Power and Knowledge in Agreements to Arbitrate Statutory Employment Rights

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I. INTRODUCTION

"[T]here is a link between the insulation of institutional arrangements from challenge and revision and their power to generate and support rigid hierarchies of power and advantage."[1]

Among commentators criticism of mandatory binding arbitration of individual employment rights has focused on whether contract doctrine has been properly applied[2] and whether nonunion, mandatory binding arbitration clauses violate the constitutional rights of employees.[3] This Note focuses on the contractual side of the debate. It employs a deconstructionist

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[1] ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 168–169 (1996).

[2] *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) (arguing that many prehire arbitral agreements are blatant contracts of adhesion that operate much like early nineteenth-century contracts in which employees had to promise not to join a union in order to be hired). *But see* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 85 (1997) (arguing that, although arbitration awards that violate public policy may harm third parties, the benefits of arbitration outweigh the dangers). *See generally* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995) (discussing the trend of the 1980s and 1990s away from a "functionalist" approach to contract law that emphasizes flexible, narrow-issue thinking and substantive fairness toward an approach relying on formal, abstract categorization of contract disputes).

[3] State action is of course a prerequisite for determining that mandatory binding arbitration agreements are unconstitutional. For an analysis suggesting that, among other factors, the Supreme Court's preference for arbitration over litigation raises the Court's enforcement of mandatory binding arbitration agreements to the level of state action, see Richard C. Rueben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997). For an analysis of the constitutionality of binding arbitration agreements suggesting that many are unconstitutional because they deprive prospective litigants of their right to a jury and an Article III judge, and deny them due process rights to adequate notice, an impartial judge, a meaningful appeal, and other procedural protections, see Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

critique of contract doctrine to suggest that a jurisprudence, like that evolving around agreements to arbitrate statutory employment claims, which limits itself to application of contract defenses (e.g., duress or unconscionability), will give short shrift to important normative issues that decisionmakers must decide in order to resolve arbitration agreement disputes.[4] Because contract defenses such as duress and unconscionability are largely indeterminate, courts must ultimately rely upon their interpretations of public norms in order to reach their conclusions rather than simply enforcing the fully consensual and thus politically neutral assent of the parties.

Contract doctrine disguises this public, nonconsensual, and nonneutral decisionmaking of courts by suggesting that it either relies on the private intentions of the parties to the exclusion of other public policy concerns or that contract doctrine has determinate and neutral ways of deciding when public concerns should intrude into private bargains. The primary contention of this Note is that this unspoken normative decisionmaking, this political determination of what levels and types of inequality the courts should tolerate, should be at the forefront of the debate rather than being subject to contract doctrine's sleight-of-hand.

After demonstrating how the contract defenses of duress and unconscionability place a veneer of formalistic legitimacy over inherently political decisionmaking, this Note will examine the Supreme Court's contractual approach to agreements to arbitrate statutory employment rights as set out in the controversial *Gilmer v. Interstate/Johnson Lane Corp.*[5] decision. This Note will suggest that the Court's application of contract doctrine disguised and falsely justified a public, normative choice by reducing the discussion of the issue to the terse statement that there was "no indication . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause."[6]

This Note will conclude by suggesting that the implicit political or normative choices that contract doctrine both forced upon the Court and that prevented the Court from openly discussing in its *Gilmer* decision were supplemented by the Court's explicit application of an arbitrary political preference for arbitration over litigation.[7] The Judiciary has created this

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[4] For an introduction to critical approaches to contract doctrine, see Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 497 (David Kairys ed., 3d ed. 1998).

[5] 500 U.S. 20 (1991).

[6] *Id.* at 33.

[7] *See* discussion *infra* Part III.B.

preference despite the Legislature's clearly expressed policy determination that inequality of bargaining power concerns required that the Federal Arbitration Act (FAA)[8] not apply to employment contracts.[9] Nevertheless, the *Gilmer* decision employs the judicially manufactured preference for arbitration in deciding to enforce an arbitration clause that in practical terms governed the employment relationship.[10]

The Court's approach does not explain the basis of the normative decisions inherent in contract doctrine's definition of defenses based on inequality of bargaining power.[11] Nor does its approach require the Court to expend significant effort in justifying its refusal to uphold contract defenses based on those theories in particular cases. As if all of this submerged normative decisionmaking were not enough, the Supreme Court has begun to construct a thin facade of circular reasoning to defend the preference for arbitration over litigation—a preference which should not require any husbanding from the bench as it is supposedly drawn directly from Congress's FAA.[12]

Given this evasive approach, it appears that the heart of the decisionmaking—the public, normative determinations as to when and why society should intervene in agreements to arbitrate—will remain cloaked in the obfuscation of contract doctrine and the arbitrariness of the preference for arbitration.

II. DURESS AND UNCONSCIONABILITY

A. *The Problems of Power and Knowledge*

Clare Dalton has identified two basic problems that render the contract defenses of duress and unconscionability largely indeterminate: the problems of power and knowledge.[13] The problem of power is that "[w]e

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[8] 9 U.S.C. §§ 1–14 (1994).

[9] *See* discussion *infra* Part III.B. For a more thorough dismantling of the legitimacy of the Court's preference for arbitration over litigation, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

[10] *See Gilmer*, 500 U.S. at 25.

[11] *See id.* at 33.

[12] *See id.* at 25.

[13] *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1024–1039 (1985). Professor Dalton's essay is truly a *tour de force* and a must-read for anyone interested in critical approaches to contract doctrine.

live with two convictions—that we should take care of ourselves and that we should take care of others—and we lack any conceptual or instrumental scheme sufficiently persuasive in its neutrality or its appeal to consensual values to regulate when one impulse should predominate."[14] Put another way, when a decisionmaker must decide when and why to overturn the expressed intent of contracting parties based upon public norms (e.g., fundamental fairness or honesty), the decision is inevitably nonneutral.

The problem of knowledge is that we cannot directly know what the parties to a contract intended.[15] Instead we must turn to factors other than the parties' intent in an attempt to infer their intent, such as whether the weaker party could have resisted particular threats or whether the bargain is so unequal that no one who was not coerced would have agreed to it. But this attempt runs squarely into the problem of power.[16] Once one must rely on factors external to the intent of the parties, one is merely trying to decide whether a particular set of factual circumstances warrants an inference that public norms have been violated. This is exactly the kind of political decision that contract doctrine purports to avoid by relying on the intent of the parties.

B. *The Realist Approach*

Before the realist critique surfaced, classical contract doctrine operated according to a paradigm that asserted that contractual obligation was absolutely private and apolitical because it was based on the assent of privately contracting parties.[17] Its conception of duress was highly formal, recognizing as coercion only threats of physical harm or otherwise illegal acts.[18] The realist critique of contract doctrine led to a softening of the rigid formalism of earlier contract law and paved the way for an approach that placed a greater emphasis on flexible, narrow-issue thinking and substantive fairness.[19] The concept of unconscionability, relying as it does on a more explicit recognition of the role of public norms in overturning contracts, would have been logically incompatible with classical doctrine.

The realists recognized that coercion did not have to be physical to improperly affect the terms of an agreement and that duress doctrine was in

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[14] *Id.* at 1025–1026.

[15] *See id.* at 1025.

[16] *See id.*

[17] *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915).

[18] *See id.* at 10–11.

[19] *See* Mooney, *supra* note 2, at 1132–1133.

fact an intrusion of public norms of fairness into a contractual dispute regardless of the parties' expressed intent.[20] Some realist critiques of contract doctrine's treatment of inequality of bargaining power recognized that *every* contract is to some extent the result of compulsion because every contract is the result of some amount of inequality of bargaining power. Thus, they concluded that every contract implicated public norms.[21]

One could have drawn the inference from this early radical approach that we should abandon the notion that the duress doctrine can be justified by treating equality of exchange and of bargaining power as indicators that the weaker party freely assented. Rather, this approach seemed to imply that our jurisprudence ought to self-consciously confront the questions of how much inequality of exchange and of bargaining power we are prepared to accept as a society and design our rule of law around an assessment of how much inequality we could accept. Perhaps because of the potentially sweeping implications of such an approach, realists insisted upon treating a combination of equivalence of exchange and equivalence of bargaining power as indicators of the reality of assent.[22]

The difference between the classical and realist conceptions of duress is that the classical or formalistic approach defined duress as involving behavior so alarming that the assent must have been "unreal." The realist approach, on the other hand, understood duress as more of an expression of public norms of fairness: some bargains are so offensive to our norms of fairness or honesty that courts should not enforce them. Thus, the realists were willing to give inequivalence of exchange greater weight in their duress determination.[23] The formalist approach "reprivatizes" duress by

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[20] *See, e.g.*, John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 266–267 (1947).

[21] *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 612 (1943). "[A]ll money is paid, and all contracts are made, to avert some kinds of threats." *Id.*

[22] *See, e.g.*, Dawson, *supra* note 20, at 289. The implications of allowing the duress doctrine to be invoked simply on the basis of inequality of exchange were more than Dawson was prepared to confront, and he thus proposed limiting the duress doctrine to those situations in which inequality of bargaining power was also at work. *See* Dalton, *supra* note 13, at 1030–1031. Thus, he stated that "in the absence of [any] countervailing factors of policy or administrative feasibility, restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining power, whether the impairment consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience." Dawson, *supra* note 20, at 289.

[23] *See* Dalton, *supra* note 13, at 1030.

suggesting that looking at factors external to the parties' intent in light of public norms is in fact simply a method of divining the parties' intent.

The realist approach recognizes that to a certain extent one must explicitly acknowledge that one is resorting to a public rather than private source to legitimize the resolution. But it once again encounters the problem of power when it suggests that one can neutrally and consensually determine when, and which, public norms should decide the case. [24] The realist solution to the observation that coercion exists in every bargain was therefore an attempt to cordon off the public aspects of contract doctrine by suggesting that it is possible to determine when public concerns should trump the private assent of the parties without making nonconsensual, nonneutral decisions. The realists failed to constrain the intrusion of public norms into contract because they failed to recognize the problem of the indeterminacy of the parties' intent. They therefore insisted upon retaining the notion that reliance upon factors external to the parties' intent could be used to determine their intent.

Specifically, some realists insisted that inequivalence of bargaining power was an essential element of duress, or simply stated that the duress determination could be affected by "factors of policy or administrative concerns."[25] This insistence on including inequivalence of bargaining power and upon leaving the door open to consider policy and administrative concerns meant that the realist approach would replicate some of the mistakes of classical doctrine. Notably, the realist insistence upon including impaired bargaining power as an element of duress would still require courts to make determinations of the "reality of assent," despite the fact that the parties' subjective intent is ultimately unknowable.[26] Critical legal

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[24] *See id.*

> Although [realists] wanted to make the substance of the bargain a central feature of duress doctrine, [they were] not prepared to confront directly the theory of "subjective value" so central to bargain theory. [They] argued that [their] suggestions did not "involve any expectation that the methods of private litigation will be used to overhaul the immense range of transactions involving the sale or exchange of goods and services in a competitive society." . . . At one level, this acknowledgement of the "public" nature of the assessment [of impaired bargaining power] repairs the difficulty of subjectively assessing intent; but it implicates the decisionmaker all over again in the question of what the basis of the decision is to be.

Id. at 1030–1031 (quoting Dawson, *supra* note 20, at 290).

[25] *See, e.g.*, Dawson, *supra* note 20, at 289.

[26] *See* Dalton, *supra* note 13, at 1032 ("The conflict between subjective and objective value, between individualistic policies premised on inequality and dedicated to

scholarship has suggested that in order to fully acknowledge the indeterminacy of intent the realist approach must be taken to its logical extreme, focusing on "identifying either those public norms that must invalidate private contracts, or those instances in which private intention requires the protection provided by public intervention."[27]

C. *Deconstructing Duress and Unconscionability*

The duress and unconscionability defenses have applied three general approaches to justify intervening in contracts to police the limits of a fair bargain.[28] First, one might look to the intent of the weaker party to determine if her assent was "real." Second, one could look to the stronger party's behavior to determine whether one thinks anyone could resist in the face of a particular threat. Third, one could look to the terms of the deal to ask whether anyone would have entered into such a deal without being coerced.[29]

The first approach fails to yield determinate results because of the problem of knowledge.[30] We cannot know the intent of the weaker party first hand. Thus, one is forced to look at factors external to the intent of the weaker party in an effort to infer whether assent was real. Examining these external factors, one inevitably partakes of the other two approaches: assessing the threat of the stronger party or looking to the terms of the deal. These approaches run up against the problem of power.[31] Because one is deciding whether the contract is enforceable based upon either acts of the stronger party or the equivalence of the bargain rather than the intent of the parties, adjudication is reduced to determining whether the particular bad acts or inequality of exchange are so incompatible with public norms as to render the contract unenforceable.

These are normative or political decisions, but contract doctrine obscures that fact either by "reprivatizing" the decision by portraying it as a method for determining the "reality" of assent or by suggesting that one

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maintaining the basic market structure, and policies designed to minimize advantage and promote fairness in contractual relationship, can be resolved only by reintroducing a private analysis of assent.").

[27] *Id.* at 1032.

[28] *See id.* at 1025–1026.

[29] *See id.*

[30] *See id.* at 1025.

[31] *See id.* at 1025–1026.

can neutrally and consensually distinguish the situations where bad behavior or inequivalence of exchange requires public intrusion.

III. THE *GILMER* DECISION

The Supreme Court addressed agreements of nonunion employees to arbitrate statutory employment rights in its controversial *Gilmer* decision.[32] The primary contention of this Note is that the Court's formalistic approach to such contracts left important normative discussions submerged and failed to provide guidance as to when and why public norms should trump arbitration agreements. But the indeterminacy of contract law is not the only factor that buries normative decisionmaking and renders the decision analytically unhelpful. Aside from the obfuscation and evasiveness that contract doctrine foisted upon the Court, the Court's formalistic approach in fact enabled it to do explicitly what contract law does implicitly: to apply a public norm without discussing why it was just to do so. Specifically, the Court's insertion of a preference for arbitration over litigation in the nonunion employment context represents (barely) submerged normative decisionmaking that was enabled by a formalistic approach to the definition of "contract of employment."[33] It was further enabled by a vapid game of stare decisis leap frog whereby one unjustified decision holding that there was a preference for arbitration propelled itself over the last in a kind of perpetual motion driven by no one bothering to figure out why the game started in the first place. The remainder of this Note will discuss how the *Gilmer* decision both implicitly, as a result of its application of contract doctrine, and explicitly, by applying a preference for arbitration over litigation, buried important political decisions.

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[32] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding that statutory employment rights could be the subjects of arbitration agreements affecting individual employees). Gilmer entered into an arbitration agreement contained in an Securities and Exchange Commission (SEC) registration application. Gilmer's employer, Interstate/Johnson Lane Corp., required that Gilmer be registered with the SEC as a securities representative in order to obtain employment. *See id.* at 23. The employer terminated Gilmer, and he filed suit for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (Supp. 1998). *See Gilmer*, 500 U.S. at 23-24.

[33] *See* discussion *supra* Part II.B.

A. *The Inequality of Bargaining Power Analysis*

The *Gilmer* decision did not clearly indicate whether it was applying duress or unconscionability doctrine when it decided, in contravention of legislative intent,[34] that inequality of bargaining did not render arbitration agreements in the nonunion employment context unenforceable.[35] Though both approaches are discussed below, the conceptual differences, if there are any, between "economic duress" and the unconscionability approach to inequality of bargaining power are ultimately insignificant as both doctrines are substantially indeterminate.

Duress doctrine focuses on threats as the basis for invalidating contracts.[36] The Second Restatement recognizes two kinds of threats: those that in and of themselves invalidate a contract and those that must also result in an unfair exchange.[37] The latter category also requires that the unfair exchange be accompanied by "a use of power for illegitimate ends."[38] Because the first category focuses on illegal acts and threats to prosecute or to file civil suits, the *Gilmer* situation would fall under the second. But the second approach is rendered indeterminate by the problem of power. There is no neutral or consensual way to determine when an exchange is "unfair," or when an exercise of power is "illegitimate." Whether the exchange was unfair and the use of power was illegitimate is the very question the court must answer, so that contract doctrine has no

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[34] *See Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting). Justice Stevens in dissent quoted a statement made at a hearing of the Senate Subcommittee of the Judiciary:

> The trouble [with these things] is that a great many of these [things] entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or leave it. The agent has no power at all to decide it. Either you can make that contract or you [cannot] 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 by a court, and has to have it tried before a tribunal in which he has no confidence at all.

Id. at 39 (Stevens, J., dissenting) (quoting *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of Sen. Walsh)).

[35] *See id.* at 30.

[36] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(a) (1981).

[37] *See id.* §§ 175(a), 176.

[38] *Id.* § 176(c).

guidance to offer the decisionmaker except the empty notion that the contract must be fair and legitimate.[39]

Unconscionability is similarly plagued by the problem of power.[40] Under the Restatement sections most likely to be applied to agreements to arbitrate employment rights, a contract or provision is unconscionable if there was grossly unequal bargaining power[41] coupled with "terms unreasonably favorable to the stronger party"[42] and indications that "the weaker party had no meaningful choice."[43] These criteria are hopelessly circular and empty giving one no neutral or consensual scheme by which to determine what constitutes "gross" as opposed to other forms of inequality, "unreasonably favorable" terms, or a "meaningful" choice. Decisionmakers are left to make these decisions solely by applying their interpretations of public norms to the situations. Thus, the unconscionability standards merely provide a diversion for the underlying normative decision of how much inequality renders the contract or provision invalid.

It is not important which indeterminate doctrine the *Gilmer* Court applied, because the discussion surrounding either is not likely to move forward in determining when public norms require intervention into contracts and which public norms should be the basis for such intervention. Rather, the analysis necessarily revolves around empty or circular criteria such as whether assent was "real" or "meaningful." Such issues are either unknowable or not resolvable in reference to any neutral and consensual justifying scheme.

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[39] *See* Dalton, *supra* note 13, at 1035.

[40] *See* Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1018 (1996).

> To declare an arbitration clause, or any contract term, substantively unconscionable requires a substantive theory of fairness to distinguish conscionable from unconscionable terms. "A substantive fairness theory assumes that a standard of value can be found by which the substance of any agreement can be objectively evaluated. Such a criterion has yet to be articulated and defended." In short, values are subjective and substantive unconscionability is in the eye of the beholder.

Id. at 1018 (footnotes omitted) (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 284 (1986)).

[41] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

[42] *Id.*

[43] *Id.*

The *Gilmer* decision predictably partakes of the shortcomings of contract doctrine in its terse treatment of inequality of bargaining power. The Court's "analysis" consists of one sentence: "There is no indication in this case . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application."[44]

This spare treatment can be interpreted in one of two ways. First, one might infer that the Court is disaffected with the realist insights that led to the acceptance of economic duress and unconscionability (i.e., that coercion exists in every contract and that duress can be economic in nature). If so, the Court's analysis is evidence of the health of what has been described as "the new conceptualism in contract law,"[45] an approach that harkens back to classical contract doctrine by "emphasiz[ing] definitions, categories, and syllogistic thought."[46] This could explain why the Court failed to discuss, in even the obfuscating manner that the duress and unconscionability doctrines allow, the very concerns about inequality of bargaining power that prompted Congress to exempt arbitration agreements contained in certain contracts of employment from coverage under the FAA.[47]

The second way one might interpret the Court's discussion, or lack thereof, is to assume that in fact they were relying on factors external to the inequality of bargaining power (or, to be accurate, one factor: Gilmer's business experience) to suggest that duress or unconscionability was not a problem because assent was real or meaningful. Predictably, the Court's discussion of duress and unconscionability did not explicitly rely upon or address public norms in reaching its decision. One should not expect it to, given the foregoing discussion of the circular and diversionary nature of the duress and unconscionability doctrines.[48]

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[44] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

[45] Mooney, *supra* note 2, at 1134.

> The most fundamental conception returning to dominate contract law today is "freedom of contract." That ideological centerpiece of classical contract law always has appealed powerfully to the hearts and minds of American contract lawyers. Recently, however, its appeal has increased to pre-1960 levels, as it becomes once again, in Wittgenstein's phrase, a "picture [holding] us captive."

Id. at 1134–1135 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 115 (3d ed. 1967)); *see also id.* at 1135 n.14 ("Other conceptualist examples include . . . narrow, definition-dominated treatments of fraud and duress . . . .").

[46] *Id.* at 1134.

[47] *See* 9 U.S.C. § 1 (1994).

[48] *See* discussion *supra* Part II.C.

To apply that discussion to the *Gilmer* decision, one need only note that the Court's emphasis on Gilmer's experience is an effort to infer that Gilmer's assent was "real." This would allow the Court to justify its decision by suggesting that it was merely effectuating the intent of the parties rather than engaging in normative or political decisionmaking. Because of the problem of the indeterminacy of intent (i.e., the problem of knowledge) and the problem of power, this effort is futile.

Because the Court cannot know Gilmer's intent first hand, it relies on other factors to infer Gilmer's intent.[49] But Gilmer's level of business experience does not directly tell us about whether he was actually coerced. One is simply making the normative or political decision that, at Gilmer's level of experience, one is willing to infer that he was not coerced while accepting the risk that he may in fact have been significantly coerced.

Further, the Court made a normative or political decision when it seized upon business experience as being dispositive of coercion-free contracting. It is quite possible that even the most experienced of businesspersons would not, as an individual, have had the bargaining power to eliminate the arbitration clause. Thus, the Court's exclusive reliance on Gilmer's experience as the factor that demonstrated that there was no coercion boils down to the rather crass proposition that anyone who understands an action that he is taking does so consensually.

This type of normative decisionmaking is exactly what contract doctrine attempts to eschew by relying on the intent of the parties to justify its outcomes. Thus, the fact that the Court has not discussed the important normative question of why the level of coercion present between the parties does or does not justify public intervention fails to be discussed. Given that contracts of employment were excluded from coverage under the FAA due to concern over inequality of bargaining power,[50] the political nature of the Court's decision that "[m]ere inequality of bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context"[51] becomes clear.

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[49] *See Gilmer*, 500 U.S. at 33.

[50] *See* discussion *infra* Part III.B.

[51] *Gilmer*, 500 U.S. at 33.

B. *The Preference for Arbitration*

Another way in which disguised political decisionmaking made its way into the Court's contract analysis of arbitration agreements is through its preference for arbitration over litigation.[52] Unlike contract doctrine, however, the preference does not hide its political nature. It makes no pretense about the fact that it is unadulterated public policy. But unjustified and unexplained normative decisionmaking was still involved. In 1983, the Supreme Court decided *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[53] Without explanation, and citing cases that similarly did not explain or justify the preference except upon docket clearing grounds,[54] the Court decided that the enforceability of arbitration agreements would be decided nonneutrally in favor of arbitration. The Court stated:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[55]

The Court's assertion that the FAA establishes that disputes should be resolved in favor of arbitration as a matter of federal law is curious in light of the text, legislative history, and early Supreme Court decisions interpreting the Act. The text of the FAA excludes certain contracts of employment,[56] and most commentators have concluded that "the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily to transactions

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[52] *See id.* at 24 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[53] 460 U.S. 1 (1983).

[54] *See* Dickinson v. Heinhold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981); Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979); Becker Autoradio U.S.A., Inc. v. Becker Auturadiowerk GmbH, 585 F.2d 39, 43–45 (3d Cir. 1978); Hanes Corp. v. Millard, 531 F.2d 585, 598 (D.C. Cir. 1976) (justifying liberal construction of arbitration agreements by suggesting that they relieve overburdened courts).

[55] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

[56] *See* 9 U.S.C. § 1 (1994). "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.*

between a large merchant and a much weaker and less knowledgeable consumer."[57] Further, the central provision of the FAA merely requires that agreements to arbitrate be treated like other contracts, not that a preference should intrude into the contract analysis.[58]

The drafters clearly intended that the Act should not apply to employees and consumers. Justice Stevens, in his *Gilmer* dissent, quoted the statement of the chairman of the American Bar Association (ABA) committee responsible for drafting the Act at a hearing before the Senate Subcommittee of the Judiciary: "It is purely an act to give the merchants the right or 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."[59] Further, early Supreme Court decisions addressing the enforceability of arbitration agreements not only did not recognize a preference for arbitration but were in fact protective of consumers and individual employees.[60]

The Court's reversal from its earlier position of concern for equality of bargaining power to its sudden recognition of a preference for arbitration was not motivated by any change in the relevant statutory law.[61] Rather,

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[57] Sternlight, *supra* note 9, at 647.

[58] *See* 9 U.S.C. § 2 (1994).

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

Id. (emphasis added).

[59] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (quoting *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of the Chairman of the ABA Committee)).

[60] *See, e.g.*, Bernhardt v. Polygraphic Co., 350 U.S. 198, 203-205 (1956) (refusing to force a discharged employee to arbitrate and expressing concern with protecting an employee from unexpected results); Wilko v. Swan, 346 U.S. 427, 438 (1953) (discussing that Congress will allow parties to use arbitration if the parties are "willing to accept less certainty of legally correct adjustment"), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

[61] The relevant statute, 9 U.S.C. § 2 (1994), was not amended after the *Wilko* decision.

the preference for arbitration sprang, fully formed, from the bench.[62] Arbitrary as the preference may be, at least one recent Supreme Court decision insists not only that the preference can be located in the FAA, but that the preference is the result of natural and inevitable jurisprudence.[63]

Reading Justice Breyer defend the preference in *First Options of Chicago, Inc. v. Kaplan*[64] gives one a Chaplinesque feeling of amused astonishment at having witnessed someone escape from a situation that in real life would have been fatal. In that decision, the Court was called upon to decide whether courts or arbitrators should decide if a dispute is arbitrable.[65] The Court analyzes the problem by making the blanket statement that arbitrability is simply a matter of contract and that just as the arbitrator's power to decide issues on the merits is limited by the arbitration agreement, so an arbitrator's power to decide arbitrability must be bestowed upon the arbitrator explicitly in the arbitration agreement.[66]

The problem with the Court's attempt to make the neat and clean argument that an arbitrator's power, as to both arbitrability and merits-related issues, is all just a matter of contract law is that there are two conflicting preferences as to how agreements to arbitrate are to be interpreted. First is the principle that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration."[67] Second is the preference for arbitration over litigation which says that "issues will be deemed arbitrable unless 'it is clear that the arbitration clause has not included' them."[68]

Justice Breyer attempts to justify the preference for interpretation of arbitration agreements in favor of arbitration by suggesting that people have given more thought to the matter of what issues they want to arbitrate than to the matter of who should decide arbitrability.[69] But why should the fact that one has thoroughly thought through a contract before entering into it dictate that the contract should be construed nonneutrally in light of a preference for a particular outcome? While it may be understandable that

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[62] *See* Sternlight, *supra* note 9, at 711.

[63] *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-943 (1995).

[64] 514 U.S. 938, 942 (1995).

[65] *See id.* at 942.

[66] *See id.* at 943.

[67] *Id.* at 945.

[68] *Id.* (quoting 1 THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION § 12.02 (rev. ed. Supp. 1993)).

[69] *See id.* ("But, [such] treatment is understandable. . . . In such circumstances, the parties likely gave [more] thought to the scope of arbitration.").

because people assume without giving it much thought that disputes they do not agree to arbitrate will be resolved by a judge, and that those disputes should thus be decided in light of a preference toward submitting the issue to a judge, the opposite simply is not true. There is no logical reason why someone's contract should be construed less neutrally as the amount of thought that he or she puts into the contract increases.

Having relied on the "thoughtful people deserve to be thrown off balance by non-neutral interpretation" argument to justify the preference for arbitration, Justice Breyer's *coup de grace* is a good old-fashioned tautology. He states, "given the law's permissive policies in respect to arbitration . . . one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter."[70] In other words, because there is a preference for arbitration, it is understandable that there is a preference for arbitration.

If it was not clear before that the preference had no basis in jurisprudence, *First Options* makes it crystal. The preference for arbitration is an arbitrary finger on the scale that was placed there by the judiciary for policy reasons. Unfortunately, public policy discussion beyond a few references to the docket-clearing power of arbitration is entirely lacking from the case law.

IV. CONCLUSION

Upon examination, the preference for arbitration over litigation turns out to be just as empty of substance and void of justification as the contract doctrine that it seeks to influence in favor of arbitration. While the preference for arbitration is explicitly political, it goes entirely unjustified, existing merely by judicial fiat—by the sleight-of-hand of citing lower court cases that are just as lacking in justification as the case itself. Similarly, contract doctrine requires the exercise of judicial fiat, but of a more insidious kind. Because the defenses of duress and unconscionability necessarily rely upon factors external to the intent of the parties, they necessarily apply public norms to those factors to come to a conclusion. This amounts to making subjective value judgments, which are not founded in any neutral or consensual justifying scheme. The resulting decisions are thus impositions of the power of the state that go without explicit justification.

Nor does this approach hold out any hope that ongoing dialogue might mitigate the nonneutral and nonconsensual nature of the decisions that

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[70] *Id.* (citation omitted) (emphasis omitted).

underlie the duress and the unconscionability doctrines. This is because decisionmakers that apply the doctrines are constrained by the myth of the "privateness" of contract doctrine from using and openly discussing public norms as a source for invalidating contracts. Even when public norms are allowed to enter into contract doctrine—as with unconscionability doctrine—the question of when they should be applied runs into the same problems because it must justify its decision of when to invoke the norm. In the context of the *Gilmer* decision, the most important question that the case presented was not even addressed, and our jurisprudence missed an opportunity to enrich the dialogue about what level of bargaining power we are willing to accept in contracts that affect statutory employment rights, which are themselves the repositories of important public policies.