶⁶ Nevertheless, the Court’s decision in *Carnival Cruise Lines* seemed to brush aside many protections for

259. See *supra* Part VI.A.1.

260. See *infra* Part VII.C.

261. See *infra* Part VII.A.

262. See generally Graydon S. Sterling, *Forgotten Equity: The Enforcement of Forum Clauses*, 30 J. MAR. L. & COM. 405 (1999) (discussing specific performance as the appropriate mechanism for enforcement of forum selection clauses); *infra* Part VII.B.

263. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

264. *Id.* at 12.

265. *Id.*

266. *Id.*

consumers. For instance, a PLA on the back of a passenger ticket, is "neither freely negotiated" nor the product of "arm's-length" bargaining.²⁶⁷ The Court simply neglected to address either the adhesive nature of the contract or any related contractual defenses.²⁶⁸ In so doing, the Court opened the door for the use of PLA adhesion contracts and closed the door to the defense of invalidity for fraud or overreaching.²⁶⁹ The result is that PLAs are almost automatically enforced, and defenses sounding of unconscionability are fruitless.²⁷⁰

In accord, the doctrine of separability makes asserting these defenses to the contract nearly impossible. Traditional contract law holds that if there is no contract, then there are no obligations or rights flowing from it.²⁷¹ Likewise, if one party can avoid the legal relations created by the contract²⁷² and chooses to do so, there are no obligations or rights flowing from the contract at all.²⁷³ Whatever the agreement between the parties may have been, there is no legally recognized duty to perform,²⁷⁴ and therefore, no contract. Corbin expressed this logic by stating:

267. The Ninth Circuit had previously refused to enforce the forum selection clause for precisely these reasons. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 388-89 (9th Cir. 1990).

268. See, e.g., Julie H. Burch, *Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum*, 23 LOY. U. CHI. L.J. 329, 345-48 (1992) (discussing that the court in *Carnival Cruise Lines* "ignored the fundamental concepts of unconscionability"); Mullenix, *supra* note 12, at 352-70 (criticizing the decision in *Carnival Cruise Lines* for promoting the use of adhesion contracts in forum selection PLAs).

269. See, e.g., Borchers, *supra* note 14, at 71-72 (stating that the *Carnival Cruise Lines* decision seriously erodes the standard for enforcement established in *The Bremen*); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clause in Consumer Contracts*, 86 NW. U. L. REV. 700, 707-14 (1992) (stating that *Carnival Cruise Lines* burdens consumers by validating forum selection PLAs in almost all consumer contracts).

270. See, e.g., *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301-02 (5th Cir. 1998) (finding that, since forum selection clauses are presumptively valid and that the party seeking to avoid enforcement of a forum selection clause bears a heavy burden, a forum selection clause contained in a fraudulently induced settlement agreement would be enforced because the fraud was not directed at the specific clause in question); see also Lederer, *supra* note 179, at 432 (stating that the application of the *The Bremen* test for enforcement of forum selection clauses almost always results in their enforcement); Solimine, *supra* note 8, at 52 (discussing the judicial trend toward rejection of challenges to forum selection clauses and their almost invariable enforcement).

271. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

272. *Id.* § 7.

273. *Id.*

274. *Id.*

[I]f the alleged defect exists, it affects the provision for arbitration just as much as it affects the other provisions If one party failed to express assent to the terms proposed by the other, no contract has been made. The proposal for arbitration lacks acceptance just as fully as do the other proposed terms.²⁷⁵

Similarly, the Supreme Court has repeatedly stated that traditional contract defenses may be utilized to defeat PLAs.²⁷⁶ However comforting this sounds, the comfort is meaningless because within the PLA jurisprudence is the doctrine of separability, which renders traditional contract formation defenses virtually meaningless.

The doctrine of separability was accepted by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,²⁷⁷ a case involving alleged fraudulent inducement of a contract containing an arbitration clause.²⁷⁸ Separability is the concept that PLAs are “separate” from the parent contracts of which they are a part.²⁷⁹ The doctrine requires that a defense, such as duress, unconscionability, or fraud, be directed at the particular PLA clause itself.²⁸⁰ Thus, a claim of fraudulent inducement which taints the entire contract is insufficient to halt the enforcement of a PLA.²⁸¹ The doctrine has also been applied to forum selection clauses.²⁸² Because the doctrine applies regardless of the nature of the defense, a forum selection clause or arbitration clause must itself be fraudulent or unconscionable;²⁸³ only then will the PLA be unenforceable. The doctrine results in the enforcement of the PLA, embedded in a contract which, as a whole, is invalid due to fraud, duress, or unconscionability.²⁸⁴ The

275. 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1444 (1951). This reasoning applies to other PLAs as well.

276. See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 493 (1987).

277. 388 U.S. 395 (1967).

278. *Id.* at 404.

279. See *id.* at 402.

280. See *id.*

281. See *id.*

282. See *e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974); *J.B. Harris, Inc. v. Razei Bar Indus. Ltd.*, 37 F. Supp. 2d 186, 191 (E.D.N.Y. 1998); *Am. Life Ins. Co., v. Parra*, 25 F. Supp. 2d 467, 478 (D. Del. 1998). *But see* *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505 (2d Cir. 1998) (finding that when an alleged contract is oral, existence of the contract should be determined prior to enforcement of a forum selection clause).

283. *Prima Paint*, 388 U.S. at 404.

284. See *id.*

doctrine enforces these clauses before the contract's validity is determined, and thus before it has been legally determined that a binding PLA exists.²⁸⁵ In the case of arbitration clauses, the result is that the dispute is removed from the courts where the defense of invalidity would seem to have a better chance of success.

While PLA jurisprudence embraces the concept of separability, traditional contract law has recognized the severability of clauses in a contract. The doctrine of severability allows for enforcement of valid contract provisions, despite the unenforceability or invalidity of one or more sister provisions.²⁸⁶ Nevertheless, the doctrine has some limitations. If public policy renders the provisions unenforceable, the court, prior to "severing" the unenforceable clause from the contract and enforcing the rest, must be assured that the severed provision is not an essential part of the agreed upon exchange²⁸⁷ and that the party seeking enforcement of the rest of the contract did not engage in serious misconduct.²⁸⁸

While similar, the doctrine of severability highlights the deficiencies of the paralleled separability concept as applied to PLAs.²⁸⁹ Severability is concerned with a valid contract, a part of which is not enforceable due to a defect in formation or matters of public policy.²⁹⁰ Thus, where severability assumes that an otherwise valid contract exists,²⁹¹ separability disregards the factual challenge to the invalidity of the contract as a whole by requiring evidence that the fraud was directed at the particular provision.²⁹² Separability pares the PLA portion away from the contract as a whole and enforces that portion prior to determining whether the rest of the contract has validity in the face of an alleged defect. Therefore, any challenges the resisting party seeks to raise concerning the formation of the contract become much more difficult when directed at the PLA, for it must be the PLA that is invalid not the contract as a whole.

285. *See id.*

286. RESTATEMENT (SECOND) OF CONTRACTS § 183 (1979).

287. *Id.* § 184.

288. *Id.*

289. *See id.*

290. *Id.*

291. *Id.* The conclusion that there is a valid contract may result if the issue is not raised by the parties or, if contested, because the court determines the issue before reaching the severability determination. *Id.*

292. *Prima Paint*, 388 U.S. at 403-04.

An examination of the two concepts reveals that severability is a process of analysis while separability is simply a rule of interpretation.²⁹³ Severability is a process in which the court determines the validity of the contract and each of its provisions.²⁹⁴ If a provision is sought to be severed, the court examines whether that provision was an essential part of the agreed exchange between the parties²⁹⁵ and whether the party seeking enforcement of the rest of the contract is one whom engaged in serious misconduct.²⁹⁶ By definition, severability applies only when a contract has both provisions that are void or voidable and that are enforceable.²⁹⁷ If the contract fails as a whole because the provision was essential to the bargain or there was misconduct, severability will not occur.²⁹⁸ By contrast, separability is simply a rule of interpretation because it contains no protection for the wronged party. In fact, there is no freedom of the court to consider the circumstances under which the parties contracted. There is no consideration of whether a deceptive party has been able to swindle an innocent party out of his day in court.²⁹⁹ Certainly, there is no determination of whether the PLA was an essential part of the exchange.³⁰⁰ While the process of severability has limitations which ensure a fair application, the rule of separability for PLAs has no such protection, and despite the Court's oft-mentioned support for traditional state law defenses to

293. RESTATEMENT (SECOND) OF CONTRACTS § 184 (1979).

294. *Id.* § 183

295. *Id.* § 184(1).

296. *Id.* § 184(2).

297. *Id.* § 184(1).

298. *Id.*

299. This effect also gives rise to serious due process issues.

300. The proliferation of arbitration clauses is evidenced by the fact that they are inserted in most contracts. Most consumers and other contracting parties are not aware of the presence of the clause. See Michael A. Hanzman, *Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Questions: An Often Overlooked Task*, 70 FLA. B.J. 14 (1996). Mr. Hanzman notes that "mandatory arbitration clauses are becoming standard in many contracts, including agreements between customers and securities broker-dealers, franchisors and franchisees, employment contracts, insurance agreements, construction contracts, and agreements between professional service providers and their respective clients." *Id.* at 14. There is no bargaining, not even a mention as to its existence. Furthermore, given the Court's ruling in *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996), states are unable to ensure that contracting parties bargained at all. For an example of a case holding parties bound to an arbitration clause that they did not see until the product arrived in the mail, see *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1996), *cert. denied*, 522 U.S. 808 (1997); see also Sternlight, *supra* note 234, at 8.

PLAs,³⁰¹ the effect of separability renders these defenses meaningless.

The Supreme Court held in *Perry v. Thomas*³⁰² that “[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of] § 2.”³⁰³ Thus, state law provisions that specifically address arbitration clauses, such as requiring that they be in bold and larger print than other provisions of the contract,³⁰⁴ are pre-empted by the FAA.³⁰⁵ This leaves state legislators and courts with general contract defenses, as arbitration-neutral policies to defeat an arbitration clause. Because general contract defenses do not target the PLA, they are not pre-empted.³⁰⁶ However, separability demands enforcement when there is only a general contract defense, rather than evidence that the arbitration provision itself was the particular target of fraud. Thus, it renders any general contract defense largely ineffective because the challenge to the contract as a whole must be arbitrated.³⁰⁷ Thus, PLA enforcement is automatic because separability prevents the legal examination that general contract defenses are designed to address. The result is an enforcement of the PLA prior to the determination that it is valid and/or enforceable.

B. *Unable To Be Breached and Always Specifically Enforced*

With any contract, a party who feels that there is no benefit to the bargain or that the cost of breaching the contract may be less

301. *Casarotto*, 517 U.S. at 687 (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.”); *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (“[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”).

302. 482 U.S. 483 (1987).

303. *Id.* at 492.

304. *See Casarotto*, 517 U.S. at 684.

305. *Id.* at 687–88. “Montana’s law places arbitration agreements in a class apart from ‘any contract’ and singularly limits their validity. The State’s prescription is thus in consonant with, and is therefore preempted by, the federal law.” *Id.* at 688.

306. *See id.* at 687; *Perry*, 482 U.S. at 490.

307. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1966) (holding that a claim of fraudulent inducement directed specifically at the arbitration provision could be heard by the court prior to ordering arbitration, but a claim of fraudulent inducement directed at the contract as a whole must proceed to the arbitrators, thus enforcing the clause before its validity is determined).

expensive than fulfilling it has the option to breach the contract and pay damages.³⁰⁸ It is an extraordinary remedy to order the breaching party to specifically perform the obligations of the contract. Moreover, courts only issue non-monetary damages for the breach of the contract when there is no adequate remedy at law.³⁰⁹ Each situation has traditionally required an affirmative showing that the underlying bargain was fundamentally fair, just, and equitable.³¹⁰

Specific performance of agreements has traditionally been within the equitable powers of courts.³¹¹ Courts may look at the totality of the circumstances between the parties when considering whether to order specific performance of a contract.³¹² Additionally, specific performance will not be granted if “the contract was induced by mistake or by unfair practices.”³¹³ The court’s discretion is so great that the Restatement’s comment (a)³¹⁴ mentions that courts may refuse specific performance “even though no single legal doctrine alone would make the promise unenforceable.”³¹⁵ Thus, the fact that a provision is legally enforceable does not control whether specific performance is ordered.³¹⁶ The near seemingly automatic and consistent enforcement of PLAs removes this discretionary power from the courts by requiring the mandatory enforcement of PLAs, regardless of the circumstances of the case and irrespective of the intent of the parties.

The enforcement of PLAs has caused traditional notions of contract law to be turned upside down. Courts cite with a near reverential voice the sanctity of the right of private autonomy in enter-

308. RESTATEMENT (SECOND) OF CONTRACTS §§ 235–236 (1979).

309. *Id.* § 359.

310. *Id.* § 358 (stating that specific performance will be ordered on such terms as justice requires); *id.* § 358 cmt. a (“The objective of the court in granting equitable relief is to do complete justice to the extent that this is feasible.”); *id.* § 364 (stating that specific performance will not be granted if doing so would be unfair because of mistake, misrepresentation, or unreasonable hardship).

311. *Id.* ch. 16, Topic 3, introductory cmt. (recounting the history and discretionary nature of specific enforcement); see also *id.* § 358 (giving guidance to attempt to effectuate the purposes of the contract and justice); *id.* § 358 cmt. a (stating that the objective of a court granting specific performance is to do “complete justice”).

312. *Id.* § 358 cmt. a.

313. *Id.* § 364; see also *id.* § 364 cmt. a (explaining that courts sometimes may not allow specific performance even though they might award damages).

314. *Id.* § 364 cmt. a.

315. *Id.*

316. *Id.*

ing contracts by giving near automatic specific performance or injunctive relief in the face of a PLA. Once found to be valid, a forum selection clause will cause a suit to be dismissed or transferred to the contractually designated forum.³¹⁷ An arbitration agreement will cause a party to be enjoined from pursuing its day in court. Yet these enforcement remedies are not preceded by a finding of either fundamental fairness in the bargain or lack of adequate remedy at law.³¹⁸ Instead, the traditional burdens are reversed.³¹⁹ It is not the party seeking the enforcement of the contract that holds the burden, as it is with specific performance. Instead, the enjoined party must prove fundamental unfairness of the PLA itself in order to escape enforcement.³²⁰ This reversing of traditional burdens results in near automatic enforcement of PLAs. As will be discussed, because PLAs have the ability to reorder the fundamental balance of the public system of dispute resolution, an even higher level of fairness should be required to be established prior to enforcement, not a lesser one.

C. *Could There Be a Public Policy More Deserving of Insulation From Contractual Modification?*

In one sense, it is remarkable that PLAs have been afforded the status of "super contract." They are contracts that operate within the public system of dispute resolution, a system that exists to serve the fundamental societal purpose of peaceful resolution of disputes. In other areas where considerations of important public or societal policy come into play, courts have given increased scrutiny to the contract when considering enforcement.³²¹ Apt analogies can be drawn from cases involving pre-marital agreements ("PMAs")³²² and covenants not to compete ("NCAs").³²³

317. See *supra* Part VI.A.1.

318. See *supra* text accompanying note 218.

319. See *supra* notes 210–12 and accompanying text.

320. See *supra* notes 179–80 and accompanying text (discussing that, after *The Bremen*, a forum selection clause will be enforced unless the resisting party can show that enforcement would be unreasonable under the circumstances).

321. See, e.g., *Advent Electronics, Inc. v. Buckman*, 112 F.3d 267, 274 (7th Cir. 1997) (holding that non-competition clauses must be analyzed by the courts to determine whether they serve a legitimate business purpose).

322. Typically, a PMA determines the substantive resolution of issues or property distribution in the event of a dissolution of the marriage. See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think*

Each contract involves a situation where a party of lesser bargaining power, the spouse-to-be with fewer assets, or the potential employee seeking a job, is presented with a contractual provision in a largely “take it or leave it” context by a party of greater power. Each also may operate to alter and even lessen the weaker party’s substantive and/or procedural rights in the event a dispute arises in the future.³²⁴ Admittedly, not all PLAs are drafted from the context of parties of unequal bargaining power; true arm’s length agreements which were voluntarily entered into by informed equals are not the problem. However, the fact that there is a context in which they can be fairly utilized does not obviate the great opportunity for fundamental unfairness in other contexts. Given the societal interest at stake in a public dispute resolution system that is fundamentally fair, it would seem that PLAs should be afforded heightened scrutiny rather than being anointed as “super contracts” which are afforded little scrutiny.

For reasons of public policy, PMAs were largely considered unenforceable prior to 1970.³²⁵ While now gaining judicial acceptance, much greater scrutiny is given to formation of PMAs than has been given to PLAs, especially the forum selection clause and the arbitration agreement. Courts examine whether the agreement was freely entered into by the parties with full knowledge of the agreement³²⁶ under circumstances that indicate good faith,³²⁷ and without duress or undue influence.³²⁸ Out of concern for fundamental fairness, commentators have suggested, and some

About Marriage, 40 WM. & MARY L. REV. 145, 145–62 (1998) (discussing the history and enforceability of PMAs).

323. NCAs set limits upon a present employee’s future activities after the termination of the employee-employer relationship. *See generally* Samuel C. Damren, *The Theory of “Involuntary” Contracts: The Judicial Rewriting of Unreasonable Covenants Not to Compete*, 6 TEX. WESLEYAN L. REV. 71, 72–73 (1999) (discussing covenants not to compete and theories of enforceability).

324. *See generally* Bix, *supra* note 322.

325. *See* Norris v. Norris, 174 N.W.2d 368, 369 (Iowa 1970) (holding that PMAs are contracts and will be upheld “if they are fair between the parties and fairly, freely, and understandingly entered into”).

326. *See* Bix, *supra* note 322, at 153–54 (indicating that the courts’ tests for evaluating PMAs inquire as to whether the parties had full disclosure and full knowledge of his or her rights).

327. *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (holding that PMAs are contracts and should be evaluated under the same criteria).

328. *See, e.g.*, Button v. Button, 388 N.W.2d 546, 550 (Wis. 1986) (holding that a PMA is valid if each spouse entered into it voluntarily, freely, and with adequate information about their spouse’s financial situation).

courts have gone so far as to make, the PMA unenforceable unless the party forfeiting the party's rights had the opportunity to consult with an attorney.³²⁹ The party must also have received full disclosure of material circumstances that could effect the provisions of the agreement.³³⁰ This stands in sharp contrast to the willingness of courts to enforce forum selection clauses hidden on the back of passenger ship tickets,³³¹ or arbitration agreements found inside the packaging of a newly purchased personal computer.³³²

While NCAs also create equal concerns with formation issues,³³³ the basic questions for purposes of determining enforcement inquire into the reasonableness of the terms of the agreement.³³⁴ To address the issue, most states use the analysis found in the Restatement (Second) of Contracts.³³⁵ This analysis looks to whether the agreement is necessary to protect legitimate interests of the employer and whether the restriction protecting the employer does so in a reasonable manner; considerations include terms of length,³³⁶ type of activity restricted,³³⁷ and geographic scope of the limitation.³³⁸ The employer's interests, however, must

329. See Bix, *supra* note 322, at 153 (noting that since courts were hesitant about enforcement of PMAs, to ensure procedural and substantive fairness the court would strongly consider whether both parties consulted attorneys or at least had the opportunity to do so).

330. See *Button*, 388 N.W.2d at 546.

331. See *supra* notes 181–88 and accompanying text.

332. See *supra* notes 233–34 and accompanying text.

333. See, e.g., *Sigma Chem. Co. v. Harris*, 794 F.2d 371, 374–75 (8th Cir. 1986) (considering the reasonableness of factors such as a limited duration and the content of information to be disclosed).

334. See generally John W. Bowers, *Covenants Not to Compete: Their Use and Enforcement in Indiana*, 31 VAL. U. L. REV. 65, 67–68 (1996) (citing *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235 (Ind. 1955) (holding that in determining the validity of a negative covenant in restraint of competition, the contract will be construed strictly against covenantee and a test of validity is dependent not merely upon the covenant itself but upon the entire contract and situation to which it is related)).

335. See generally Damren, *supra* note 323 (describing enforceable contracts as a subset of mutual agreements and subsequently a majority of jurisdictions eliminate or void restrictive covenants that contain unreasonable restrictions).

336. See, e.g., *Harvest Ins. Agency v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 688 (Ind. 1986) (finding a covenant not to compete unenforceable because it did not include a temporal restriction).

337. See, e.g., *Weseley Software Dev. Corp. v. Burdette*, 977 F. Supp 137, 144 (D. Conn. 1997) (outlining the “factors to be considered in evaluating the reasonableness of a restricting covenant not to compete”).

338. See, e.g., *House of Vision, Inc. v. Hiyane*, 225 N.E.2d 21, 24–25 (Ill. 1967) (finding void an agreement that prohibited the employee from engaging in same or similar busi-

be reasonably balanced against the hardship imposed upon the employee.³³⁹

This type of analysis is almost wholly absent from the PLA analysis. When the merits of enforcement are examined, forum selection clauses are refused enforcement only if the designated forum is "so gravely difficult and inconvenient that he [the resisting party] will for all practical purposes be deprived of his day in court."³⁴⁰ The analysis of PLAs has not been focused on balancing the reasonableness of the contracting parties' competing interests. Rather, it has focused on the presumption of enforcement, a task that is extremely difficult, if not impossible, for a resisting party to overcome.

One could argue that the difference in approach is justifiable because PLAs deal with procedural rights, while PMAs and restrictive covenants serve to limit substantive rights. However, that argument undervalues the importance of procedural rights, and PLAs can render the substantive right beyond the reach of the party who has been denied his or her day in a judicial tribunal or relegated to a far away forum. Thus, PLAs deserve the same degree of scrutiny as pre-dispute contractual provisions seeking to define substantive rights.

VIII. THE NEED FOR REQUIRED CONGRESSIONAL CONTROL

*"It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens."*³⁴¹

With the exception of the arbitration clause, the question of when to enforce PLAs is a confused muddle of mostly judge-

ness as employer anywhere within a radius of thirty miles from any office of the employer because the terms were considered unreasonable).

339. *See, e.g.,* McRand, Inc. v. Van Beelen, 486 N.E.2d 1306, 1311 (Ill. App. Ct. 1985) (using a test which asks "whether the covenant is reasonably necessary to protect the interests of the employer" while considering the hardship imposed upon the employee); Chemimetals Processing, Inc. v. McEneny, 476 S.E.2d 374, 376 (N.C. Ct. App. 1996) (listing factors to be considered in determining whether a non-competition agreement is valid).

340. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972); *see also supra* notes 55-59 and accompanying text.

341. *Casarotto v. Lombardi*, 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., concurring) (emphasis added).

created law.³⁴² The forum selection clause was given life by a judicial about-face as to the ability of parties to contractually alter the system of procedure, especially in regard to removing a dispute from an otherwise appropriate court.³⁴³ Also, the arbitration clause, once prohibited by the same reasoning that refused to recognize forum selection clauses, was given legitimacy by legislative action.³⁴⁴ However, the courts have extended the application of arbitration agreements far beyond anything arguably ever intended by Congress.³⁴⁵ Taken together, both of these PLAs demonstrate a judicially created convolution of private contract and public procedure that has been unable to appropriately balance these two competing interests. The convolution claims to give deference to the right of parties to enter contracts but, in reality, has created a “super contract” that supersedes the interests of fairness that should be at the heart of a public system of dispute resolution. Because the courts have failed to construct a workable framework for recognition and enforcement of PLAs, one can only look to the legislature to provide a framework for enforcement which ensures fundamental fairness. It is not only appropriate that Congress act in this area, but only Congress has the power to act.³⁴⁶ It is Congress that possesses the power under Article III to establish the jurisdictional reach of the federal courts.³⁴⁷ It should not be left to the courts to establish their own jurisdiction. While Congress may delegate, and has delegated to the court the power to establish rules of procedure by rulemaking, those powers not delegated to the courts are reserved by Congress.³⁴⁸ Looking at the arbitration clause as an example, the intention of Congress to act pursuant to its Article III power is obvious from a reading of the legislative history.³⁴⁹ Congress should again act pursuant to its Article III power to address and resolve the difficulties that surround PLAs, but unlike the FAA,³⁵⁰ all appropriate issues need

342. *See supra* notes 160–64 and accompanying text.

343. *See supra* Part III.

344. *See supra* Part III.B.1.

345. *See supra* notes 137–38 and accompanying text (discussing the judicial extension of the appropriate use of the arbitration PLA).

346. *See* U.S. CONST. art. III.

347. *See id.*

348. *See* 28 U.S.C. §§ 2071–2072 (1994 & Supp. V 1999).

349. *See infra* note 359.

350. *See supra* note 217.

be addressed in a manner which does not allow the courts sufficient wiggle-room to recreate this convoluted mess.

To the extent that PLAs operate to remove a category of cases from the federal courts altogether, as with arbitration clauses, or from any court other than the specifically designated one, as with forum selection clauses, it is arguable that only Congress, pursuant to its Article III power, possesses the constitutional authority to act.³⁵¹ Further, when a PLA operates to reorder an aspect of procedure, such as altering rules of evidence or limiting discovery, it is within the sole province of Congress to act, except to the extent that Congress has delegated rule-making power to the Supreme Court.³⁵² However, even then, the Court should only engage in its deliberative rule-making function, and not redefine the procedural system by judicial decision.³⁵³

Since Congress has acted to provide for the recognition and enforcement of PLAs only in the area of arbitration, an examination of the FAA as to the appropriate relative roles of courts and Congress in recognizing and enforcing PLAs would be valuable. Unfortunately, such is not the case; all that is revealed by an examination of the FAA jurisprudence is a judicial rush to embrace arbitration clauses which has caused the Court to ignore, if not purposefully contort, the legislative history of the FAA. Most recently, in *Circuit City Stores, Inc. v. Adams*,³⁵⁴ the United States Supreme Court held that employment contracts, except those specifically exempted in section 1 of the Act, are entitled to enforcement of an arbitration provision.³⁵⁵ The Court's opinion is grounded in a discussion of how the FAA derives its power from the Commerce Clause,³⁵⁶ and this serves as a prime example of how the Court has continued its misinterpretation, misapplication, and contortion of the Act.

The origins of the Court's misunderstanding can be traced primarily to *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*³⁵⁷ In *Prima Paint*, the Court held that Congress was acting

351. See U.S. CONST. art. III.

352. See *id.*

353. See *id.*

354. 532 U.S. 105 (2001).

355. *Id.* at 119.

356. See *id.* at 115-19.

357. 388 U.S. 395 (1967).

pursuant to its Commerce Clause power when it enacted the FAA.³⁵⁸ This ruling directly contradicts oft-repeated explicit statements in the legislative history.³⁵⁹ Nevertheless, the decision has formed the foundation upon which most of the Supreme Court's subsequent FAA jurisprudence is based. Therefore, the opportunity to gain insight into the proper roles of the courts and Congress, in recognizing and enforcing PLAs, has been lost. Additionally, the jurisprudence surrounding the FAA demonstrates how the courts, when left to their own devices, have contorted a legislative enactment far beyond what its drafters intended.³⁶⁰ The need for new legislative control is thereby at least demonstrated, if not commanded.

A. *The FAA: Congress Acting Pursuant to Article III Power*

In *Prima Paint*, the United States Supreme Court held that the FAA was passed pursuant to Congress' power under the Commerce Clause,³⁶¹ citing to legislative history to support their decision.³⁶² However, the Court misinterpreted critical passages of the history and outright misstated others.³⁶³

Prima Paint involved a claim of fraudulent inducement of a contract for the purchase of a paint business.³⁶⁴ The Court held that "in passing upon a section 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbi-

358. *Id.* at 406-07.

359. *See, e.g., Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong. (1924)* [hereinafter *Joint Hearings*]; *Hearings on S. 4213 before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. (1923)* [hereinafter *Senate Hearings*]; H.R. REP. NO. 68-96 (1924); S. REP. NO. 68-536 (1924); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926). The New York statute and the federal Act were very similar and were both written by Mr. Cohen. Cohen had help from commercial entities who also contemplated, supported, and presented the FAA, such as: The Committee on Commerce, Trade and Commercial Law of the American Bar Association, and The Chamber of Commerce of the State of New York, as well as "numerous other chambers and trade organizations." *See Senate Hearings, supra*, at 2.

360. *Prima Paint*, 388 U.S. at 406-07; *see also infra* Part VIII.A.1.

361. *Prima Paint*, 388 U.S. at 405.

362. *Id.* at 405 n.13.

363. *See infra* notes 384-404 and accompanying text.

364. *Prima Paint*, 388 U.S. at 396-97.

trate.”³⁶⁵ Thus, the Court held that arbitration clauses were “separable” from the parent contract, and evidence of fraud in the inducement had to be directed at the arbitration clause itself rather than at the entire agreement between the parties.³⁶⁶ The Court’s decision that separability of the arbitration clause from the parent contract emanated from the Act, combined with the decision in *Bernhardt v. Polygraphic Co. of America*,³⁶⁷ which effectively held that the Act was substantive,³⁶⁸ raised the following *Erie* question: could federal courts apply separability in a suit where jurisdiction was based upon the diversity of the parties?³⁶⁹ Rather than address the *Erie* substance versus procedure question, the Court explicitly dismissed it, creating the fallacy that it was “clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”³⁷⁰ This characterization avoided the *Erie* issue, because “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to

365. *Id.* at 404. In so doing, the Court “honor[ed] . . . the unmistakably clear congressional purpose” that arbitration, once agreed upon by the parties, be speedy and efficient. *Id.*

366. *Id.* For a discussion of the doctrine of separability as applied by the courts to PLAs, see *supra* note 277–85 and accompanying text. In addition to the previously discussed difficulties, separability also cannot be squared with the legislative history. See *Joint Hearings, supra* note 359, at 17. The following was a conversation between Senator Thomas Sterling, Chairman of the Senate Subcommittee, and Mr. Cohen:

Mr. Cohen: [T]he question whether you waive it or not depends on whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on.

The Chairman: The issue there is whether there is an agreement to arbitrate or not.

Mr. Cohen: Exactly.

Id.

367. 350 U.S. 198 (1956).

368. *Id.* at 205. Although the case did not explicitly hold that the FAA was substantive, the analysis the Court undertook, as well as the effect of its holding, rendered it so. James F. Nooney, Note, *Commercial Arbitration in Federal Courts*, 20 VAND. L. REV. 607, 608 (1967) (“[I]t was not, however, until the decision in *Bernhardt v. Polygraphic Co. of America* in 1956 that the Supreme Court finally directed that arbitration was to be characterized as substantive in federal court diversity cases.”); see also Linda R. Hirshman, *The Second Arbitration Trilogy: the Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1320 (1985).

369. *Prima Paint*, 388 U.S. at 396.

370. *Id.* at 405 (quoting H.R. REP. NO. 68-96 (1924)).

legislate.³⁷¹ Thus, the *Prima Paint* holding was secured, and no constitutional question arose because the Act was considered federal substantive law.³⁷² Justice Fortas, writing for the majority, relied on legislative history for that holding.³⁷³ However, the Court disregarded the vision apparent from a plain reading of the history and instead relied on excerpts that supported a vision of its own.³⁷⁴

While it is true that arbitration affects the outcome of cases in a manner sufficient to raise *Erie* concerns, the legislative history speaks clearly that the Act was not intended as a substantive measure, but rather a procedural one.³⁷⁵ The Court's holding cannot be reconciled with the brief in support of the Act which was submitted to the joint committees. The brief states that the statute is not the source of arbitration clauses as a matter of substantive law.³⁷⁶ This brief also indicates "[t]hat the enforcement of arbitration contracts is within the law of procedure, as distinguished from substantive law, is well settled"³⁷⁷ since "[a]n agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."³⁷⁸ Addition-

371. *Id.*

372. The Act would eventually be held to vitiate state law based upon this holding. See *infra* note 381.

373. *Prima Paint*, 388 U.S. at 405 (citing H.R. REP. No. 68-96, at 1 (1924)); *id.* at 405 n.13 (citing to various individual points in the history). For further discussion, see *infra* notes 380-404 and accompanying text.

374. See *Prima Paint*, 388 U.S. at 408 (Black, J., dissenting); *infra* notes 380-404 and accompanying text.

375. See *infra* notes 380-404 and accompanying text. We do not assert that the Act is not capable of being passed pursuant to the commerce power, but rather than it was not, in fact, passed under that authority. Simply because Congress *may* have powers via the Commerce Clause to enact this legislation, does not provide conclusive evidence that it was, in fact, passed pursuant to that power. The legislative history is the logical source for what, in fact, Congress intended its authority to vest from. See *id.*; *Southland Corp. v. Keating*, 465 U.S. 1, 26 n.11 (O'Connor, J., dissenting). The Court's desire to avoid the constitutional problem that would arise from acknowledgment of this fact is understandable. However, it is debatable whether the damage caused by its improper characterization, as borne out in later decisions, is less than that which would have followed from the correct characterization of the Act as procedural, even if it meant, at worst, that the Act was unconstitutional.

376. See *Joint Hearings*, *supra* note 359, at 38; see also Cohen & Dayton, *supra* note 359, at 276.

377. *Joint Hearings*, *supra* note 359, at 37 (citations omitted).

378. *Id.* (quoting *Meachum v. Jamestown F. & C. R.R. Co.*, 105 N.E. 653 (N.Y. 1914)); see also Cohen & Dayton, *supra* note 359, at 279 ("[A]rbitration under the Federal and similar statutes is simply a new procedural remedy.").

ally, Senator Graham testified that “[i]t does not involve any new principle of law. . . [i]t creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.”³⁷⁹ Thus, both Congress and proponents of the Act declared it to be merely a form of remedy, which falls squarely in the realm of procedural, rather than substantive, law.

The problematic holding in *Prima Paint* has been the foundation for subsequent decisions which have held that the Act was not only an exercise of the commerce power, but was an exercise of that power to its fullest extent.³⁸⁰ This reasoning eventually gave the Act the power to: (1) pre-empt state law;³⁸¹ (2) apply to unwitting consumers;³⁸² and most recently, (3) apply to all employees except those involved in commerce.³⁸³ Each of these decisions assumes, and is premised upon, the passage of the Act by Congress’s exercise of its commerce power. However, if, contrary to the finding of the Supreme Court in *Prima Paint*, the Act was passed pursuant to Congress’s Article III control over courts, the commerce language in § 1 would then merely identify the target of the legislation, rather than compel arbitration upon the unwilling as a rule of law. What is most astonishing is that the legislative history of the Act is not ambiguous on this point. Overwhelmingly, it is clear that the Act was procedural, rather than substantive, and passed via Article III rather than pursuant to the commerce power. Thus, the Court’s holding in *Prima Paint* is directly contradictory to the legislative history.

The Court’s assertion in *Prima Paint* that “it is clear beyond dispute”³⁸⁴ that the Act was passed pursuant to the commerce power is a gross overstatement. Justice Fortas cited to both the Senate and House Reports for support of this proposition.³⁸⁵ However, the only reference to interstate commerce that can be found in the Senate Report merely reiterates those areas that the bill relates to, which includes “contracts in interstate and foreign

379. 65 CONG. REC. 1931 (1924).

380. See *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271, 275 (1995).

381. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

382. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1151 (7th Cir. 1997).

383. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

384. *Prima Paint*, 388 U.S. at 405.

385. *Id.*

commerce.³⁸⁶ The House Report does mention the commerce power,³⁸⁷ but this language is preceded in the paragraph by the following:

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.³⁸⁸

The Court also cited to various places in the legislative history,³⁸⁹ but this support is equally unpersuasive, as each cite merely reiterates that the targets of the Act were those contracts involving transactions in interstate commerce.³⁹⁰ Most appallingly, in its zeal to base the Act on the commerce power, the Court stated that a “jurisdictional base broader than the commerce and admiralty powers” was urged in the brief submitted by Mr. Cohen, but that there was “no indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and [that] his own testimony took a much narrower tack.”³⁹¹ This statement is the only clear assertion that the legislative history supports the conclusion that the Act was passed pursuant to the commerce power.³⁹² However, this statement is completely erroneous. The section in the brief entitled

386. S. REP. NO. 68-536, at 3 (1924) (“The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920.”).

387. H.R. REP. NO. 68-96, at 1 (1924) (“The remedy is founded also upon the Federal control over interstate commerce and over admiralty.”).

388. *Id.*

389. *Prima Paint*, 388 U.S. at 405 n.13.

390. *Id.* (citing S. REP. NO. 68-536, at 3 (1924) (noting that the Act should relate to “maritime transactions and to contracts in interstate and foreign commerce, [and that it] follows the lines of the New York arbitration law enacted in 1920”); 65 CONG. REC. 1931 (1924) (stating that the Act “only affects contracts relating to interstate subjects and contracts in admiralty”); *Senate Hearings, supra* note 359, at 2 (stating that the Act “follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction” and observing that “[t]hese fields are in admiralty and in foreign and interstate commerce”); *Joint Hearings, supra* note 359, at 7; *id.* at 16, 27–28 (noting Mr. Cohen and Mr. Rose’s statements that the promulgation of arbitration was intended to cover three steps: state statutes, federal statute for federal jurisdiction, and treaties for foreign countries)).

391. *Prima Paint*, 388 U.S. at 405 n.13.

392. *Id.*

“Legal Justification” did far more than “urge” a base broader than the commerce power.³⁹³ Rather, it suggested that the commerce power *might* be a legitimate source of authority,³⁹⁴ but explicitly concluded that the sole power was Article III:

It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact.

The statute as drawn establishes a procedure in the [f]ederal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior [f]ederal courts. So far as congressional acts relate to the procedure in the [f]ederal courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it can not be seriously disputed.

A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the [f]ederal courts

[W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.³⁹⁵

In fact, despite the suggestion that the commerce power might be a legitimate source of authority, the brief closes the section with the following:

Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce

393. See *Joint Hearings*, *supra* note 359, at 38.

394. The brief stated that:

[i]t seems probable, however, that Congress has ample power to declare that all arbitration agreements connected with interstate commerce or admiralty transactions shall be recognized as valid and enforceable [sic] even by the state courts. In both cases, the federal power is supreme. Congress may act at its will, and having acted, no law or regulation of a state inconsistent with the congressional act can be given any force or effect even in the courts of the state itself. They are as much bound to carry out the provisions of such a Federal statute as though it was an act of their own legislature.

. . . .

The only questions which apparently can be raised in this connection are whether the failure to enforce an agreement for arbitration imposes such a direct burden upon interstate commerce as seriously to hamper it or whether the enforcement of such a clause is of material benefit. If either of these questions can be answered in the affirmative, we believe it to be beyond question that Congress can legislate concerning the matter.

Id.

395. *Id.* at 37.

arbitration agreements shall be valid, the present statute is not materially affected. The primary purpose of the statute is to make enforceable [sic] in the [f]ederal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the [f]ederal courts.³⁹⁶

Thus, the Court's reading of the brief was faulty in that it ignored the clear message that the primary source of authority was Article III rather than the Commerce Clause.

Regarding Mr. Cohen's testimony, there is no explicit indication as to what Congress perceived as the authority for the Act, since the only explicit conversation on the subject questioned whether the jurisdiction was "ample" rather than on what jurisdiction was based.³⁹⁷ However, the last statement made to Congress prior to its determination that it was authorized to pass the Act was the following statement by Cohen to the Joint Committee:

But it can not be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, in the exercise of your power to confer jurisdiction on the [f]ederal courts. The theory on which you do this is that you have the right to tell the [f]ederal courts how to proceed. And you say to the judge, "You used to hold that these things were not good; now they are good. You used to say you did not have jurisdiction; now you have jurisdiction." That is all there is to it.³⁹⁸

Thus, the statements made and papers delivered to the congressmen explicitly and unquestioningly stated that Article III was the source of authority for the Act.

Further, in a strongly worded dissent, Justice Black described the *Prima Paint* holding as "judicial legislation"³⁹⁹ and convincingly used passages from the legislative history which contra-

396. *Id.* at 38; see also Cohen & Dayton, *supra* note 359, at 277-78.

397. *Joint Hearings*, *supra* note 359, at 24. The hearings contained the following discussion:

Representative Dyer: There is no question of the authority of Congress to legislate on this subject as provided in the bill, is there?

The Chairman: I do not think there is.

Representative Dyer: The authority and jurisdiction is ample?

The Chairman: Yes.

Id.

398. *Id.* at 17.

399. *Prima Paint*, 388 U.S. at 425 (Black, J., dissenting).

dicted the Court's reasoning.⁴⁰⁰ However, the majority disregarded his assertions.⁴⁰¹ In so doing, the Court modified the Act from its original purpose. This decision formed a false foundation upon which all future arbitration jurisprudence would rest, a foundation based on nothing more than the mere mention of possible commerce power, language identifying the target of the Act,⁴⁰² history,⁴⁰³ and an erroneous characterization of Mr. Cohen's testimony and brief.⁴⁰⁴

B. *The Court's Embrace of Arbitration Agreements Has Expanded the FAA Beyond Congressional Intention*

The Court has caused great confusion with its decision in *Prima Paint* by choosing to ignore the FAA legislative history indicating the reliance of Congress upon Article III power, and instead holding that the FAA was intended to be an act of national substantive law that pre-empts state action in the area and that avoids the *Erie* doctrine problems that would arise if the FAA were considered to be a matter of procedure. By so doing, the Court has greatly facilitated the judicial embrace of PLAs, to the end that state attempts to restrict the use of arbitration clauses have been nullified and the removal of cases from the jurisdiction of the federal courts in favor of arbitration, has greatly expanded. The effect is that courts are defining which cases they should hear when it is Congress who not only should be the body to act in this area, but has, in fact, acted. The separation of powers problem is thus squarely faced.

1. Expanding to Whom the Act Applies

As a measure of federal substantive law, which negates any attempts by states to regulate arbitration clauses, the Act has proliferated the use of arbitration agreements tenfold.⁴⁰⁵ It was noted that "[m]andatory arbitration clauses are becoming standard in

400. *Id.* at 413.

401. *See id.* at 401 n.7.

402. *See supra* note 390.

403. *Joint Hearings, supra* note 359, at 38.

404. *See supra* notes 391–96 and accompanying text.

405. *See, e.g., Hanzman, supra* note 300, at 16.

many contracts, including agreements between customers and securities brokers-dealers, franchisors and franchisees, employment contracts, insurance agreements, construction contracts, and agreements between professional service providers and their respective clients.⁴⁰⁶ Such agreements are also enforceable against consumers,⁴⁰⁷ even without notice that the agreement provides for arbitration when products are purchased through the mail or over the phone.⁴⁰⁸

Examination of the legislative history leaves little doubt that this expansion of arbitration clauses was not contemplated by Congress. The legislative history is inundated with references to businessmen or merchants.⁴⁰⁹ The following are but a few exam-

406. See *id.* at 14.

407. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

408. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

409. The Senate Hearings contain a reference to 'merchants' or 'commercial activity' on almost every page. *Senate Hearings, supra* note 359, at 1 (alluding to activity conducted "as a merchant"); *id.* (noting that a committee handled "the many commercial disputes, cases and cancellations by United States merchants"); *id.* at 2 ("[T]he merchants were satisfied with the manner in which the matters were disposed of."); *id.* (questioning whether "any questions were asked me as a merchant"); *id.* at 3 (noting the appeal to keep consumer costs down, because merchants, when figuring costs, add to the price a certain amount that represents the risk of disputes); *id.* ("Arbitration is the time-honored method for the disposition of all business disputes and controversies."); *id.* (alluding to "the merchants standpoint"); *id.* at 4 ("A merchant can not depend on it."); *id.* at 5 (noting that "the merchants find that arbitration is very direct"); *id.* at 5-6 (referring to "trade disputes"); *id.* at 7 (giving an example of a successful resolution by arbitration, where the parties were merchants); *id.* at 8 (referring to an example given where a person "buys a certain class of goods for 50 cents a hundred"); *id.* at 9 ("It is purely an act to give the merchants the right or the privilege of sitting down and agreeing."); *id.* at 10 ("[I]t is the primary end of this contract that it is a contract between merchants with one another, buying and selling goods."); see also *Joint Hearings, supra* note 359, at 6 (referring to "[t]he difficulties merchants then met with"); *id.* ("The most unprofitable thing that the merchant and business man, or anyone engaged in buying and selling, can confront him, is that of litigation."); *id.* at 7 ("There are four methods based on long experience I have had by which to meet trade disputes, the ordinary everyday trade disputes, and it is for them that this legislation is proposed."); *id.* ("Speaking for those engaged in buying and selling merchandise, what is usually called trading. . . . It applies to all of them."); *id.* ("Speaking for those who have had experience and who are engaged in business. . . . It preserves business friendships It raises business standards. It maintains business honor."); *id.* at 8 ("[B]y which I mean our merchants were satisfied."); *id.* at 16 ("[W]hy are these merchants and these fruit shippers and those who are represented here, why are they for this?"); *id.* at 29 (explaining that trade organizations have an interest in developing customs"); *id.* (providing an example of a successful resolution where both parties were merchants); *id.* at 40 ("An agreement for arbitration is in its essence a business contract."); see also 64 CONG. REC. 1931, 1 (Mar. 6, 1997) ("This bill provides that where there are commercial contracts and there is a disagreement.").

ples of comments made by the drafters and proponents of the FAA:

“It is purely an [A]ct to give the merchants the right or privilege of sitting down and agreeing”⁴¹⁰

“[I]t is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods.”⁴¹¹

“[T]he ordinary every day trade disputes, and it is for them that this legislation is proposed.”⁴¹²

“[O]ne of the trade customs that has been established, one of the rules of the trade is that if you belong to a trade you shall arbitrate your differences with them. The effect is that if you are a member you arbitrate your differences, and if you are outside you are not bound by it.”⁴¹³

The repeated use of the term “merchant” in the legislative history strongly suggests that expansion outside the class of merchants was not foreseen. In fact, the only organizations that testified before Congress were commercial and trade organizations.⁴¹⁴ Despite the legislative history, courts have routinely seen fit to apply the Act to consumers and employees, most recently in *Circuit City Stores, Inc. v. Adams*.⁴¹⁵

It is one thing for arbitration clauses to be enforced between parties of relatively equal bargaining power, who directly benefit by the reduction in delay, cost, and amount of technicalities, which results in a benefit to the business relationship. It is quite another for an arbitration clause to bar from court a party who merely purchased a single product or gained employment and was unaware of the ramifications of an arbitration clause. These

410. *Senate Hearings, supra* note 359, at 9.

411. *Id.* at 10.

412. *Joint Hearings, supra* note 359, at 7.

413. *Id.* at 29.

414. *See generally Joint Hearings, supra* note 359. There were representatives from the following associations and trade organizations: The American Farm Bureau Federation, National League of Marine Merchants of the United States, The Western Fruit Jobbers Association of America, The International Apple Shippers Association of America, The Canner's League of California, American Fruit Growers, Inc. of Pittsburgh, Pennsylvania, National Retail Lumber Dealer's Association, American Banker's Association, and American Manufacturer's Export Association of New York.

415. 532 U.S. 105 (2001).

people are often less sophisticated and may be faced with the choice of signing the agreement or foregoing the benefit. These are also the people most disadvantaged by the Court's application of its pro-arbitration policy, which disregards those parts of the Act's history which plainly protect them.

Section 1 of the FAA exempts "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁴¹⁶ This was the language at issue in *Circuit City*.⁴¹⁷ All but one lower court interpreted this phrase as exempting only those employees who directly worked in interstate commerce.⁴¹⁸ However, the Ninth Circuit alone held that all employment agreements were outside the embrace of the FAA,⁴¹⁹ the decision reversed by the United States Supreme Court.⁴²⁰

Circuit City involved an employment application containing an arbitration clause.⁴²¹ After two years of employment, Adams filed an employment discrimination lawsuit in state court.⁴²² In response, Circuit City filed a federal action, seeking to enjoin the state action and compel arbitration in accordance with the FAA.⁴²³

In its opinion, the Court failed to address the distinction between the application for employment before it and the "contract of employment" of which the Act speaks.⁴²⁴ Similarly, the Court dismissed the notion that the contract at issue was not a "contract evidencing a transaction involving interstate commerce," to which the FAA applies.⁴²⁵ The Court reasoned that if all contracts of employment were beyond the reach of the Act, then exemption for transportation employees would be "pointless."⁴²⁶ As a result, the Court held that unlike other portions of the Act, the exemption language should not be given a broad interpretation.⁴²⁷ The

416. 9 U.S.C. § 1 (2000).

417. *Circuit City*, 532 U.S. at 109.

418. *Id.*

419. *Id.*

420. *Id.*

421. *See id.* at 109–10.

422. *Id.* at 110.

423. *Id.*

424. *Id.* at 113.

425. *Id.*

426. *Id.*

427. *Id.*

Court chose to construe the exemption language in “a manner consistent with the FAA’s purpose.”⁴²⁸ Congress’s purpose was merely to place arbitration clauses “on the same footing as other contracts,”⁴²⁹ but the Court’s purpose, as borne out by its decisions, was to favor arbitration clauses.⁴³⁰ Most interestingly, the Court explicitly declined to consult the legislative history surrounding the exclusionary phrase, but noted that the record was “quite sparse.”⁴³¹

Given the Court’s refusal to revisit the legislative history, it is not surprising that its opinion adds to the misapplication of the Act, creating the situation where

[t]hose employment contracts *most* involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 . . . are *excluded* from [the] Act’s coverage; while those employment contracts having a less direct and less certain connection to interstate commerce . . . would come *within* the Act’s affirmative coverage and would not be excluded.⁴³²

The Court dismissed this inconsistency by asserting that several statutes existed at the time and more would be passed which were designed to handle disputes involving these classes of workers.⁴³³ Therefore, the Court opined, Congress simply could have chosen to remove those classes of employees and situations because statutes already applied to them.⁴³⁴

The Court also dismissed assertions of twenty-two state Attorney Generals that the decision would intrude upon the ability of the states to regulate the employment relationship.⁴³⁵ The Court correctly characterized that assertion as being directed at *Southland Corp. v. Keating*, rather than the decision at hand.⁴³⁶ Noting that they had previously declined to overrule *Southland* in *Allied-Bruce*,⁴³⁷ and that Congress had failed to act after either deci-

428. *Id.* at 118.

429. H.R. REP. NO. 68-96, at 1 (1924).

430. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

431. *Circuit City*, 532 U.S. at 119.

432. *Id.* at 120 (citing to Brief for Respondent, page 38) (alteration in original).

433. *Id.* at 121.

434. *Id.*

435. *Id.* at 121–22.

436. *Id.* at 122 (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

437. *Id.* (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)).

sion,⁴³⁸ the Court felt assured that its decision was the correct one.⁴³⁹

Among the troublesome aspects in *Circuit City* lies the premise upon which it and most other arbitration jurisprudence is based—namely, that the Act was a substantive measure passed pursuant to the Commerce Clause.⁴⁴⁰ Much of the Court's opinion is largely superfluous when the Act is correctly viewed as an Article III measure, and the "commerce" language so revered by the Court is removed from its pillar and given its proper role as merely the means to identify the target of the legislation. When viewed as such, the exemption language of section one is easily interpreted. The Act, a procedural measure designed to target commercial and trade contracts in interstate commerce, did not involve the everyday employment contract.⁴⁴¹ Thus, Congress chose to protect employees engaged in interstate commerce from overzealous enforcement of the Act not because they were the only employees to receive such protection, but rather because Congress feared that their involvement with interstate commerce might cause them to be targeted for enforcement.⁴⁴² The Act was presented to the Senate a year prior to its passage,⁴⁴³ and such a conclusion can be gathered from reading the legislative history. During the hearings, an objection was raised by the head of a labor union.⁴⁴⁴ In response, the Senators were explicitly told by the Act's proponent:

[I]t was not the intention of this bill to make an industrial arbitration in any sense . . . if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not in-

438. *Id.*

439. *Id.* at 122–23. However, there is currently before the Senate a bill that would amend the FAA to include the following: "This chapter shall not apply with respect to a claim of unlawful discrimination in employment if such claim arises from discrimination based on race, color, religion, sex, national origin, age, or disability." Civil Rights Procedures Protection Act of 2001, S.163, 107th Cong. § 9 (2001).

440. *Circuit City*, 532 U.S. at 119.

441. See, e.g., Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, nn.456–57 (1996).

442. *Senate Hearings*, *supra* note 359, at 9.

443. *Id.*

444. *Id.*

tended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.⁴⁴⁵

Further, senators were concerned with the non-voluntary nature of "take it or leave it" contracts,⁴⁴⁶ such as those involving employment and consumers. One Senator stated:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried before the court, and has to have it tried before a tribunal in which he has no confidence at all.⁴⁴⁷

This same concern was expressed for insurance, freight, and railroad consumers.⁴⁴⁸ To alleviate the concerns of the congressmen, they were told: "I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods."⁴⁴⁹ Accordingly, when the bill was re-introduced in 1924, the language exempting employees of interstate commerce had been added.⁴⁵⁰ It is readily apparent from these selections that the extension of the Act to areas of consumer and employee contracts was contemplated, considered unacceptable, and the bill was appropriately amended. Thus, the Act was to apply only to those who were directly involved in the *business* of commercial transactions.

Advocates of the Court's decisions assert that state law still exists to protect consumers and employees. However, under *Southland*,⁴⁵¹ and now *Circuit City*, these attempts to protect employees

445. *Id.* (statement of Mr. Platt, chairman of the Committee of Commerce, Trade, and Commercial Law of the American Bar Association).

446. *Joint Hearings*, *supra* note 359, at 15; *see also Senate Hearings*, *supra* note 359, at 9-10.

447. *Senate Hearings*, *supra* note 359, at 9 (statement of Senator Walsh from Montana).

448. *Id.* at 10.

449. *Id.*

450. *See* H.R. REP. NO. 68-96, at 1 (1924).

451. 465 U.S. 1 (1984) (holding that a California statute that limited the effect of arbi-

will conflict with the FAA and be held to violate the Supremacy Clause.⁴⁵² Further, several employee-protective federal statutory schemes enacted subsequent to the passage of the FAA are also likely to be rendered meaningless.

2. State Pre-emption

If the FAA was passed pursuant to Article III and largely intended as a procedural measure, neither the issues of pre-emption nor the Act's application in state court proceedings come into play. However, given the Court's mischaracterization of the Act,⁴⁵³ subsequent courts have faced such issues.⁴⁵⁴ Although several cases chipped away at the original purposes and limits of the Act,⁴⁵⁵ *Southland* was the bludgeon by which the Frankenstein-like creation was forced upon the states.⁴⁵⁶

In *Southland*, the Court held that a California franchise investment law, which voided a contractual agreement that waived compliance with its provisions, violated the Supremacy Clause.⁴⁵⁷ *Southland* held that, as a federal substantive law, the FAA pre-empted state laws which "undercut the enforceability of arbitration agreements."⁴⁵⁸ Thus, the California law had to fall.⁴⁵⁹ In addition, the Court noted "ambiguities" in the legislative history,⁴⁶⁰ but nevertheless concluded that Congress "withdrew the power of the states to require a judicial forum for the resolution of

tration clauses not conforming with its requirements violated the Supremacy Clause); see also *Doctors Assocs. v. Casarotto*, 517 U.S. 681 (1996) (holding that a Montana statute requiring notice that a contract was subject to arbitration be typed in underlined capital letters on the front page of the contract violated the Supremacy Clause because it conflicted with the FAA).

452. See *supra* notes 304–07 and accompanying text.

453. See *supra* notes 384–404 and accompanying text.

454. For a discussion of some important Supreme Court Cases considering the expansion of the FAA, see Hirshman, *supra* note 368.

455. See, e.g., *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983) (stating that "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (holding that the Act was sufficiently outcome determinative to not be applied in a federal court as a procedural measure).

456. See 465 U.S. 1 (1984).

457. *Id.* at 16.

458. *Id.*

459. *Id.*

460. *Id.* at 12.

claims.⁴⁶¹ The Court based its decision on prior holdings which found that the Act was a substantive measure passed pursuant to the commerce power.⁴⁶² If this had, indeed, been the case, *Southland's* holding that the Act was capable of preempting state laws would naturally follow. However, neither is accurate, and *Southland* has added insult to injury. In her dissent, Justice O'Connor, joined by then Justice Rehnquist, convincingly used direct quotes from the legislative history to squarely contradict the "ambiguities" and "indications" found by the Court.⁴⁶³ Similarly, other Justices have noted their disagreement with the Court's holding, arguing that the Act was never intended to apply to the states.⁴⁶⁴

The entire purpose of the subcommittee hearings on the FAA was to convey the need for regulation in the area of interstate commerce, and this need only arises if the states are free to pass their own laws regarding arbitration.⁴⁶⁵ In fact, the very problem which was meant to be addressed by the Act was that federal courts would not enforce arbitration clauses, even where a pro-arbitration state law controlled.⁴⁶⁶ Much like its decision in *Prima Paint*, the 'ambiguities' noted by the Court are explicitly non-

461. *Id.* at 10. Justice Stevens dissented with regards to this holding. *Id.* at 17 (Stevens, J., dissenting). While he felt that Justice O'Connor's dissent legitimately established that the Act was originally a procedural measure, he was "persuaded that the intervening developments in the law compel the conclusion that the Court has reached." *Id.* (Stevens, J., dissenting). He dissented on the basis that he did not think that all state statutes which sought to protect parties would be in conflict with the Act. *Id.* at 18 (Stevens, J., dissenting).

462. *Id.* at 11-12.

463. *Id.* at 25-29 (O'Connor, J., dissenting). One commentator has opined that Justice O'Connor's quarrel is, in fact, with *Prima Paint*. See Hirshman, *supra* note 368, at 1345.

464. *Southland*, 465 U.S. at 17 (Stevens, J., concurring). Justice Stevens found Justice O'Connor's review of the legislative history convincing, but felt that "intervening developments in the law compel the conclusion that the Court" reached. *Id.* (Stevens, J., concurring); see also *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting) (stating "I will, however, stand ready to join four other Justices in overruling it."); *id.* at 285 (Thomas, J., dissenting).

465. See also *Current Legislation: The United States Arbitration Act*, 25 COLUM. L. REV. 822, 824 (1925) (calling for passage of a "Uniform State Arbitration Act" that would change the law in those states where arbitration agreements were not yet enforceable).

466. See *Joint Hearings*, *supra* note 359, at 16. Testimony of Mr. Cohen:

Why do we do that in the Federal Courts? We have it in New York State
You have got it in New Jersey.

First of all, it was held that a State statute was not binding in admiralty, even in the Federal courts And the Federal Court will not be bound by any State statute.

Id.

supportive of the view it chose to pursue. The brief states in several places that states were free to do as they wished, which caused the necessity for the FAA in those situations which arose when parties from different states entered a contract that would be heard in a federal court:

It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.⁴⁶⁷

....

To meet the situation where, through dishonesty or mistake or otherwise, one party to an arbitration agreement refuses to perform it, statutes such as those adopted in New York and New Jersey are advocated and have met favor. To correct the same defect and also assure justice where one of the parties lives in a State not recognizing arbitration agreements, the present Federal statute is proposed.⁴⁶⁸

....

Every one of the States in the Union might declare such agreement to be valid and enforceable, and still in the Federal courts it would remain void and unenforceable unless the Supreme Court of the United States felt at liberty itself to reverse a rule recognized for centuries. This, in the absence of a congressional declaration, it has so far felt itself unable to do.

There is no disposition therefore by means of the Federal budget to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect. It is desired only that the Federal Government shall declare the validity of arbitration agreements in the field where necessarily it is supreme and where without this action no remedial action by the States ever can be effected. . . .⁴⁶⁹

467. *Id.* at 37. "Nor can it be said that the Congress of the United States, directing its own courts no longer to recognize this anachronism in the law, would infringe upon the provinces or prerogatives of the States." *Id.* at 39; *see also* Cohen & Dayton, *supra* note 359, at 277.

468. *Joint Hearings, supra* note 359, at 35.

469. *Joint Hearings, supra* note 359, at 40. Cohen and Dayton stated that:

The rule must be changed for the jurisdiction in which the agreement is sought to be enforced, and a change in the jurisdiction in which it was made is of no effect. Every one of the States in the Union might declare such agreement to be valid and enforceable, and still in the Federal courts it would remain void and unenforceable without this statute.

See Cohen & Dayton, *supra* note 359, at 276.

Further, Congress was told that there was no doubt that "all of the states would pattern after it."⁴⁷⁰ If the Court's interpretation is correct, and the Act was intended to force enforcement of arbitration clauses upon the states, then such assertions and statements would not have been made. The problem was not that the states would fail to pass legislation that recognized arbitration clauses, but rather that once a state did pass such legislation, the federal courts would not enforce it. Thus, it was the acknowledgment that states have the power to recognize or disallow arbitration agreements that created the need for the Act. However, it is this very power that the Court is consistently muddling by its faulty interpretation of the Act. Further, state statutes requiring the non-drafter to be made aware of the existence of an arbitration clause in the contract prior to the signing have been struck down in states that have statutes recognizing arbitration agreements.⁴⁷¹ If a state has the ability to not recognize or enforce arbitration agreements, then surely it has the ability to recognize them and place limitations upon their enforcement. Accordingly, some states have aggressively refused to accept the mandates of the Supreme Court.⁴⁷²

3. Right to Trial by Jury

The effect of an arbitration provision is to give one party the ability to have the case removed from court and heard by arbitrators who are not bound by the law and need not give reasons for their decisions. While the Supreme Court's arbitration jurisprudence has unfailingly supported the Act's power to do this to the fullest extent possible, the congressmen who passed the Act clearly were satisfied by repeated assurances that the legal system would remain a vital part of the enforcement of arbitration clauses.

470. *Joint Hearings, supra* note 359, at 28 (statement of Mr. Alexander Rose, Arbitration Soc'y of Am.).

471. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687-88 (1996).

472. *See, e.g., Shaffer v. Jeffrey*, 915 P.2d 910 (Okla. 1996) (refusing to apply separability); *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995) (finding again, after vacatur and remand, that the Montana statute was not preempted by the FAA), *overruled by Casarotto*, 517 U.S. 681 (1996); *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994) (Trieweiler, J., concurring) (holding that a state statute requiring a notice that the contract contains an arbitration clause appear on first page is not preempted by the FAA).

There are several points in the history of the FAA where the proponents heralded the safeguarding of the trial by jury if the making of the agreement was at issue. The following statement was made often: "the constitutional right to a jury trial is adequately safeguarded."⁴⁷³ In the House Report, the bill was offered as "reducing technicality and delay and expense to a minimum and at the same time safeguarding the rights of the parties."⁴⁷⁴ Furthermore, the brief stated:

At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.⁴⁷⁵

Despite such statements in the legislative history, the doctrine of separability, the heralding of the Act as a federal substantive commerce measure, the extension of the Act's application to consumers and employees, and the Act's ability to strike down state statutes, all have removed these safeguards and rendered them largely meaningless in the pro-arbitration environment established by the Supreme Court.⁴⁷⁶ Today, these preliminary questions are routinely sent to arbitrators rather than courts of law.

Thus, the current atmosphere of furthering the availability of arbitration far exceeds the considerations of Congress and the intentions of the proponents and drafters. Despite the Act's characterization as a procedural measure passed pursuant to Article III, it is heralded as "national substantive law" passed pursuant to the commerce power, which "withdrew the power of the states to require a judicial forum for the resolution of claims. . . ."⁴⁷⁷ From a measure applicable to those who regularly deal in commercial transactions, it has become applicable to any and all, even if greatly oppressive. From a protector of the right to a jury trial, the Act has become the easiest way to bar having the case heard by a jury. Throughout this history of mischaracterization and

473. S. REP. NO. 68-536, at 3 (1924); *Senate Hearings, supra* note 359, at 2 (statement of Charles L. Bernheimer, Chairman, Arbitration Comm. of the N.Y. Chamber of Commerce).

474. H. REP. NO. 68-96, at 2 (1924).

475. *Joint Hearings, supra* note 359, at 35 (statement of W.W. Nichols, President, Am. Mfrs. Exp. Ass'n of N.Y.).

476. *See Sternlight, supra* note 52; *see also Carbonneau, supra* note 51.

477. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

misinterpretation, as well as greatly exaggerated application, the current arbitration environment is a completely different character than the Act authorized.

The Federal Arbitration Act was a proper exercise of Congress's authority over the jurisdiction and procedure in the federal courts. The courts have made the FAA far more powerful than was intended or authorized by Congress. However, other PLAs lack even this small amount of congressional sanction, however wrongfully that sanction has been applied. Rather than being applied beyond congressional intent, they were actually created by the courts. Therefore, not only is it necessary for Congress to tighten the expansion of arbitration clauses beyond the scope of the FAA, but it is also necessary for them to examine other PLAs and promulgate a system of enforcement that ensures fairness, because the courts have shown themselves unable to protect that fundamental right.

IX. WHAT SHOULD BE ADDRESSED

Were Congress to act, the threshold question would, of course, be whether PLAs should be recognized and enforced at all. While an argument can be made that parties should not be allowed to alter the public procedural system by private agreement, the day to make that argument seems long gone. More important, however, is the fact that there does seem to be an appropriate place for PLAs between entities of equal bargaining power who are making an informed decision about how to most efficiently resolve any dispute that may arise between them. That inexorably leads to the most important question that Congress should resolve: In what situations and among which types of parties should PLAs be recognized?

While there is a place for PLAs entered at arm's length between entities of equal bargaining power, the PLA contained in a consumer contract packaged inside of a consumer good seems fundamentally unfair. Similarly, the PLA contained in a contract for employment presents the same opportunity for over-reaching. Therefore, it is imperative that the legislative process be utilized to draw the difficult line between the appropriate and inappropriate application of PLAs. This decision should involve considerations of the type of party, as well as the substance of the un-

derlying contract. Both need to be fully considered to determine the proper use of the PLA.

Resolution of questions of proper contract formation should follow directly. PLAs buried in multiple pages of a consumer contract contained inside a boxed good do not support even a fictionalized notion of mutual assent. However, the method in which these issues should be resolved can only be properly addressed after deciding who may be the proper parties to the PLA, and under what circumstances the PLA should be enforced. It would be silly to legislate a font requirement for a PLA between two corporate entities represented by counsel. At the same time the placement, font, and timing of the PLA is imperative in a consumer contract if fundamental fairness is to be assured.

Having determined in what situations PLAs may be utilized, fundamental questions of enforcement must be addressed. The present judicial view of PLAs as "super contracts" cannot be justified. If deference is to be given to autonomy to enter contracts, traditional contract defenses must not be rendered meaningless for the sake of enforcing PLAs. Also, there is no logic to support the present approach which supports a deference to private contractual autonomy, while at the same time reversing the normal view of when enforcement should be ordered by means of specific performance or injunction. Therefore, the notion of considering fraud in the inducement of the PLA portion of the contract as a question separable from fraud in the inducement of the substantive portion of the contract should be discarded.

Additionally, the traditional burdens from contract law should be restored to the question of whether enforcement by means of injunction or specific performance is appropriate. That is, it should be the burden of the party seeking what is otherwise viewed as an extraordinary contractual remedy to establish that the underlying agreement is fundamentally fair. Finally, Congress should consider whether a statutorily imposed measure of damages should be determined for a situation where a party seeks to breach a PLA. Determining an appropriate amount of monetary damages for a suit filed in a forum other than the contracted-for forum, a suit filed in court that was contracted for arbitration, or a suit subject to a jury demand when that option was contractually removed is at best illusory, if not impossible. A legislatively determined contractual penalty removes the uncer-

tainty and serves to make enforcement by means of injunction or specific performance no longer seem to be the only remedy.

The proper scope of what may be addressed by PLAs should also be addressed. A threshold question is whether parties should be limited in the terms of their PLAs to the litigation choices available under the present procedural system. For example, should parties by means of a forum selection clause be able to designate any forum they desire, or should they be limited to the option available under existing notions of jurisdiction and venue? How this question should properly be resolved should be largely dependent upon the resolution of the threshold question of in what situations and among what types of parties PLAs are thought to be appropriate. The greater the opportunity for unequal bargaining among parties to a PLA, the more attractive the notion of limiting PLAs to the options of the present procedural system. Nevertheless, PLAs made as the result of arm's length bargaining between informed parties of equal bargaining power do not need the same scope-limiting fallback protection. Therefore, as with the formation issues, the appropriate resolutions to these questions are interdependent.

In summary, the authors do not intend to elude these difficult issues. Nevertheless, the appropriate resolution of any one issue is dependent upon how any number of others is resolved. At this time, it seems most appropriate to simply define the terms of the public debate that is wanting. If and when the stage is set for resolution, specific legislative proposals can be made as the debate unfolds.

X. CONCLUSION

Simply put, the judicially created doctrine for enforcement of forum selection clauses, as well as the unwarranted judicially created extensions of FAA, are a mess. The judicial rush to embrace private contractual autonomy that reorders basic concepts of the public system of dispute resolution has the opportunity for resultant unfairness to the unsophisticated party to the contract. The courts seem to have premised their fondness for PLAs upon a mistaken assumption that parties enter these agreements with equal bargaining power and understanding of the terms. That is not the case, especially for the consumer or potential employee.

The most expedient way out of this mess is for Congress to engage in public debate as to what role, if any, PLAs should play in public dispute resolution. If it is decided that there is an appropriate role for PLAs, the parameters of that role must be established so that their beneficial utilization is preserved, but not at the expense of the consumer or employee. Moreover, not only is congressional intervention warranted, it is constitutionally demanded by notions of separation of powers. As demonstrated by the legislative history of the FAA, Congress originally acted under its Article III authority. It is only by judicial sleight of hand that the FAA became viewed as a product of the power to regulate interstate commerce. As an act pursuant to Article III, it is only for Congress to define when and in what circumstances arbitration clauses should be recognized and enforced. They should similarly act for all forms of PLAs.