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Scott J. Burnham
Professor of Law, University of Montana School of Law

THE WAR AGAINST ARBITRATION IN MONTANA

Scott J. Burnham[1]

I. AN IDIOSYNCRATIC VIEW OF CONTRACT

A. Freedom of Contract

Doyle Brunson famously said that poker is a game of people, not a game of cards.[2] The same can be said for contract law. Contracts is about people, not about rules. When you grasp this concept, the apparent complexity of the rules of contracts falls away like the sun breaking through the clouds, revealing the subject in its glorious simplicity. The goal of contract law is to facilitate exchange relationships between people by defining when they are created, by facilitating their making, and by unwinding them at their termination. In doing these things, we assume that people will act reasonably, so the contract rule can almost always be derived by asking, what would a reasonable person do?[3] My law and economics friends will say that when I ask what a reasonable person would do, I am really trying to determine what is economically efficient.[4] That may be, but I don't know how to determine economic efficiency and, perhaps unwisely, I think I can determine what is reasonable. So, recapitulating the experience of hundreds of years of contract law, I will continue to grope for what is reasonable. If the economists are right, then our views should largely converge.

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1. Professor of Law, The University of Montana School of Law. I wish to thank my able research assistant John Mastin, a student at The University of Montana School of Law, for his considerable help. In the interest of full disclosure, I should indicate that I have been an arbitrator for the Better Business Bureau AutoLine program and am currently an arbitrator for the National Arbitration Forum.

2. DOYLE BRUNSON, SUPER/SYSTEM 17 (2d ed. 1978).

3. Note that I hedged by inserting "almost." This is law, so there are always going to be exceptions. More significantly, the rules of contract law are no longer entirely derived from the common law experience, but with unfortunate frequency also come from legislation, and I think it is fair to say that legislatures do not always act like reasonable people. *See infra* Part I.B.

4. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2 (5th ed., Aspen 1998).

In playing this game, the parties' freedom to establish their contracts is of paramount significance. We do not usually number Freedom of Contract among our cherished liberties, yet surely it is one of them.[5] The progress of man, it has been said, is from status to contract.[6] Historically, a dominant group, as part of its suppression of a subservient group, has frequently deprived the subservient group of freedom of contract. This is not the place to track the expansion of freedom of contract as a civil rights movement, bringing that freedom, for example, to women, African-Americans, and Indians, but it is a glorious part of that movement.[7] Free people have the right to contract freely.[8]

In Montana, we frequently hear our Constitution praised for including, in its Article II Declaration of Rights, the inalienable right "to a clean and healthful environment."[9] Less frequently do we hear that the Montana Constitution gives equal weight to the inalienable rights "of pursuing life's basic necessities" and of "acquiring, possessing and protecting property."[10] Exercise of these rights would not be possible without freedom of contract. The market economy through which we obtain necessities would cease to function if we could not readily buy and sell. Our property rights would not be meaningful if we could not readily transfer property, thereby increasing our wealth.[11]

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5. I was just speaking with one of my students from Poland. She told me that she never appreciated what a free country this is until she studied Contracts. The fact that you can sit down with another person and agree to terms that are going to bind you, without the permission or approval of a governmental agency, came as a revelation to her. Conversation with Alicja Biskupska 8/14/2004.

6. Famed English jurist Sir Henry Sumner Maine (1822-1888) in ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (10th ed. 1924) argued that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*." *Id.* at 174. Maine observed that in liberal (free) societies, the law treats persons as contracting individuals, not as members of status groups. *Cf.* Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 265 (1989) (analyzing the substantive outcomes of workplace disputes based upon status rather than contract).

7. *See, e.g.*, Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (women); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Classroom*, 28 CONN. L. REV. 1 (1995) (African-Americans); Anna-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy?* 33 CONN. L. REV. 667 (2001) (Indians).

8. *See* discussion *infra* Part I.C.

9. MONT. CONST. art. II, § 3.

10. *Id.*

11. Maybe Davy Crockett, or at least the words put in Crockett's mouth by John

The role of the law in furthering our rights is both facilitatory in enabling us to exercise our freedoms and regulatory in channeling our conduct away from harmful activities. Finding the balance between facilitation and regulation is a challenge in contract law just as it is in other social ordering. The respective roles of facilitation and regulation are somewhat different in the three aspects of contract law: formation, performance, and termination. In formation—the determination of whether there is a contract—we require the parties to conform to social norms of what reasonable people would think it takes to make a contract. In making this determination we are regulatory, though quite tolerant. After all, it would not do for Bob and Carol to form a contract by incanting "abracadabra" while Ted and Alice form theirs with "open sesame." We need a general consistency without a confining rigidity. Contract law can give the parties guidance *ex ante* and can examine *ex post facto* whether what they have done is sufficient to cause a contract to fall from the sky. If contract law assumes both parties intended to form a contract, it may well find that they did, even though they did not follow the proper guidance.[12] In this, as in all things contract, the first rule is what is reasonable.

In termination, contract law tries to prevent the failure of the relationship by helping the parties work through their problems, but if they reach the point of irreconcilable differences, it facilitates their divorce. In doing so, contract law tends to be more regulatory than facilitatory, largely because it wants to preserve certain economic norms. We have a sense that more harm may ensue from perpetuating a bad relationship than from terminating it; therefore, the terminating party may have to atone for the wrong done but will not be punished for it. The emphasis is not on fault but on fair allocation of the assets. Therefore, in the process of termination, the parties must obey rules that prevent one from taking unreasonable advantage of the other. The separation may be unpleasant, but it will not

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Wayne, said it best: "Republic. I like the sound of the word. It means people can live free, talk free, go or come, buy or sell, be drunk or sober, however they choose." THE ALAMO (Republic Pictures 1960).

12. This is, I think, the wisdom of Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (1917) in which Judge Cardozo stated that "[a] promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Id.* (quoting McCall Co. v. Wright, 117 N.Y.S. 775, 779 (N.Y. App. Div. 1909); Moran v. Standard Oil Co. of N.Y., 105 N.E. 217, 211 (N.Y. 1914)).

result in ruin.[13]

It is in performance that the parties have the most freedom and contract law is the most facilitatory. Sometimes this aspect of contract law is called "the law of the contract," as opposed to "contract law."[14] That is, while contract law determines whether or not the parties made a contract, the law of the contract determines what contract they made. If the parties reach what the law recognizes as a contract, but they provide no performance standards, the law of the contract will facilitate the relationship by providing the standards for them. Those standards are, of course, the standards reasonable persons would have provided had they given the matter any thought. If I merely agree to buy a peanut from you, without stipulating a price, the law will impute to me a promise to pay a reasonable price for it. We call such a supplied rule a default rule. This is not to say that the parties must act reasonably; reasonable persons have the freedom to make bad contracts. If it behooves me to buy a peanut from you for $20, the law will not question my judgment. I believe our economist friends would say that at that moment a peanut had more utility for me than $20 did, and vice-versa for you; so are deals born.[15]

But how unreasonable will the law permit me to be? If I were to trade my birthright for the infamous peanut, the law, even if it determined that I was sane and you were without coercive power, might well determine that we had made a bargain that no reasonable person in my shoes would have made, or indeed, that no reasonable person in your shoes would have extracted.[16] Freedom of contract presupposes the freedom to make bad choices as well as good ones, just as freedom of

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13. More colloquially, the law is tender to dirty contract breakers.

14. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.1 (3d ed. 2004).

15. *See The Simpsons: Boy-Scoutz 'N the Hood* (Fox television broadcast, Nov. 18, 2003):

> Homer: (searching sofa cushions for a peanut) Aw, twenty dollars—I wanted a peanut.
>
> Homer's Brain: Twenty dollars can buy many peanuts.
>
> Homer: Explain how.
>
> Homer's Brain: Money can be exchanged for goods and services.
>
> Homer: Woo-hoo!

16. "Traditionally, a bargain was said to be unconscionable in an action at law if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other;' damages were then limited to those to which the aggrieved party was 'equitably' entitled." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b. (1981) (citing Hume v. U.S., 132 U.S. 406 (1889) (quoting Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750))).

speech protects Larry Flynt as well as James Joyce.[17] But the state sees it as its paternalistic function to protect us from some of our bad choices. Enter the law as police officer, protecting me from my folly by relieving me of the deal I foolishly made. It might do this legislatively, regulating the transaction before the fact, or it might do it judicially, declaring it unconscionable after the fact. The principle, however, is the same whether achieved through a legislative or judicial act—either system is asking, what would reasonable people do?[18]

B. The Common Law and Codes

This example of how contract law might deal with a problem illustrates how contract law principles developed historically along two divergent paths that have unfortunately converged: the golden pathway of the common law and the bramble-strewn path of codification.[19] When I was asked to train judges of courts of limited jurisdiction, most of whom are not lawyers, I was told, teach them contracts in one hour. I quickly realized I couldn't feed them all the rules in that time, and even if I did, they would develop indigestion. I then had the epiphany that the rules merely represent what is reasonable. If the judges simply decide what is reasonable, they will alight upon the rule 90% of the time.[20] In thinking about the law this way, I told them, they are inheritors of the great common law tradition,

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17. *Compare* Hustler Magazine v. Jerry Falwell, 485 U.S. 46 (1988) *with* U.S. v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

18. Again, here our economists friends would say that if two autonomous individuals, acting in their own interests, made the deal, we need inquire no further. POSNER, *supra* note 4, § 4.1, at 101.

19. The wayfarer,
Perceiving the pathway to truth,
Was struck with astonishment.
It was thickly grown with weeds.
"Ha," he said,
"I see that none has passed here
In a long time."
Later he saw that each weed
Was a singular knife.
"Well," he mumbled at last,
"Doubtless there are other roads."
STEPHEN CRANE, WAR IS KIND 41 (1899).

20. This reduced my speaking time to five minutes. I then spent the other fifty-five minutes talking about that other 10% of the time where statutes have mucked up the scheme.

where the lord of the manor would be asked the rule and would supply it either from what was customary or what was reasonable. The law was enormously flexible, for what worked for Scotland did not necessarily work for Wales, and what worked for beekeepers did not necessarily work for millers. As the law began to coalesce, the decisions of the common law courts embodied these principles.

In other traditions, including the Roman, the French, and the Spanish, however, the principles were found in codes. Here a judge did not have to think through what was reasonable or become familiar with the common law decisions in order to solve a legal problem; the judge need only open the code to the appropriate text and the solution would be found. Significant voices in the Anglo-American tradition believed that there was benefit to be found in codification. After all, if the law was found in the decisions of the courts, how could one know the law other than to read the decisions?[21] And so it happened that in some jurisdictions, legislatures enacted codifications of the law to displace their common law tradition. But did the legislature intend the rules found in those codes to serve the traditional legislative function of regulation or the traditional common law function of facilitation?

Ideally, legislation would be only regulatory, advising us in advance, as with the criminal law, which conduct we should steer clear of to avoid trouble. Such rules appear even in a code that is largely facilitatory, such as the Uniform Commercial Code (UCC). For example, UCC section 2-201 tells us that agreements for the sale of goods for $500 or more must be evidenced by a writing to be enforceable. If I orally agreed to buy three peanuts from you for $600, and we also agreed that this agreement would be enforceable in spite of being within the confines of section 2-201, we would find that this rule is regulatory. Our agreement is not enforceable in spite of our agreement to the contrary. This is a regulatory rule that we cannot contract around, presumably because it is a formation rule.[22]

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21. The answer, of course, is that there is always some entrepreneur eager to make a buck by performing the service of stating the principles in narrative form, thereby relieving us of the burden of reading the cases. Such narratives comprise some of the most distinguished legal works, from WILLIAM BLACKSTONE, COMMENTARIES (1969) to the RESTATEMENT (SECOND) OF CONTRACTS (1981).

22. U.C.C section 1-102 cmt. 2 (2004) provides in part:

This principle of freedom of contract is subject to specific exceptions found

On the other hand, most of Article 2 of the UCC is facilitatory, advising us what the rule would be if we omitted the term from our contract, but permitting us, should we include the term, to contract around the facilitatory rule. These statutes, known as gap-fillers, expressly supply terms only if the parties omit the term. For example, section 2-305 tells us that "the price is a reasonable price at the time of delivery." If we agreed in writing that I would buy three peanuts from you for $600, this agreement would be enforceable in spite of that statute even though the reasonable price of those peanuts is much less than $600. This statute is facilitatory because, in the part that I conveniently stopped short of quoting, it provides that "the price is a reasonable price at the time of delivery if . . . nothing is said as to price." So we contracted out of that rule by saying something as to price.

Other UCC sections provide default rules that sound regulatory, but the parties are free to contract around them. For example, section 2-612(3) provides that when dealing with an installment contract, "[w]henever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole."[23] If you are to deliver my peanuts in installments and the first delivery does not conform to the peanuts you promised, I can't necessarily terminate the contract, for I don't know that the non-conformity with respect to one installment "impairs the value of the whole." You might compensate me for my loss and deliver conforming installments in the future. If I don't like that result, because I don't want to deal with a vendor of non-conforming peanuts, we are free to state in the contract, "[n]onconformity with respect to one installment permits the other party to terminate the contract even if the nonconformity does not impair the value of the whole." This is a default rule that we are free to change. How do we know that? Presumably because section 1-102(3) tells us so. That much-neglected statute, preserving our freedom of contract, provides:

> (3) The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except

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elsewhere in the Act and to the general exception stated here. The specific exceptions vary in explicitness: the statute of frauds found in Section 2-201, for example, does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the "contract" made unenforceable.

23. Codified in Montana at MONT. CODE ANN. § 30-2-612(3) (2003).

> that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable.[24]

In a purely common law system, statutes would be only regulatory. We would not need a statute like section 1-102(3) to tell us that some of the rules are facilitatory. But when a society decides to codify the law, and it codifies both the regulatory rules and the facilitatory rules, it creates a great muddle because the statutes do not come with labels attached declaring this to be regulatory and that to be facilitatory. And who wants to be beholden to the historian with the thick glasses, who is eager to tell us that this one is derived from the common law while that one is in derogation of it? Did we not enact a codification scheme so we could look only to the guidance of our simple code and not to the wisdom stored in dusty volumes?

This problem of discriminating between the facilitatory statutes and the regulatory ones is acute in a state that adopted the codes created by David Dudley Field of New York, and hence known as the Field Code. Alas, Montana is such a state. The sad story of how Montana became saddled with this monstrosity is recounted elsewhere and I will not dredge it up again.[25] Most of the Field Code statutes merely codify the common law, and since the common law permits the parties to change the default rules by agreement, one would think that these statutes are facilitatory rather than regulatory. But to judges, the black letters on the page look an awful lot like regulations. Furthermore, we are increasingly told that in applying statutes, we should stick to the "plain language" of the statute and not let extraneous baggage, like the glorious history of the common law, get in the way.[26]

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24. Codified in Montana at MONT. CODE ANN. § 30-1-102(3) (2003).

25. *See* Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371 (2000). But I will again say to the Legislature: Repeal the damned thing.

26. *See* Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573 (1996). In footnote 1, Snyder writes that "William Eskridge says the 'annus mirabilis' for the renaissance was 1982 when J. WILLARD HURST, DEALING WITH STATUTES (1982); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); and Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982), were all published. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 335 n.1 (1994)."

Unfortunately, there is no Field Code equivalent of UCC section 1-102(3) to tell us that these statutes may be merely facilitatory. Well, almost none. In the process of codifying the law, Field also codified the "maxims of equity," which no one would claim are regulatory. The maxims were intended historically (and I do mean historically—the English cadences ring false, reminding us that they are pale translations of the original Latin) merely to provide guidance to courts attempting to do what? (This is a review question.) Right, they were intended to help courts reach the reasonable result.[27] Do we really need the legislature to tell us that "superfluity does not vitiate"?[28] Or, less succinctly, that "He who can and does not forbid that which is done on his behalf is deemed to have bidden it?"[29]

One of these maxims does appear to permit one to contract around the law. It tells us:

> **Waiver of benefit of a law.** Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.[30]

What does this maxim mean? The trouble with the phrase "a law established for a public reason" is that it sounds exactly like

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27. We know this because one of the maxims says so: "**Purpose of maxims.** The maxims of jurisprudence set forth in part 2 of this chapter are intended not to qualify any of the other provisions of this code but to aid in their just application." MONT. CODE ANN. § 1-3-101 (2003).

28. *Id.* § 1-3-228 provides in its entirety: "**Superfluity.** Superfluity does not vitiate."

29. *Id.* § 1-3-210.

30. *Id.* § 1-3-204. Field Civil Code § 1968, which is identical to the Montana statute, is based upon two separate legal maxims of jurisprudence. The first is *quilibet potest renunciare juri pro se inducto.* DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK ' 1968 (Proposed Draft 1865). This legal maxim is translated as "[a]ny one may renounce a right introduced for his own benefit." BLACK'S LAW DICTIONARY 1750 (8th ed. 2004). Field suggested that we compare the first legal maxim with *modus et conventio vincunt legem*, which is translated as "[c]ustomary form and the agreement of the parties overcome the law. This is one of the first principles relative to the law of contract. 2 Coke 73." DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK § 1968 (Proposed Draft 1865); BLACK'S LAW DICTIONARY 1734 (8th ed. 2004). The second legal maxim is *privatorum conventio juri publico non derogat.* DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK § 1968 (Proposed Draft 1865). This legal maxim is translated as "[a]n agreement of private persons does not derogate from public law." BLACK'S LAW DICTIONARY 1747 (8th ed. 2004). As support for this section, Field also quoted this maxim *jus publicum privatorum pactis mutari non potest.* DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK § 1968 (Proposed Draft 1865). This maxim is translated as "[a] public right cannot be changed by agreements of private parties." BLACK'S LAW DICTIONARY 1728 (8th ed. 2004).

the reason a legislature enacts a statute.[31] And if every statute is established for a public reason and one can't contract around a statute enacted for a public reason, then every statute is regulatory and none is facilitatory. Freedom of contract has been replaced by regulation. The Montana Supreme Court fell into this trap in *Rothwell v. Allstate Insurance Co.*, using this maxim to support its decision not to allow an employee to waive the right to indemnification.[32] The court held that the indemnification statute was "an expression of public policy" that could not be contracted around.[33] But this reasoning does not make sense, for if every statute were regulatory, then there would be no statutes that a person could contract around and the maxim would serve no function. And we know the maxim serves a function because another maxim tells us that "[i]nterpretation must be reasonable."[34] Justice Gray is probably not up on her Justinian, but she smelled a rat and her instincts were right:

> My second point with regard to the error I perceive in the Court's opinion is the Court's somewhat loose use of the term "an expression of public policy" as the equivalent of the language "established for a public reason" which is contained in § 1-3-204, MCA. It can—and should—be said that every statute duly enacted by the Legislature is an expression of public policy with regard to its subject matter. However, the "public policy" connotation cannot properly be equated to the "public reason" language in § 1-3-204, MCA, because to do so would render § 1-3-204, MCA, a nullity. Section 1-3-204, MCA, clearly contemplates that only some laws have been established for a "public reason" and, pursuant to the statute, the benefit of such laws cannot be waived by private contract. Interpreting "public reason" and "public policy" as essentially identical renders the language of § 1-3-204, MCA—permitting waiver of the advantage of a law intended solely for an individual's benefit—totally ineffective and mere verbiage. Such a result clearly was not intended by the Legislature and we are obligated to interpret statutes to give them effect wherever possible, rather than to render them mere surplusage. *Formicove, Inc. v. Burlington Northern, Inc.* (1983), 207 Mont. 189, 194, 673 P.2d 469, 471 (citation omitted). For these reasons, it is my view that the Court's implicit substitution of "an expression of public policy" for the statutory language "established for a public reason"

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31. *See e.g.* Kuzmiak v. Brookchester, Inc., 111 A.2d 425 (N.J. Super. Ct. App. Div. 1955).

32. 1999 MT 50, ¶ 12, 293 Mont. 393, ¶ 12, 976 P.2d 512, ¶ 12.

33. *Id.* ¶ 9.

34. MONT. CODE ANN. § 1-3-233 (2003).

is both inappropriate and unsupported.[35]

In fact, the Field Code hides in the maxims what is a fundamental policy. We sometimes forget that freedom of contract is a constitutionally protected right. In its most important provision (all right, I exaggerate a bit), the Constitution provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts."[36] At the same time, of course, states have the right to pass laws that promote the general welfare. These obligations may well conflict when, in the course of promoting the general welfare, the state deprives us of our freedom of contract. How do we resolve the dilemma between the two obligations of the state? By requiring that the impairment of the obligation of contract be undertaken in the public interest. So the maxim is simply stating what we would derive as the reasonable rule: if a provision is regulatory, then you can't contract around it; but if it is merely facilitatory then you are free to contract around it, and if it confers a right on you, then you are free to waive that right.[37]

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35. *Rothwell*, ¶ 24 (Gray, J., dissenting).

36. U.S. Const. art. I, § 10, cl. 1.

37. There is an excellent discussion of the "public reason" language in De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App.2d 225, 233-36, 153 P.2d 983, 987-89 (Cal. Ct. App. 1944) (holding that because CAL. LABOR CODE § 2855 (enacted in Montana at MONT. CODE ANN. § 28-2-722) was enacted for a public reason, the parties were not free to contract around it).

The confusion caused by the Field Code provisions was exemplified recently in Cole v. Valley Ice Garden, 2005 MT 21, 325 Mont. 388, ___ P.3d ___. The issue involved the enforceability of a liquidated damages clause in light of Montana Code Annotated section 28-2-721. The court applied Montana Code Annotated section 1-3-204 to determine whether this provision could be waived and concluded that "because Cole waived the benefit of the liquidated damages law by virtue of the contract provisions he drafted, the District Court erred in applying the provisions of the liquidated damages statute to the contract before us." *Id.* ¶ 33.

The court correctly determined that section 28-2-721 is not the kind of regulatory rule that parties cannot waive. But that does not mean that when the parties have included a liquidated damages clause in their contract, they have somehow "waived" the statute. This statute is facilitatory. It merely states the common law rule on the enforceability of liquidated damages—or at least the rule frozen in time 150 years ago. *See* Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 Mont. 103, 79 P.3d 250, where the court declined to follow the statute, apparently because of its obsolescence. *Id.* ¶ 24 n.7.

Instead of finding that the parties waived section 28-2-721, the court should have applied the statute to determine whether this particular liquidated damages clause was enforceable. I do not believe that I am overly optimistic in thinking that if all these Field Code statutes were repealed, the analytical problems that arose in *Cole* and in *Klyap* would go away. I like to think that without the fog created by the statutes, the court would see the issue more clearly. It would say, "Hmmm. Liquidated damages clause, eh? Let's analyze it in light of the common law to determine whether it is enforceable."

Historically, we have gone back and forth between the emphasis on the general welfare and the emphasis on freedom of contract. Freedom of contract, or liberty of contract, as it was often referred to in the Nineteenth Century, took a hard knock with *Lochner v. New York,* the case that held that a state regulation limiting bakers to working a sixty-hour week violated the workers' freedom of contract.[38] I do not intend by this essay to advocate a return to the *Lochner* era, in which, as one author put it, "the police power could not be used to help those unable to protect themselves in the marketplace."[39] The eternal conflict of freedom and order is a question of balance, and I merely maintain that the Montana Supreme Court's view of contract law is out of balance.

C. The Two Spheres of Contract Law

The common law has traditionally supported the scheme of letting the parties negotiate the contract that determines the rules that govern their transaction, as long as they obey the regulatory rules. But there have always been two spheres of contract law co-existing rather unhappily. One sphere is the realm of freely negotiated contracts. The other sphere is the so-called contract of adhesion, arising when one party with superior bargaining power dictates non-negotiable terms to the weaker party, who merely "adheres" to the terms.[40] It should be said that there are those, again largely found among our law and economics friends, who tell us there is only one sphere. After all, if weaker parties are being offered such unbalanced terms, would not the market produce a champion who would exploit this inefficiency in the system, thereby creating better terms?

But the mainstream of contract law recognizes the two spheres and struggles mightily, and I would have to conclude, unsuccessfully, to reconcile them. As a first principle, as far as contract law goes (as distinct from the law of the contract), it is agreed that a contract of adhesion does not generally pose a formation problem.[41] The guidance Anglo-American

38. 198 U.S. 45, 64-65 (1905).

39. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880 (1987).

40. Promulgation of the term is attributed to Friedrich Kessler, *Contracts of Adhesion - Some Thoughts about Freedom of Contract,* 43 COLUM. L. REV. 629 (1943).

41. "[M]ere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable." Kloss v. Edward D.

jurisprudence has historically provided for the determination of whether parties have assented to a contract has proved remarkably versatile even in an electronic era. For better or worse, we have chosen to look for "objective manifestation of assent" even if we sometimes describe assent in a term that rolls more trippingly from the tongue.[42] While in former days that manifestation may have been objectified with seals, signatures, handshakes, and witnesses, today it is as likely objectified by tearing, clicking, or moving a stylus across a pad. Under this objective view of assent, it doesn't matter whether both parties or one of the parties did not read the contract, or read it and did not understand it. Reading and understanding are subjective; only an objective manifestation of assent signifies agreement to form a contract.[43]

But when they objectively manifested their assent, what terms did the parties manifest assent to? Pondering this question is what gives us a horse race. Freedom of Contract, the entry of the economists, tells us that the answer must be: all of them.[44] But the economists have by and large a long shot in this race. The mainstream view, that the parties agreed to all the dickered terms, but not necessarily to the "boilerplate" terms

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Jones & Co., 2002 MT 129, ¶ 24, 310 Mont. 123, ¶ 24, 54 P.3d 1, ¶ 24, *cert. denied*, 538 U.S. 956 (2003).

Memo to Clinical Students. Stop enacting this scene in my office:

> Student (showing me a form contract): My client entered this contract. They can get out of it, right?
>
> Burnham (warily): On what grounds?
>
> Student: Well, it's a contract of adhesion.
>
> Burnham: Aaaagh! (Has heart attack and is hauled away. Exeunt stage right.)

42. What is the other view of assent to which I am referring? I have some reluctance to type the very words, lest I memorialize them. On the other hand, the repression of forbidden words only seems perversely to increase their appeal. Ask any adolescent. And to tell you, "don't think about X" may only serve the purpose of causing much rumination about X. So I'd better say it and get on with it. Okay. It is "M _ _ _ _ _ _ o _ t _ _ M _ _ _ _." The Montana Supreme Court properly distinguished these two concepts of contract formation in Conagra, Inc. v. Nierenberg, 2000 MT 213, ¶ 31, 301 Mont. 55, ¶ 31, 7 P.3d 369, ¶ 31 (2000): "Generally, it is the duty of the court to enforce a contract if the parties intended that one exist. *See* Nordwick v. Berg, 223 Mont. 337, 342, 725 P.2d 1195, 1199 (1986) (citations omitted); MONT. CODE ANN. § 28-3-201. Such intent, in turn, must be gathered from the outward objective manifestations of the parties and not by the subjective undisclosed intent of one of the parties. Miller v. Walter, 165 Mont. 221, 226, 527 P.2d 240, 243 (1974) (citations omitted)." (Citations altered to conform to Bluebook.)

43. Unless one is on the planet Vulcan. I am reliably informed that contracts there are indeed formed through a M _ _ _ _ _ _ o _ t _ _ M _ _ _ _. *Star Trek: Dagger of the Mind* (NBC television broadcast, Nov. 3, 1966).

44. POSNER, *supra* note 4, § 4.1, at 105-06.

was stated nicely by Karl Llewellyn:

> Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the more broad type of the transaction, but one thing more. The one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent term the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print that has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.[45]

To determine which terms in the adhesion contract are enforceable and which are not, we rely on two concepts that limit the power of the stronger party: unconscionability and reasonable expectations. Some say there is a third concept, the one described in Restatement (Second) of Contracts section 211(3): "Where the [business] has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[46] But this concept has largely merged into reasonable expectations, so I am treating them as a double entry.[47]

Unconscionability we have already touched upon. It is elusive and undefinable.[48] This is probably because to define is to limit; nevertheless, like pornography, we know it when we see it.[49] The two-prong test of Judge Skelley Wright is a helpful starting point: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably

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45. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960). This is praise. In my opinion, this is one of the rare moments when Karl stated something nicely.

46. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

47. "Courts have expanded upon the rule set forth in Restatement section 211(3) and changed its focus from the expectations of the drafter to those of the consumer. . . . [I]n doing so, courts have transformed section 211(3) into an inquiry not unlike the doctrine of reasonable expectations. . . ." Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 458-459 (2002).

48. "That the term is incapable of precise definition is a source of both strength and weakness." FARNSWORTH, *supra* note 14, § 4.28, at 581.

49. "I shall not today attempt further to define the kinds of material I understand to be embraced. . . . But I know it when I see it. . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

favorable to the other party."[50] In pinning it down from there, it would be helpful if attention were paid to the UCC provision on unconscionability, section 2-302. Not subsection 1, for we know that this merely codifies a common law concept.[51] Attention must be paid to subsection 2, which provides:

> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[52]

Here we see that the burden is on the person claiming unconscionability to prove that in the commercial context the term is unfair. Perhaps the Federal Trade Commission definition of unfairness would be persuasive.[53] In any event, whatever standard is applied, it is generally accepted that the police power of the courts extends to striking down unconscionable contracts or unconscionable terms.

Reasonable expectations is a more modern concept that was first applied to insurance contracts.[54] The theory begins by recognizing as reality that most of us, even though we objectively manifest our assent to form contracts placed before

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50. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

51. **§ 2-302. Unconscionable Contract or Clause**

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C § 2-302(1) (2003).

See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding that the principle of unconscionability could be applied to a non-UCC case because it was a common law principle incorporated into the statute). The Montana Supreme Court correctly applied this concept in All-States Leasing Co. v. Top Hat Lounge, Inc., 198 Mont. 1, 6, 649 P.2d 1250, 1252 (1982).

52. U.C.C § 2-302(2).

53. The Commission shall have no authority under this section or section [15 USCS § 57a] to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. § 45(n) (2000).

54. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

us, do not in fact read them.[55] Why not? Not reading is probably a rational choice on our part, for we would probably not understand many of the terms, and even if we did understand them and objected to them, we would have no opportunity to negotiate them. So reading is a waste of our valuable time.[56] But there may be another reason—for better or worse, we think we know what is in them. One who purchases life insurance or rents a car has a reasonable idea of what terms a contract for that transaction contains. Contracting is largely a matter of risk-shifting, so we can largely assume that the drafter has used the absence of negotiation as an opportunity to shift the risks to the weaker party. Knowing that I am unlikely to read it, the drafter might also take advantage of the superior bargaining position to slip in terms which, even though not unconscionable, would not be reasonably expected by a party to that contract. Examples might be a provision in the life insurance contract that if I smoke, the benefit is not payable, or in the car rental agreement, that there is an additional insurance premium payable if I drive on gravel roads. These terms are probably not unconscionable in the commercial context, as they may substantially increase the risk of loss on the part of the insurer and car renter.[57] Yet if I am not forewarned of these terms, I may violate them, thereby exposing myself to a substantial loss.

If I were to complain when I suffered such a loss, one answer of the law might be to hold me to the contract on the grounds that I objectively manifested assent to those terms. One cannot criticize this point of view in theory. But as they say, it works in theory but it doesn't work in practice. A modern view would say that since I was not put on reasonable notice of these unexpected terms, I am not bound by them.[58] The burden then shifts to the party offering the terms to bring them within

55. This reality excludes those who have discovered the joys of contract reading after encountering Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133 (2003).

56. Only 57 percent of Americans read a book in 2002. National Endowment for the Arts, *Reading at Risk: A Survey of Literary Reading in America* (June 2004), *available at* http://www.nea.gov/pub/ReadingAtRisk/pdf.

57. Recall the discussion of our useful friend U.C.C section 2-302(2) in text accompanying notes 48-53.

58. "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975) (quoting Rodman v. State Farm Mut. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973)).

my reasonable expectations. This is not hard to do. The terms can be objectively called to my attention. In a written contract, they might be highlighted in bold print or different-colored ink on the front page of the contract or separately initialed by me. On the Internet, they might be highlighted apart from other terms, or separately checked.

Note that none of these attention-calling devices should save the unconscionable term. If a term is so shocking to the conscience that a court would not want one to agree to it, it should not matter how clearly it was explained or highlighted. This seems a simple litmus test for determining whether a term is unconscionable: if the term does not belong in an agreement, it is unconscionable; if it is permissible in the agreement if called to one's attention, then it is not unconscionable. Unconscionable terms are really, really bad. Hint to courts: use the doctrine sparingly.

Note also that reasonable expectations is an objective concept—the question is whether the term was objectively brought to the attention of the reader, not whether the reader was subjectively aware of it. For example, assume you and I are both offered the same standard form contract. You, as is your wont, sign it without looking at it. I, however, versed in the pleasures of contract reading, cannot restrain my enthusiasm at the thought of reading the document as though it were the latest outpouring of Stephen King (and probably equally fiendish).[59] I peruse every word and, because of my training, understand every word. I then sign it. Later, we both claim that a certain provision is not binding because of the doctrine of reasonable expectations. You are home free. Do I lose out because the term was within my actual expectations? Of course not. I was no more able than you to negotiate the term (that is our premise—that the contract is a non-negotiable form contract). I should not be penalized for having taken the time to try to read and understand it. To do so would discourage contract reading, and the law would not be so cruel as to deprive us of such a pleasure.

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59. This passage was written before the latest outpouring of Stephen King turned out to be not a horror story but quite the opposite—a devoted fan's recounting of the 2004 season of the Boston Red Sox. STEPHEN KING & STEWART O'NAN, FAITHFUL (2004). Is this relevant or am I merely trying to find an excuse to worm a reference to the *World Champion* Boston Red Sox into my article? In fact, there is a contract aspect to the story, as King and O'Nan apparently had an escalator clause in their publishing agreement that entitled them to more revenues if the Red Sox won the World Series. Bob Minzesheimer, *A Team a Horror Writer Could Love,* Oct. 7, 2004, *available at* http://www.usatoday.com/sports/baseball/al/redsox/2004-10-07-king-redsox_x.htm.

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Again, this is why the doctrine is called *reasonable* expectations. Whenever you see that word, you know the concept will be applied objectively and not subjectively.[60]

D. Arbitration at Last

Now that is all well and good, you might say, but what does this interesting discussion have to do with arbitration? Everything, of course. In dealing with arbitration, we see played out all the grand themes we have discussed—freedom of contract v. paternalism, common law v. statutory law, facilitation v. regulation—as well as a new one, federal v. state government. In Montana, arbitration is the legal equivalent of the wolf, a critter much despised except by a fringe group that would spread it widely.

Some trace this antipathy to arbitration to the allegation that because judges obtained fees from the cases before them, every case that went to arbitration took bread from their mouths. Others, however, find little historical hostility to arbitration.[61] In any event, a careful examination indicates that courts do not hate arbitration per se; they hate contracts that

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60. RESTATEMENT (SECOND) OF CONTRACTS § 211(2) makes this clear when it provides: "Such a writing [a standardized agreement] is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." The Montana Supreme Court got this wrong in Chor v. Piper, Jaffray & Hopwood, Inc., 261 Mont. 143, 862 P.2d 26 (1993). The court held that the plaintiff could not claim the benefit of the reasonable expectations doctrine because she admitted she had read the contract. *Id.*, 261 Mont. at 149, 862 P.2d at 30.

61. In Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270-71 (1995), Justice Breyer traced some of this alleged history:

> First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate. (citations omitted). The origins of those refusals apparently lie in ancient times, when the English courts fought for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction. (citations omitted). American courts initially followed English practice, perhaps just stand[ing] . . . upon the antiquity of the rule prohibiting arbitration clause enforcement, rather than upon its excellence or reason. (citations omitted). Regardless, when Congress passed the Arbitration Act in 1925, it was motivated, first and foremost, by a . . . desire to change this antiarbitration rule. (citations omitted). It intended courts to enforce [arbitration] agreements into which parties had entered, (citation omitted) and to place such agreements 'upon the same footing as other contracts. (citations omitted).

But Ian Macneil tells us, "In sum, contrary to modern folklore . . . the premodern statutory law of arbitration was largely supportive of that institution, as was the common law." IAN R. MACNEIL, AMERICAN ARBITRATION LAW 19 (1992).

contain arbitration provisions. What, you may ask, is the difference? The court is a dispute resolution mechanism in which rights are vindicated. Citizens have a right to access the court system, and once in court, the party with the greater right under the law presumably will prevail.[62] In a contract case, the principles of contract law will be applied and the party claiming the greater right under contract law will find vindication.[63] Arbitration, on the other hand, is a dispute resolution mechanism in which, fittingly, disputes are resolved. People go to arbitration to get their disputes resolved, and not necessarily to have their rights enforced. It comes as a shock to some to discover that an arbitrator's error in law is not grounds for appealing an arbitrator's decision.[64] This rule applies not only to substantive law, but the law of procedure and evidence as well. How could it be otherwise, when an arbitrator does not need to be versed in the law?

So this system, the veritable Antichrist of the legal system, drives many judges crazy. Why would people voluntarily give up their right to have their rights vindicated in court? If parties have a dispute, and voluntarily agree not to take their dispute to court, but to take their chances with arbitration, judges may wonder what fever infected their brains. Nevertheless, the parties venture forth with the court's blessing. In that event, Montana statutes as early as the Bannack Statutes of 1866 provided rules governing the arbitration.[65] However, a pre-dispute contract that bound a person to arbitrate future disputes

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62. MONT. CONST. art. II, § 16.

63. As Portia promised Shylock:

Thyself shalt see the act:
For, as thou urgest justice, be assured
Thou shalt have justice, more than thou desirest.

WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

64. *See* 9 U.S.C. § 10 (2000); UNIF. ARBITRATION ACT § 12(a), 7 U.L.A. 280 (1997). Grounds for appealing an arbitrator's decision are normally limited to situations in which the award was procured by corruption, fraud, undue means, or upon the misconduct of the arbitrator.

65. In 1864, President Lincoln signed the Organic Act, which created the Montana Territory. The town of Bannack, in Beaverhead County, was the territorial capitol and hosted the first territorial legislative session from December 12, 1864 to January 21, 1865. This first legislative assembly enacted what is known as the "Bannack Statutes," which were published in 1866 and were based upon the English common law. Andrew P. Morriss, *Montana Field Code Debate: Decius S. Wade's Necessity for Codification*, 61 MONT. L. REV. 407 (2000). These statutes, containing Montana's first arbitration provisions, were re-enacted in 1867, 1871, 1877, 1879, 1887, 1895, 1907, 1921, 1935 and 1947. The Bannack Statutes with respect to arbitration were repealed and replaced by the Montana Uniform Arbitration Act in 1985. Mont. Code Ann. § 27-5-101 (2003).

was another story. As early as 1891, the Montana Supreme Court declared a pre-dispute agreement to arbitrate void as against public policy:

> The question, as to how far courts will be governed by a provision in the contract, requiring that controversies arising as to the rights and liabilities of parties thereunder be submitted to arbitration, has engaged the profound consideration of both American and English courts of last resort. The conclusion reached, and probably settled beyond further controversy, is that a provision in a contract, requiring *all differences or controversies* arising between the parties as to their rights and liabilities thereunder, to be submitted to arbitration, will not be allowed to interfere with or bar the litigation of such controversies when brought into court. To enforce such provisions would be to allow parties to barter away the jurisdiction of courts to determine the rights of parties and redress their wrongs. Therefore such provisions are disregarded as against public policy.[66]

This common law antipathy to pre-dispute resolution was then embodied in a statute that the Montana legislature took from the Field Code in 1895 and that was codified among the statutes on illegal provisions in contracts:

> **Restraints upon legal proceedings void.** Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.[67]

This statute renders void two kinds of contractual provisions. One is a provision that limits the statute of limitations. We will defer discussion of this limitation on freedom of contract to another day.[68] The other provision makes void contractual

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66. Randall v. Am. Fire Ins. Co. of Philadelphia, 10 Mont. 340, 353, 25 P. 953, 956-957 (1891) (citing Scott v. Avery, 10 Eng. Rep. 1121 (1855)).

67. MONT. CODE ANN. § 28-2-708 (2003) (originally enacted in Montana in 1895 as section 2245 of the Montana Civil Code in the form above, and amended in 1985 with the addition of a new last sentence stating "[t]his section does not affect the validity of an agreement enforceable under Title 27, chapter 5." Curiously, even though Montana based its code on the California Code, California had repealed this Field Code provision in 1873-1874. Historical and Statutory Notes of CAL. CIV. CODE § 1674 (West 1985). So Montana had to look back to the Field Code itself to find it.

68. Our facilitatory friend the UCC is more flexible, providing that "[b]y the original agreement the parties may reduce the [4 year] period of limitation to not less than 1 year but may not extend it." U.C.C § 2-725(1).

Note to students. So how do you reconcile two contradictory statutes, one voiding changes to the statute of limitations (MONT. CODE ANN. § 28-2-708) and one permitting changes (MONT. CODE ANN. § 30-2-725(1))? You presume that the legislature intended the narrower statute (the one governing sale of goods) to carve out an exception to the broader rule (the one covering all contracts). In fact we have a statute (of course) telling us this. Montana Code Annotated section 1-2-102 provides:

restrictions on "the usual proceedings in the ordinary tribunals." Where does this language come from? No one knows for sure. Its author, David Dudley Field, begins his explanation by stating, "[t]he first part of this section is acknowledged law. A covenant in a contract, not to sue for a breach thereof, is void."[69] But he then cites no sources for this "acknowledged law."[70] In any event, the meaning does not seem to be disputed—a person cannot contractually give up the right to go to court, though as we shall see, Montana has put a somewhat more provincial spin on the concept.[71] Because of Montana Code Annotated section 28-2-708, a party could agree in a contract to arbitrate, go through the arbitration, end up on the short end, and announce that the result was illegal and unenforceable.[72]

Times change, even if Field Code statutes are slow to reflect the changes, and throughout the twentieth century arbitration gained momentum. In 1925, the federal government enacted a Federal Arbitration Act.[73] To understand the reason for the Act, you have to realize that it took place pre-*Erie*. Since I had to recite on it for Professor Peterfreund in Civil Procedure, I still

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> **Intention of the legislature - particular and general provisions.** In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

69. DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK § 832 (Proposed Draft 1865).

70. *Id.* § 832. Some legal scholars have attributed the concept to Albert Venn Dicey (1835-1922), Vinerian Professor of English Law at Oxford University, who wrote:

> When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions. We mean in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the *ordinary courts* of the land . . . We mean in the second place . . . not only that . . . no man is above the law but . . . every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the *ordinary tribunals*. [Thirdly] the general principles of the constitution are . . . the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* 187-96 (1885) (emphasis added). *See* Berta Esperanza Hernandez-Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INTL. L. 167, 169 (2004). Since Dicey first published his work in 1885 and Field developed his Civil Code from 1857-1865, it is unlikely that Field was quoting Dicey.

71. *See infra* notes 160-188 and accompanying text.

72. *See, e.g.*, State *ex rel.* Cave Constr. Co. v. Dist. Ct, 150 Mont. 18, 430 P.2d 624 (1967) (Petitioner went to court three years after case had been decided in arbitration).

73. 9 U.S.C. §§ 1-15 (2000).

recall that *Erie R.R. Co. v. Tomkins*[74] essentially held that in diversity cases federal courts would no longer apply federal common law but would apply the law of the relevant state. In those pre-*Erie* days, however, Congress was concerned that federal courts might refuse to apply state law supportive of arbitration in diversity cases. Thus, the Act authorized federal courts to enforce pre-dispute arbitration clauses in state contract disputes that were heard in federal court.[75] In 1983, the United States Supreme Court got on the arbitration bandwagon when it decided the case of *Southland Corp. v. Keating*.[76] The effect of the decision was to take a statute that was intended to make state law apply in federal court, thus furthering states' rights, and turn it into a statute that federalized the enforcement of arbitration clauses.[77] The legislative history clearly indicates that this was never the intention of Congress in passing the Act.[78] Since the decision, many members of the Supreme Court have expressed their unhappiness with it.[79] Yet *Southland* and

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74. 304 U.S. 64 (1938).

75. 9 U.S.C. § 2 (2000).

76. 465 U.S. 1 (1983).

77. Is it a coincidence that one of the senators most anxious to receive assurances that the Act would not have this pernicious effect was Senator Walsh of Montana? Here is an excerpt from his testimony at a Senate hearing:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] 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 by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Allstar Homes v. Waters, 711 So. 2d 924, 931 (Ala. 1997) (Cook, J., specially concurring) (quoting *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. (1923)).

78. "One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts." *Southland*, 465 U.S. at 25 (1983) (O'Connor, J., dissenting).

79. In Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995), Justice Breyer sounds downright embarrassed in declining to overturn *Southland*. Justice O'Connor begrudgingly went along, but only because of *stare decisis*. *Id.* at 284 (O'Connor, J. concurring). Justice Scalia, without, of course, citing the legislative history, nevertheless concluded that "*Southland* clearly misconstrued the Federal Arbitration Act." *Id.* at 284. He then stated that "I shall not in the future dissent from judgments that rest on *Southland*." *Id.* at 285. This left Justice Thomas alone to dissent on this

its progeny (of which there are many) continue to govern us, proving the persistence of precedent in the face of reason.[80]

However wrongheaded it was about the law, the Court could not have made a clearer statement of policy: nothing should stand in the path of arbitration. Section 2 of the Act declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[81] Because the Act was now binding on the states, states could not render arbitration clauses invalid on grounds that did not apply to other provisions in contracts.[82] So we turn now to what the State of Montana was doing with respect to arbitration clauses.

In 1985, the Montana legislature joined the national trend toward increasing opportunities for alternative dispute resolution by substantially modifying Montana Code Annotated section 28-2-708. The revised statute added this seemingly innocuous amendment: "This section does not affect the validity of an agreement enforceable under Title 27, chapter 5."[83] The reference in the amended statute to Title 27, chapter 5 is to the rules governing arbitration. These rules had previously been in the Bannack Statutes, but when the legislature amended Montana Code Annotated section 28-2-705, it also modernized the procedures for arbitration by replacing those arbitration statutes with the Uniform Arbitration Act, one of the many

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ground by the time the court decided Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 689 (1996) (Thomas, J. dissenting).

80. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (upholding the precedent that baseball is a sport, not a business, and therefore not subject to anti-trust regulation). Note the Montana Supreme Court correctly characterized this history in Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 Mont. 123, 54 P.3d 1, *cert. denied*, 538 U.S. 956 (2003).

81. 9 U.S.C. § 2 (2000).

82. An excellent example of a case that applied state contract law to find an arbitration clause unenforceable is Myers v. MBNA America, No. 00-163-M-DWM, 2001 WL 965063 (D. Mont. March 20, 2001), where Judge Molloy found that no contract was formed in which the parties agreed to arbitration of disputes. The original credit card agreement between the parties did not contain an arbitration clause. MBNA, the issuer of the credit card, purported to amend the terms by proposing an arbitration clause and informed Myers that "[i]f you do not wish you [sic] account to be subject to this Arbitration Section, you must write to us . . . ." *Id.* *1. Judge Molloy held that under general principles of contract law, an offer cannot be accepted by the silence of the offeree. *Id.* *3. The court also found that a provision in the original agreement that purported to allow MBNA to unilaterally amend the terms of the contract was overly broad, as it would permit MBNA to alter Myers' rights and remedies without her agreement. *Id.* *4-5.

83. MONT. CODE ANN. § 28-2-708 (1983) (amended 1985).

Uniform Laws promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL).[84] Reading the two statutes together, a pre-dispute agreement to arbitrate was no longer illegal—as long as the arbitration complied with the Uniform Arbitration Act.

Much to the chagrin of NCCUSL, which wants its Uniform Laws enacted in their uniform form,[85] when the Montana legislature enacted the Uniform Arbitration Act, it made a number of non-uniform amendments that reflected an unwillingness to embrace enthusiastically the growing trend toward arbitration. The tepidness of the embrace can be gleaned from the language of the amendments. The Uniform Act made express that both pre-dispute and post-dispute agreements to arbitrate were enforceable:

> **1. Validity of Arbitration Agreement.**
>
> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].[86]

The Montana legislature expressed its acceptance of post-dispute agreements to arbitrate in its adaptation of Uniform Arbitration Act section 1:

> (1) A written agreement to submit an existing controversy to arbitration is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract.[87]

But it then added non-uniform subsections 2 and 3, making a clear distinction when it came to pre-dispute agreements to arbitrate:

> (2) A written agreement to submit to arbitration any controversy arising between the parties after the contract is made is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract. This subsection does not apply to:

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84. http://www.nccusl.org.

85. "It is the purpose of the Conference to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable." NCCUSL CONST. art.1, § 1.2, *available at* http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=1 (last visited Jan. 29, 2005). In other words, Why do you think we call them the UNIFORM laws?

86. UNIF. ARBITRATION ACT § 1, 7 U.L.A. 6-7 (1997).

87. Codified at MONT. CODE ANN. § 27-5-114(1) (1985).

(a) claims arising out of personal injury, whether based on contract or tort;

(b) any agreement concerning or relating to insurance policies or annuity contracts except for those contracts between insurance companies;

(c) any contract by an individual for the acquisition of real or personal property, services, or money or credit where the total consideration to be paid or furnished by the individual is $35,000 or less; and

(d) claims for workers' compensation.

(3) Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.[88]

The amendments in subsection (2) restrict the kinds of agreements that may contain an agreement to arbitrate. Particularly noteworthy is subsection (2)(c), which prevents consumers from bring able to arbitrate virtually all disputes. One wonders if such a provision protects consumers, for when a small amount of money is involved, recourse to the courts often involves higher transaction costs than going to arbitration. But it is the amendment in subsection (3) that proved particularly problematic. Recall our discussion of reasonable expectations.[89] The legislature seemed to be using that doctrine in making an arbitration provision enforceable only if it is objectively called to the attention of the parties to the contract. Under that doctrine, such objectification saves a provision that would otherwise be judged unfair. Hence, this statute signaled that the legislature deemed arbitration provisions presumptively unfair. And because it singled out arbitration, it invited federal scrutiny under the Federal Arbitration Act. Moreover, it was inevitable that a national entity was not going to tailor its contract to the requirements of such a small market as Montana, making it a certainty that the enforceability of the statute would eventually be litigated.

Furthermore, the legislature added this language to the Uniform Arbitration Act section 18:

No agreement concerning venue involving a resident of this state is valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived upon the advice of counsel as evidenced by counsel's

88. *Id.* § 27-5-114(2)-(3) (1985).

89. *See supra* notes 54-60 and accompanying text.

signature thereto.[90]

This interesting provision saves Montanans the hardship of traveling to a distant location to arbitrate their claims, and possibly providing them with an arbitrator more familiar with local mores. It was also inevitable that national corporations would neglect to tailor their agreements to accommodate this requirement. Note, however, that this provision does not so clearly fall afoul of the Federal Arbitration Act; it does not prevent the arbitration, but merely requires that it be held in Montana.

So we now had a federal act that imposed on the states an obligation not to treat arbitration provisions differently from any other contractual provision, and a state statute that imposed some restrictions on the enforceability of arbitration provisions. The competing forces were poised for battle.

II. THE BATTLE OF *CASAROTTO*

That showdown came in 1994 in *Casarotto v. Lombardi*.[91] Great Falls residents Paul and Pamela Casarotto entered into a franchise agreement with defendant Doctor's Associates, Inc. (DAI), the legal name for the Subway Sandwich Shop franchisor.[92] The Casarottos alleged that DAI's agent, Nick Lombardi, orally promised them that they would have the right to move their shop to a more desirable location when that location became available.[93] Alleging breach of this promise, the Casarottos sued Lombardi and DAI in district court in Cascade County, Montana.[94]

Citing a clause in the contract requiring the parties to arbitrate any dispute in Bridgeport, Connecticut, the location of Subway's main office, defendants moved to dismiss. Defendants' claim rested on the requirement of the Federal Arbitration Act that provided that if a contract has an issue referable to arbitration, the court is required to stay the proceedings.[95] The

90. Codified at MONT. CODE ANN. § 27-5-323 (1985).

91. 268 Mont. 369, 886 P.2d 931 (1994) [hereinafter Casarotto I].

92. *Id.*, 268 Mont. at 371, 886 P.2d at 932.

93. *Id.*

94. *Id.*

95. *Id.*, 268 Mont. at 372, 886 P.2d at 933. Additionally, 9 U.S.C. § 3 (2000) provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that

Casarottos, seizing upon the fact that DAI had neglected to include on the first page of the agreement the notice that the Montana Uniform Arbitration Act required as a prerequisite to arbitration, asked the court not to honor the arbitration clause.[96] Finding that under the choice of law clause in the contract, Connecticut law governed the agreement, and that Connecticut law did not similarly restrict arbitration, the district court granted the motion to stay legal proceedings pending arbitration of the dispute.[97] The Casarottos appealed.

The Montana Supreme Court heard the oral argument in Missoula during Law Week in 1994. DAI's urbane, Yale-educated attorney began his argument with a pleasantry. "It is a pleasure to be here in Montana after my trip from Connecticut," he began. Justice Trieweiler leaned over and inquired politely, "Was it a long trip, counselor?" "A *very* long trip," the attorney responded, not realizing he was stepping into a trap. "Well, counselor," Trieweiler continued, snapping closed the jaws of the trap, "that's how far these plaintiffs would have to travel to have their case heard by an arbitrator." The rest of the argument consisted of the attorney's attempt to escape from that ill-fated beginning.[98]

Curiously, although Justice Trieweiler's point about the location of the arbitration raised an interesting practical point, the Casarottos had not raised the legal question of whether the Connecticut venue violated Montana's Uniform Arbitration Act requirement that "[n]o agreement concerning venue involving a resident of this state is valid unless the agreement requires that arbitration occur within the state of Montana."[99] Instead, there

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the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

96. *Casarotto I*, 268 Mont. at 372 , 886 P.2d at 933. *See* MONT. CODE ANN. § 27-5-114(3) (1985). *See supra* note 88 and accompanying text. It has always seemed bizarre to me to refer to the non-uniform Montana enactment as the "Uniform Arbitration Act," but in fact Montana Code Annotated section 27-5-111 (1985) provides in its entirety: "**Short Title**. This chapter may be cited as the 'Uniform Arbitration Act.'"

97. *Casarotto I*, 268 Mont. at 371, 886 P.2d at 932.

98. The tape of the hearing is no longer available. I was present at the argument and this narrative is derived from my recollection of the event.

99. MONT. CODE ANN. § 27-5-323 (1985). *See supra* note 90 and accompanying text. It is possible that the plaintiffs overlooked the statute. It is more likely that they determined that a finding that DAI had violated that statute would not have given them the relief they wanted. It seems to me that that statute renders the venue invalid, but does not render the arbitration clause invalid. In other words, if they had prevailed on

were two issues to resolve. First was the choice of law issue: Would the court's resolution be governed by Montana law or Connecticut law (or theoretically some other body of law)? Second, if the contract was governed by Montana law, which required the notice for an arbitration clause to be effective, was the Montana statute requiring notice pre-empted by the FAA?

In the majority opinion, penned by Justice Trieweiler and joined by Justices Harrison, Hunt, and Nelson, the court first addressed the choice of law issue. Recall that choice of law is not a question of jurisdiction or venue, but simply the question of which jurisdiction's law the forum court (here Montana) will apply to resolve the dispute. The court stated the law correctly, using as authority a sound source, the Restatement (Second) of Conflict of Laws.[100] The general rules, cited by the court, are that in the absence of a choice of law clause in the contract, the forum state applies the law of the state that "has the most significant relationship to the transaction and the parties."[101] Additionally, if there is a choice of law clause in the contract, the chosen law will govern unless the chosen state law has no substantial relationship to the parties or the transaction, or the law of the chosen state would 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 . . . ."[102]

The court found that because Montana had the most significant relationship to the transaction, Montana law would govern in the absence of a choice of law clause.[103] Given the facts that the plaintiffs resided in Montana and the franchise was located in Montana, this seems a fair conclusion. However, because the contract contained a choice of law clause that stipulated Connecticut law, Montana law would govern only if Connecticut had no substantial relationship to the parties or the transaction, or the law of Connecticut was contrary to "a fundamental policy" of Montana.[104] The first condition plainly did not apply, as Connecticut bore a substantial connection to

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that ground, they would have been required to go to arbitration in Montana. If they wanted their day in court, that would not have been adequate relief.

100. *Casarotto I*, 268 Mont. at 373-75, 886 P.2d at 934-35 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971)).

101. *Id.*, 268 Mont. at 373, 886 P.2d at 934 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)).

102. *Id.*, 268 Mont. at 375, 886 P.2d at 935 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

103. *Id.*, 268 Mont. at 375, 886 P.2d at 935.

104. *Id.*, 268 Mont. at 374-75, 886 P.2d at 934-35.

the parties and the transaction. The issue, then, came down to whether Connecticut law was contrary to a fundamental policy of Montana.[105]

The court concluded that the notice requirement established a fundamental public policy of Montana because it was enacted by the legislature and because it protected our citizens from the horrors of arbitration. In its own words, here is how the court justified this conclusion:

> In *Trammel v. Brotherhood of Locomotive Firemen and Enginemen* (1953), 126 Mont. 400, 409, 253 P.2d 329, 334, we held that the public policy of a state is established by its express legislative enactments. Here, the legislative history for § 27-5-114(4), MCA, makes clear that the legislative committee members considering adoption of the Uniform Arbitration Act had two primary concerns. First, they did not want Montanans to waive their constitutional right of access to Montana's courts unknowingly, and second, they were concerned about Montanans being compelled to arbitrate disputes at distant locations beyond the borders of our State.
>
> The facts in this case, and our recent decision in another case, justify those concerns.
>
> Regardless of the amount in controversy between these parties, the arbitration clause in the Subway Sandwich Shop Franchise Agreement requires that the Casarottos travel thousands of miles to Connecticut to have their dispute arbitrated. Furthermore, it requires that they share equally in the expense of arbitration, regardless of the merits of their claim. Presumably, that expense could be substantial, since under the Commercial Arbitration Rules of the American Arbitration Association (1992), those expenses would, at a minimum, include: the arbitrator's fees and travel expenses, the cost of witnesses chosen by the arbitrator, the American Arbitration Association's administrative charges, and a filing fee of up to $4000, depending on the amount in controversy. For a proceeding involving multiple arbitrators, the administrative fee alone, for which the Casarottos would be responsible, is $150 a day. In addition, since the contract called for the application of Connecticut law, the Casarottos would be required to retain the services of a Connecticut attorney.
>
> In spite of the expense set forth above, the procedural safeguards which have been established in Montana to assure the reliability of the outcome in dispute resolutions are absent in an arbitration proceeding. The extent of pretrial discovery is within the sole discretion of the arbitrator and the rules of evidence are not applicable. The arbitrator does not have to follow any law, and there does not have to be a factual basis for the arbitrator's decision. See *May v. First National Pawn Brokers, Ltd.*

105. *Id.*, 268 Mont. at 375, 886 P.2d at 935.

(Mont._____, 1994), Slip Op. 94-189.

> Based upon the determination by the Legislature of this State that the citizens of this State are at least entitled to notice before entering into an agreement which will limit their future resolution of disputes to a procedure as potentially inconvenient, expensive, and devoid of procedural safeguards as the one provided for by the rules of the American Arbitration Association, and the terms of this contract, we conclude that the notice requirement of § 27-5-114, MCA, does establish a fundamental public policy in Montana, and that the application of Connecticut law would be contrary to that policy. Therefore, we conclude that the law of Montana governs the franchise agreement entered into between the Casarottos and Doctor's Associates, Inc.[106]

The court here overplayed its hand. The issue was whether the absence of a notice requirement showed that Connecticut's law was contrary to a fundamental policy of Montana. That was the only relevant difference between Montana law and Connecticut law. The fact that a party has to travel to an arbitration, the fact that arbitration may be more costly than court, and the fact that arbitration does not have the same procedural rules as court are not differences between Connecticut policy and Montana policy. They are differences between arbitration and court. The villain here was obviously not Connecticut's policy, but arbitration itself.

Is the fact that one state had a notice requirement and the other didn't enough to invoke Montana law? That would depend on the meaning of the "fundamental policy" language of the Restatement. In a dissent joined by Justice Turnage, Justice Weber concluded that because the choice of Connecticut law was effective, the notice requirement was not applicable to the contract, so he did not analyze the issue.[107] In another dissent, also joined by Justice Turnage, Justice Gray pointed out that the notice requirement did not apply to every arbitration agreement entered into by a Montanan, but only to those to which Montana law applied. Because the parties chose Connecticut law, the notice requirement was not applicable and "cannot form the basis of a public policy broad enough to negate the parties' choice of Connecticut law."[108]

Justice Gray's questioning whether there is broad public policy here is reminiscent of her analysis of the meaning of "a law established for a public reason" in Montana Code Annotated

106. *Id.*, 268 Mont. at 375-77, 886 P.2d at 935-36.

107. Casarotto I, 268 Mont. at 387-88, 886 P.2d at 942 (Weber, J., dissenting).

108. *Id.*, 268 Mont. at 392, 886 P.2d at 945 (Gray, J., dissenting).

section 1-3-204, where she concluded that the language cannot merely mean that the legislature has enacted the law.[109] This analysis seems correct in this context as well, for if the fact that the legislature enacted a law made it "fundamental public policy" of the state, then the mere fact that the law of Montana differed from the law of the other jurisdiction would render that state's law inapplicable. A court must require something more than mere enactment to determine that a law reflects a "fundamental policy."

What is a fundamental policy? Benjamin Cardozo wrote:

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[110]

The Restatement (Second) of Conflict of Laws states in the comments to section 187 that "a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power."[111] The Montana Supreme Court might well say that is exactly what the notice statute did in this case, but once again the argument is circular. The statute has obvious application where there is superior bargaining power, for the party who negotiated a contract is more likely to know that there is an arbitration provision than a party who merely "adheres" to the contract. But the need for protection against "oppressive use" is only present if it is presumed that arbitration is oppressive. And that belief clearly drove the majority decision.

The court next addressed whether the Federal Arbitration Act preempted the Montana notice requirement. Section 2 of the Act provides:

> 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 such grounds as exist at law or in equity for the revocation of any

109. *See supra* note 35 and accompanying text.

110. Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918).

111. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971).

contract.[112]

The Act's prohibition of enforcement of an arbitration clause "save upon such grounds as exist at law or in equity for the revocation of any contract" means that courts cannot subject arbitration clauses to treatment not given to other clauses. It would seem that the majority of the Montana Supreme Court had shot itself in the foot, for in resolving the first issue, it made clear that what made Montana's policy different from Connecticut's was the special treatment of arbitration clauses in Montana. After all, Montana did not require that other clauses—even illegal ones such as exculpatory clauses[113] and restrictive covenants[114]—be pronounced in underlined capital letters on the first page, but only arbitration clauses. The clause in this case was clearly avoided because it was an arbitration clause, not because of the application of general principles of law or equity.

Yet, not surprisingly, the court did not follow its own logic. The court first recognized that in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*[115] the Supreme Court had stated that a state law was pre-empted if it "would undermine the goals and policies of the FAA."[116] It then reasoned that the goals and policies of the Federal Arbitration Act were not to force unwilling parties to arbitrate, but to enforce agreements that parties had willingly entered into. The purpose of the Montana notice requirement was to ensure that parties entered into arbitration clauses knowingly. Therefore, the court concluded that the notice requirement did not undermine the goals and policies of the Federal Arbitration Act and was not pre-empted. Therefore the Casarottos did not have to take their dispute to arbitration.[117]

In a "specially concurring" opinion, Justice Trieweiler gave his personal opinion of those who supported the use of arbitration to deprive citizens of their day in court.[118] Any paraphrase of this polemic would not do it justice, and I urge the

112. 9 U.S.C. § 2 (2000).

113. MONT. CODE ANN.§ 28-2-702 (1985) as interpreted in Miller v. Fallon County, 222 Mont. 214, 721 P.2d 342 (1986).

114. MONT. CODE ANN. § 28-2-703 (2003).

115. 489 U.S. 468 (1989).

116. *Casarotto I,* 268 Mont. 369, 379, 886 P.2d 931, 937.

117. *Id.,* 268 Mont. at 382, 886 P.2d at 939.

118. *Id.* (Trieweiler, J., specially concurring). The special concurrence was joined by no other member of the court.

reader to read it in its entirety. The opinion began by celebrating the virtues of the court system as opposed to the arbitration system: "While our system of justice and our rules are imperfect, they have as their ultimate purpose one overriding principle. They are intended, and continue to evolve, for the purpose of providing fairness to people, regardless of their wealth or political influence."[119] Justice Trieweiler might be uncomprehending if one freely chose this alternative system, but that was not his concern. Instead, he was concerned with those who entered contracts of adhesion that contained arbitration clause. He stated:

> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.
>
> The procedures we have established, and the laws we have enacted, are either inapplicable or unenforceable in the process we refer to as arbitration.[120]

This observation is curiously absent from the majority opinion in *Casarotto I*, which contained no mention of unequal bargaining power in the analysis. The majority opinion focused on the notice requirement as evidencing a knowing assent to the arbitration clause. If unequal bargaining power, as opposed to knowledge, was the issue, it was not found in the opinion. Of course, the notice requirement itself would not assist a party with little bargaining power against a party who put the proper notice on the first page of the contract. Something more than the notice requirement would be required to help those parties. Therefore, Justice Trieweiler's concurrence makes clear that lack of bargaining power was a factor in his reasoning:

> The notion by federal judges, like Judge Selya, that people like the Casarottos have knowingly and voluntarily bargained and agreed to resolve their contractual disputes or tort claims by arbitration, is naive at best, and self-serving and cynical at worst. To me, the idea of a contract or agreement suggests mutuality. There is no mutuality in a franchise agreement, a securities

119. *Id.*, 268 Mont. at 383, 886 P.2d at 940.
120. *Id.*

> brokerage agreement, or in any other of the agreements which typically impose arbitration as the means for resolving disputes. National franchisors, like the defendant in this case, and brokerage firms, who have been the defendants in many other arbitration cases, present form contracts to franchisees and consumers in which choice of law provisions and arbitration provisions are not negotiable, and the consequences of which are not explained. The provision is either accepted, or the business or investment opportunity is denied. Yet these provisions, which are not only approved of, but encouraged by people like Judge Selya, do, in effect, subvert our system of justice as we have come to know it. If any foreign government tried to do the same, we would surely consider it a serious act of aggression.[121]

Trieweiler has a reputation as a liberal, but on this point he sounds not unlike our Freemen friends. The point of congruity is the championship of states' rights in the face of pre-emption by the federal government.

Two dissents shredded the logic of the majority on the pre-emption issue. In a dissent joined by Justice Turnage, Justice Weber stated that he understood *Volt* as holding that "the agreement to arbitrate should be enforced according to its terms."[122] Therefore, the arbitration as agreed to by DAI and the Casarottos should go forward. Weber also cited two cases, one from the Second Circuit applying Vermont law and the other from Missouri, both of which held that state statutes like the Montana statutes were preempted by the Federal Arbitration Act.[123] In another dissent, also joined by Justice Turnage, Justice Gray also examined the notice requirement in the light of *Southland*, in which the Supreme Court found in the Federal Arbitration Act a congressional intent "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[124] Under the facts of *Casarotto I*, she found that the notice requirement "undermines the purpose of the FAA by rendering the parties' arbitration agreement unenforceable."[125]

After the decision in *Casarotto I* was handed down, the defendants petitioned the United States Supreme Court for certiorari. That petition was granted. The Supreme Court

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121. *Id.*, 268 Mont. at 384-85, 886 P.2d at 940-41.

122. *Casarotto I.*, 268 Mont. at 389, 886 P.2d at 944 (citing Threlkeld v. Metallgesellschaft, 923 F.2d 245 (2d. Cir. 1991); Bunge Corp. v. Perryville Feed & Produce, 685 S.W.2d 837 (Mo. 1985)) (Weber, J., dissenting).

123. *Id.*, 268 Mont. at 390-391, 886 P.2d at 944.

124. *Id.*, 268 Mont. at 393, 886 P.2d at 946 (quoting *Southland*, 465 U.S. at 16) (Gray, J., dissenting).

125. *Id.*, 268 Mont. at 395, 886 P.2d at 947 (Gray, J., dissenting).

ordered the judgment vacated and remanded the case to the Montana Supreme Court for further consideration in light of that U.S. Supreme Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*.[126] As instructed, the court took a look at *Dobson*, and, not taking the hint from the Supreme Court, found it distinguishable from *Casarotto I*. *Dobson* involved an Alabama statute that was exactly the same as the pre-1985 Montana statute that made pre-dispute arbitration agreements invalid.[127] In an opinion joined by Justices Nelson, Hunt, and Leaphart, Justice Trieweiler wrote:

> After careful review, we can find nothing in the *Dobson* decision which relates to the issues presented to this Court in this case. Our prior *Casarotto* decision did not involve state law which made arbitration agreements invalid and unenforceable. Our state law simply requires that the parties be adequately informed of what they are doing before they enter into an arbitration agreement.[128]

Justice Leaphart, who had replaced Justice John C. Harrison on the bench after the court decided *Casarotto I*, wrote a specially concurring opinion in which he echoed some of the sentiment about contracts of adhesion found in Justice Trieweiler's special concurrence in *Casarotto I*:

> In *Dobson*, the United States Supreme Court held that the FAA preempts anti-arbitration state statutes which invalidate arbitration agreements. Section 27-5-114(4), MCA, cannot be characterized as anti-arbitration nor does it invalidate arbitration agreements. On the contrary, it is one section of Montana's Uniform Arbitration Act which specifically recognizes arbitration agreements: "A written agreement to *submit* an existing controversy to arbitration is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract." Section 27-5-114(1), MCA. The notice requirement of subsection (4) merely protects the consumer by requiring that notice of an arbitration provision be conspicuously placed on the front page of the contract. This does not undermine the pro-arbitration policy of the FAA. Rather, it furthers the policy of meaningful and consensual arbitration by helping ensure that the consumer who signs what is most often a nonnegotiated, form contract, knowingly agrees to arbitration in the event of a dispute. I see no inconsistency between *Dobson* and our decision in *Casarotto* and I specially concur in the Court's decision to reaffirm and reinstate its December 15, 1994 opinion.[129]

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126. Casarotto v. Lombardi, 274 Mont. 3, 4, 901 P.2d 596, 597 (1995) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)) [hereinafter Casarotto II].

127. 513 U.S. 265 (1995).

128. *Casarotto II*, 274 Mont. at 7, 901 P.2d at 598.

129. *Id.*, 274 Mont. at 9, 901 P.2d at 599 (Leaphart, J., specially concurring).

At first blush, Justice Leaphart's concern for "the consumer who signs what is most often a nonnegotiated, form contract," seems off the mark. Because the purchase of a Subway franchise is a business transaction, and a costly transaction at that, it seems odd to characterize the purchaser as a consumer, for "consumer" is usually defined as one who enters into a transaction for personal, family, or household purposes.[130] On the other hand, the purchase of a Subway franchise is analogous to a consumer transaction, for the purchaser lacks bargaining power and must sign the document that is put in front of him.[13131] As we have earlier discussed, it is appropriate for a court to use its police power to review the terms of a non-negotiated contract for onerous terms. The surprising aspect is that an arbitration clause per se, as opposed to a demonstrably unfair arbitration clause,[132] would be regarded as such a term, but Justice Leaphart apparently shared the court's hostility to arbitration.

Justice Gray, in a dissent joined by Justices Turnage and Weber, found that *Dobson* expressed the fundamental premise that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."[133] Because the Montana notice requirement "undercuts, undermines and renders unenforceable the parties' agreement to arbitrate," she concluded that *Casarotto I* should have been reversed in the light of *Dobson*.[134]

When the defendants again petitioned for certiorari, the Supreme Court accepted the case, rendering its decision in *Doctor's Associates, Inc. v. Casarotto*.[13135] In an opinion by Justice Ginsburg, the Court held that the notice requirement "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity. The State's prescription is thus inconsistent with, and is therefore

130. *Cf.* MONT. CODE ANN. § 30-14-102(1) (2003) (defining "consumer" for purposes of the Consumer Protection Act).

131. On the franchise agreement as a contract of adhesion, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1178 (1983). *See also* Dunfee v. Baskin-Robbins, Inc., 221 Mont. 447, 450, 720 P.2d 1148, 1150 (1986) (describing the non-negotiable purchase of a Baskin-Robbins franchise).

132. *See infra* note 141 and accompanying text for a discussion of what might constitute an unconscionable arbitration clause.

133. *Casarotto II*, 274 Mont. at 10, 901 P.2d at 600 (Gray, J., dissenting) (quoting *Dobson*, 513 U.S. at 270).

134. *Id.*, 274 Mont. at 16, 901 P.2d at 600.

135. 517 U.S. 681 (1996) [hereinafter Casarotto III].

preempted by, the federal law."[136] The Court reiterated that, as provided in § 2 of the Federal Arbitration Act, states may regulate contracts under contract law principles, but "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."[137] In these circumstances, the Court held, the notice requirement failed because it was applicable only to arbitration provisions.[138]

Why didn't the Montana Supreme Court find some other basis for invalidating the arbitration provision? One commentator suggests that the court could have used the law of contract formation to invalidate the arbitration clause without running afoul of the FAA.[139] Furthermore, the court itself, in describing the reasons for the notice provision, stated that the legislature "did not want Montanans to waive their constitutional right of access to Montana's courts unknowingly."[140] Yet the waiver of constitutional rights was never mentioned again. But some other line of reasoning based on contract formation claims would probably have proved unavailing. In a footnote, the Supreme Court briefly addressed these claims:

> At oral argument, counsel for Casarotto urged a broader view, under which § 27-5-114(4) might be regarded as harmless surplus. See Tr. of Oral Arg. 29-32. Montana could have invalidated the arbitration clause in the franchise agreement under general, informed consent principles, counsel suggested. She asked us to regard § 27-5-114(4) as but one illustration of a cross-the-board rule: Unexpected provisions in adhesion contracts must be conspicuous. See also Brief for Respondents 21-24. But the Montana Supreme Court announced no such sweeping rule. The court did not assert as a basis for its decision a generally applicable principle of "reasonable expectations" governing any standard form contract term. Cf. *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 180, 656 P.2d 820, 824 (1983) (invalidating provision in auto insurance policy that did not "honor the reasonable expectations" of the insured). Montana's decision trains on and upholds a particular statute, one setting out a precise, arbitration-specific limitation. We review that disposition, and no other. It bears reiteration, however, that a court may not

136. *Id.* at 688.

137. *Id.* at 686 (quoting *Allied-Bruce*, 513 U.S. at 281).

138. *Id.* at 687.

139. Traci L. Jones, *State Law of Contract Formation in the Shadow of the Federal Arbitration Act*, 46 DUKE L.J. 651 (1996).

140. *Casarotto I*, 268 Mont. at 376, 886 P.2d at 935.

> "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."[141]

In this footnote, the Court initially seems sympathetic to the argument that the reasonable expectations doctrine could be applied to arbitration clauses. If this were the case, then it left the door open for Montana to invalidate agreements to arbitrate, at least in contracts of adhesion, not by employing a statute directed only at arbitration clauses, but by employing basic principles of contract law. The closest the Montana Supreme Court came to basing its reasoning on something other than the statute was Justice Leaphart's suggestion in *Casarotto II* that "[t]he notice requirement of subsection (4) merely protects the consumer by requiring that notice of an arbitration provision be conspicuously placed on the front page of the contract."[142] That rationale sounds very close to the Supreme Court's characterization of the oral argument as arguing that the statute was merely requiring that "[u]nexpected provisions in

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141. *Casarotto III*, 517 U.S. at 687 n.3 (citing Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987)). The language from *Perry* is worth quoting in full:

> We also decline to address Thomas' claim that the arbitration agreement in this case constitutes an unconscionable, unenforceable contract of adhesion. This issue was not decided below, see nn. 4 and 6, *supra,* and may likewise be considered on remand.
>
> We note, however, the choice-of-law issue that arises when defenses such as Thomas' so-called "standing" and unconscionability arguments are asserted. In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law, see* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983), "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Thus state 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. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. *See* Prima Paint, 388 U.S., at 404; Southland Corp. v. Keating, 465 U.S., at 16-17 n. 11. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

482 U.S. at 492 n.9 (emphasis in original) (citations altered to conform to Bluebook).

142. *Casarotto II*, 274 Mont. at 9, 901 P.2d at 599 (Leaphart, J., specially concurring).

adhesion contacts must be conspicuous."[143] The last sentence of the footnote, however, seems to warn the Montana Supreme Court not to try that approach. When the Court said, "It bears reiteration, however, that a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot,'" it seemed to be saying that if the Montana Supreme Court always found that an agreement to arbitrate must be stricken as unconscionable, then the court would once again have unlawfully prohibited an agreement to arbitrate. As we shall see, these arguments would lie buried like moles only to later emerge into the sunlight.

The Supreme Court concluded *Casarotto III* with the usual language of reversal, stating that "the judgment of the Supreme Court of Montana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."[144] Those further proceedings would require the court to vacate its judgment in *Casarotto II* and order that the arbitration go forward. When the Montana Supreme Court issued the order, Justices Trieweiler and Hunt, in a final act of defiance at the federal authorities, refused to sign it. It did not escape the attention of some observers that refusal to comply with an order of the Supreme Court was not unprecedented—some judges in the South had refused to comply with such orders in desegregation cases.[145] Again, the issue of states' rights provides the connection.

When all was said and done, the Casarottos never went to arbitration but reached a settlement with DAI.[146] One thing that has always troubled me about this case is that the Casarottos put these tremendous resources into their fight to keep the dispute out of arbitration and get it into the courts in Montana. Their claim was that the defendants allegedly made an oral promise to move their franchise to a better site and then broke that promise. In other words, the Casarottos wanted to introduce parol evidence. Didn't their lawyers tell them that the

143. *Casarotto III*, 517 U.S. at 687 n.3.

144. *Id.* at 689.

145. Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, ABA J., Oct. 1996, at 16.

146. Telephone Interview with Paul Casarotto, August 18, 2004. He had abandoned the Subway franchise in 1992 and reached a settlement with DAI in 1998. He is now operating a franchise (not Subway) in Delaware.

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Montana courts hate parol evidence almost as much as they hate arbitration?[147] On that issue, one would think the Casarottos would have been better off in arbitration, where, as Justice Trieweiler acknowledged, the arbitrator often ignores legal "technicalities" in order to reach a just result.

III. THE GUERILLA WAR CONTINUES

A. Iwen v. U.S. West Direct

For a while, it looked like the anti-arbitration forces were routed. After the defeat in *Casarotto*, the Montana Legislature deleted the notice requirement from Montana Code Annotated section 27-5-114 in 1997.[148] The war would continue sporadically, however, with the Montana Supreme Court still finding opportunities to express its hostility to arbitration.

The facts of *Iwen v. U.S. West Direct*[149] seemed designed to give arbitration a black eye. In *Iwen*, defendant U.S. West screwed up plaintiff attorney's yellow pages advertisement. When plaintiff brought suit, defendant claimed the dispute must be submitted to arbitration under the parties' agreement, which stated in pertinent part:

> 11. ARBITRATION. Any controversy or claim arising out of or relating to this Agreement, or breach thereof, *other than an action by Publisher for the collection of the amounts due under this Agreement*, shall be settled by final, binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, which rules are incorporated herein by reference; provided, however, that any person nominated to act as arbitrator is licensed to practice law before the courts of the State where the arbitration is conducted. There shall be one arbitrator to any arbitration. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Venue for any arbitration under this provision shall be at the office of the American Arbitration Association closest to the Advertiser, or as such other location as the parties may agree.[150]

Having learned its lesson from *Casarotto*, the court knew that it could strike an arbitration clause only, in the language of the

147. *See* Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93 (1994).

148. MONT. CODE ANN. § 27-5-114 (2003) (enacted in 1985, amended in 1997 to remove notice requirement).

149. 1999 MT 63, 293 Mont. 512, 977 P.2d 989.

150. *Id.* ¶ 19 (emphasis added).

Federal Arbitration Act, "upon such grounds as exist at law or in equity for the revocation of any contract."[151] One of the grounds for revoking a contract, or a term of a contract, is unconscionability. The court had previously examined the unconscionability of an arbitration clause in *Passage v. Prudential-Bache Securities, Inc.*,[152] and had stated a two-prong test for the voidability of a clause in a contract of adhesion:

> For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party, or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable or against public policy.[153]

Recall that these concepts—reasonable expectations and unconscionability—are traditional grounds that exist in the law for policing contracts.[154] Applying these concepts to the facts in *Iwen*, the court had no trouble determining that the agreement between Iwen and U.S. West was a contract of adhesion—it was a standardized form previously prepared by U.S. West that was not negotiable. Without looking at whether the arbitration clause was within the reasonable expectations of Iwen, the court examined whether it was unconscionable. The court stated another two-prong test, this one for unconscionability:

> Unconscionability in a contract is a concept introduced under the Uniform Commercial Code and it has been applied to insurance contracts. Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.[155]

The court found unreasonably favorable terms in the language of the arbitration clause that excepted from arbitration "an action by Publisher for the collection of the amounts due under this Agreement."[156] Correctly reasoning that virtually all claims by U.S. West would be for collection, the court observed that this provision had the effect of requiring Iwen to arbitrate his claims while U.S. West was free to go to court on its

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151. 9 U.S.C. § 2 (2000).

152. 223 Mont. 60, 727 P.2d 1298 (1986).

153. *Id.*, 223 Mont. at 66, 727 P.2d at 1301-02.

154. *See supra* Part I.C.

155. *Iwen*, ¶ 31 (citing Leibrand v. National Farmers Union Property & Casualty Co., 272 Mont. 1, 898 P.2d 1220 (1995) (quoting Worldwide Underwriters Ins. Co. v. Brady, 973 F.2d 192, 196 (3d Cir. 1992)).

156. *Id.*

claims.[157] The term was therefore unconscionable because it was unreasonably favorable to the drafter. By using a standard contract defense that was not limited in application to arbitration clauses, the court was able to strike the arbitration clause without running afoul of *Casarotto III*.

This result seems correct, for while the court may be too quick to find arbitration provisions objectionable, there indeed are arbitration provisions that are unconscionable. Certainly the parties are entitled to an arbitration provision that treats them equally and that provides for a level playing field and a neutral arbitrator.[158] But the Montana Supreme Court, having found the concepts of reasonable expectations and unconscionability useful for avoiding arbitration clauses, seemed poised to unleash those new-found weapons rather freely.

B. The Battleground Shifts to Choice of Forum

The drafter of a contract who was aware of Montana's anti-arbitration sentiment might simply include not only a choice of law provision, specifying the law to be applied, but a choice of forum provision, specifying the location where the dispute would be heard. Recall that in *Casarotto I*, DAI did just that, including in the contract a choice of forum clause that called for arbitration in Connecticut. Justice Trieweiler made much of the foreign forum at oral argument, when he alluded to the distance the plaintiffs would have to travel to arbitrate, and in the majority opinion in *Casarotto I*, he used the time and expense of travel as a justification for Montana's statutory notice requirement.[159]

Enforceability of the choice of forum clause, however, was not an issue in *Casarotto*. Now it would be in *Keystone, Inc. v. Triad Systems Corp.*[160] Keystone, a Montana business that distributed auto parts, contracted with Triad, a California designer of computer systems, for the purchase of a $250,000 system.[161] After disputes arose about the operation of the

157. *Id.* *See* the italicized portion of the arbitration clause *supra* text accompanying note 150.

158. *See* F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS (3d ed. 2003).

159. *Casarotto I*, 268 Mont. 369, 376, 886 P.2d 931, 935. *See supra* text accompanying note 98.

160. 1998 MT 326, 292 Mont. 229, 971 P.2d 1240.

161. *Id.* ¶¶ 3-4.

system, Keystone brought suit in Montana.[162] Triad moved to compel arbitration in California, pursuant to the terms of the contract, which provided that the parties were "required to arbitrate any dispute between them before the American Arbitration Association (AAA) in San Francisco, California."[163] Keystone acknowledged that the dispute was subject to arbitration, but moved to compel arbitration in Montana.[164] The district court upheld the parties' agreement, granting Triad's motion to compel arbitration in California.[165]

On appeal, Keystone claimed that the choice of forum provision was void under Montana Code Annotated section 27-5-323, the nonuniform amendment to the Uniform Arbitration Act that provides in pertinent part:

> **Venue** . . . No agreement concerning venue involving a resident of this state is valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived upon the advice of counsel as evidenced by counsel's signature thereto.[166]

The choice of forum provision would be void under this statute only if Montana law applied to the transaction, however, and the contract also contained a choice of law clause specifying California law. To find the appropriate law governing the contract, the court engaged in the same choice of law analysis it employed in *Casarotto I*, with—not surprisingly—the same result. Applying Restatement (Second) of Conflict of Laws section 188, the court determined that because Montana had a materially greater interest in the contract, Montana law would apply in the absence of an effective choice of law provision. As long as it was looking to the Restatement (Second) of Conflict of Laws as authority, the court should have applied the rule that in the case of the sale of goods, the place of delivery presumptively governs.[167] Usually a seller of goods structures its contract so that the place of delivery (e.g., the F.O.B. destination) is its own place of business. It is possible that this seller did not do so. It is also possible that in this mixed goods and services contract, the services were a larger factor. In any event, the analysis was incomplete.

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162. *Id.* ¶ 5.
163. *Id.*
164. *Id.* ¶¶ 5-6.
165. *Id.* ¶ 6.
166. MONT. CODE ANN. § 27-5-323 (2003).
167. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 (1971).

The court then looked to Restatement (Second) of Conflict of Laws section 187, under which the chosen law—California law—would govern the contract unless that law was contrary to a fundamental public policy of the state whose law would govern in the absence of that provision. Recall that in *Casarotto I*, the court found that Connecticut policy was contrary to a fundamental public policy of Montana because it did not require notice of an arbitration clause.[168] In *Keystone*, the choice of law clause was not effective because Montana found "strong public policy considerations in Montana for voiding choice of forum provisions."[169]

The court wisely avoided deciding the case on the basis of Montana Code Annotated section 27-5-323, the statute that requires that the venue of arbitration be Montana. Such a determination would undoubtedly have fallen afoul of the Federal Arbitration Act, for that Montana statute invalidates choice of forum only in arbitration clauses and has the stringent waiver requirement only with respect to arbitration clauses. Instead, the court returned to Montana Code Annotated section 28-2-708, the statute that had historically voided pre-dispute arbitration agreements:[170]

> **Restraints upon legal proceedings void.** Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.[171]

The court found that this statute had "historically been applied . . . to protect Montana residents from having to litigate outside of Montana."[172] It might be said that in reaching this conclusion, the court was merely following precedent, as it should do, and following the instructions of the legislature, as it must do. Let us take a closer look at the cited statutes and

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168. 268 Mont. at 376-77, 886 P.2d at 936.

169. *Keystone*, ¶ 13.

170. *Supra* note 67 and accompanying text.

171. MONT. CODE ANN. § 28-2-708 (1985) (originally enacted in Montana in 1895 as section 2245 of the Montana Civil Code in the form above, amended in 1985 with addition of new last sentence stating, "[t]his section does not affect the validity of an agreement enforceable under Title 27, chapter 5.").

172. *Keystone*, ¶ 17. It is mildly curious that Montana does not object to choice of venue clauses that place venue in Montana. *See* MONT. CODE ANN. § 25-2-202 (2003). The net effect of these policies is that a resident of Wibaux, Montana can't be compelled to have the case heard in Beach, South Dakota, but can be compelled to have the case heard in Missoula.

precedent to see if they support the outcome in *Keystone*. Does the history of the statute confirm this conclusion? The original Field Code contained this comment on the section: "The first part of this section is acknowledged law. A covenant in a contract, not to sue for a breach thereof, is void."[173] If the provision is merely saying you can't give up your right to sue for breach of contract, it is a stretch to interpret it as saying you can't give up your right to sue *in Montana*.

But in fact the precedents cited in *Keystone* do indeed state that the statute is applicable to this situation, though the history is neither long nor distinguished. The first precedent, *State ex rel. Polaris Industries, Inc. v. District Court*,[174] was about as succinct as a decision comes; i.e, it is totally devoid of analysis. After stating the facts and setting out the statute, the court stated *in toto*:

> The complaint of the plaintiff in this case comes within the provisions of the foregoing code section [§ 28-2-708]. The plaintiff seeks to enforce its right under its contract with Polaris by a "usual proceeding" in the "ordinary tribunals" of Montana. We hold that the forum-selection clause of the Agreement is void under the statute as an improper restraint upon the plaintiff's exercise of its rights.[175]

In the other cited precedent, *Rindal v. Seckler*, a federal court had to decide whether the issue of forum selection was a procedural issue, in which case it would be governed by federal law, or a contract issue, in which case it would be governed by state law under the *Erie* doctrine.[176] Having decided that state law should govern, it was not too difficult for the court to determine what the Montana law was. Citing *Polaris*, the court found that the forum selection clause was invalid under the law of Montana.[177]

I don't have a problem with the court determining that choice of forum clauses are contrary to public policy. I do have a problem with the court not articulating what that policy is and instead making what is at worst a tortured reading of a Field Code statute and at best an incorrect interpretation of that

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173. DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK § 832 (Proposed Draft 1865).

174. 215 Mont. 110, 695 P.2d 471 (1985).

175. *Id.*, 215 Mont. at 111, 695 P.2d at 472. Memo to Law Students: If your exam answers contain this level of analysis, you will probably not make it through law school.

176. 786 F. Supp. 890, 894 (D. Mont. 1992).

177. *Id.*

statute to support its outcome.[178] This use of the statute illustrates another weakness of the Field Code—that it has frozen the common law as it stood more than 100 years ago and does not permit change. There is a great deal of debate about the enforcement of choice of forum clauses that the court might have thoughtfully discussed.[179] Most significantly, this case might have given the court an opportunity to distinguish between contracts of adhesion and negotiated contracts, for in *Casarotto I* the court promised not to "decline to enforce arbitration agreements which are entered into knowingly"[180] while in *Keystone* the court mentioned during the choice of law analysis that "the parties eventually entered into their contract after many months of negotiation."[181]

The decisions in *Casarotto* and *Iwen* were clearly rooted in a court's power to police a contract of adhesion. In *Keystone*, on the other hand, the court never alluded to the fact that it was dealing with an arbitration clause in a negotiated commercial contract. The distinction is significant, for if the court is not exercising its police power, then it is simply overriding freedom of contract in its haste to protect Montanans from arbitration. The result is that in a contract governed by Montana law, Montanans do not have the freedom to contract to have their disputes resolved in another jurisdiction.

Having proceeded from a faulty premise to a foregone conclusion, the court then forthrightly addressed whether the Montana statutes were pre-empted by the Federal Arbitration Act. Noting that *Casarotto III* requires that "state law may not 'place arbitration clauses on an unequal footing,' from general contract provisions," the court concluded that because Montana Code Annotated section 28-2-708 invalidated choice of forum

178. *See* Miller v. Fallon County, 222 Mont. 214, 721 P.2d 342 (1986); *see also* Morriss, et al., *supra* note 25, at 396, as a particularly egregious example of this phenomenon.

179. The trend seems to be toward enforcement of choice of forum clauses. *See* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R.4th 404 (1984). California had enacted the equivalent of Montana Code Annotated section 28-2-708 (2003) at California Civil Code section 1672 in 1872, but it was quickly repealed the next year. *See* CAL. CIVIL CODE § 1672 (2003). Today in California, "[a] forum selection clause in a contract will be given effect unless it is unfair or unreasonable." 13-140 CAL. FORMS OF PLEADING AND PRACTICE ANNOTATED § 140.11 (2004). *See also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (for purposes of admiralty jurisdiction, holding forum selection clause in consumer contract enforceable).

180. *Casarotto I*, 268 Mont. 369, 381-82, 886 P.2d 931, 939 (1994).

181. *Keystone*, ¶ 12.

clauses in all contracts and not just in arbitration agreements, it did not conflict with the Federal Arbitration Act.[182] Furthermore, the result did not invalidate the parties' agreement to arbitrate, but merely restricted where that arbitration can take place.[183] This analysis seems correct.[184]

Lurking in the background of these cases is a sleeping giant, the Montana Constitution, which recognizes a right of access to the courts of Montana. Article 2, Section 16 of the Montana Constitution provides:

> Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.[185]

In a concurring opinion in *Polaris*, Justice Sheehy argued that the choice of forum clause also violated this provision of the Constitution:

> The provisions of Art. II, Section 16, 1972 Montana Constitution, are further evidence of a strong public policy in this State that impedances to state courts may not be countenanced by us. The constitutional statement is that courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character. Forum selection clauses in contracts impede the right to judicial process and especially discourage a speedy remedy.[186]

Similarly, in *Iwen*, the court found that access to the judicial system was a constitutional right, stating that "U.S. West Direct pointedly protected itself by preserving its constitutional right of access to the judicial system while at the same time completely removed that right from the advertiser."[187] The court seemed to be drawing nearer to addressing the circumstances under which persons may waive their constitutional rights by agreeing to

182. *Id.* ¶¶ 25-27.

183. *Id.* ¶ 26.

184. One thoughtful commentator disagrees. *See* Bryan L. Quick, Keystone, Inc. v. Triad Systems Corporation*: Is the Montana Supreme Court Undermining the Federal Arbitration Act?* 63 MONT. L. REV. 445 (2002).

185. MONT. CONST. art. II, § 16.

186. *Polaris*, 215 Mont. at 112, 696 P.2d at 472 (Sheehy, J., specially concurring).

187. *Iwen*, ¶ 31.

submit their dispute to arbitration.[188]

C. *Ticknor v. Choice Hotels International, Inc.*

Following *Iwen* and *Keystone*, the Montana Supreme Court got confirmation from the Ninth Circuit that it was going to get away with its application of traditional contract doctrine to arbitration clauses. In *Ticknor v. Choice Hotels International, Inc.*,[189] the plaintiff Ticknors, in a transaction eerily reminiscent of *Casarotto*, had entered into a franchise agreement with the defendant operators of the Econo Lodge franchise to operate a hotel in Bozeman. When disputes arose, the plaintiff went to Montana district court and defendant moved the proceedings to federal court, which took jurisdiction based on diversity. Defendant claimed that the case should go to arbitration, under an arbitration clause that specified arbitration of disputes in Maryland, the location of defendant.[190] The federal district court denied the motion to compel arbitration.[191]

The Ninth Circuit affirmed in a split decision of the panel. The majority, in a decision by Judge Thomas joined by Judge Pregerson, used the Montana choice of law rules as developed in *Keystone* to determine what law applied, with the not-too-surprising result that Montana law ended up being the chosen law. First, the court upheld the district court's determination that Montana had a materially greater interest than Maryland in the transaction.[192] So, according to the Restatement (Second)

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188. In Nebraska, the Supreme Court held that Uniform Arbitration Act was unconstitutional under the Nebraska Constitution, which provided that "[a]ll courts shall be open, and every person, for any injury done him in goods, person, or reputation shall have a remedy by due course of law, and justice administered without denial or delay." NEB. CONST. art. I, § 13 (amended 1996); State v. Neb. Ass'n of Pub. Employees, 477 N.W.2d 577, 580 (Neb. 1991). The people of Nebraska then rose up to amend the constitution to specifically recognize arbitration. The amended Article 13 provides:

> All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.

NEB. CONST. art. I, § 13.

189. 265 F.3d 931 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133 (2002).

190. *Id.* at 935-36.

191. *Id.* at 936.

192. *Id.* at 938. The determination was upheld in spite of the fact that both the majority and the dissent noted significant non-Montana contacts. *Id.* at 938, 942 n.1

of Conflict of Laws, if there were no choice of law provision, Montana law would be applicable.[193] But the contract did have a choice of law clause specifying Maryland law. According to the Restatement (Second) of Conflict of Laws, however, the specified choice of law is not effective if "application of the law of the chosen state would be contrary to a fundamental policy" of the state that would otherwise have jurisdiction, i.e., Montana.[194]

Recall that in *Casarotto I*, the Connecticut choice of law was not effective because Connecticut did not have a statute that had a notice provision and in *Keystone*, the California choice of law was not effective because California did not have a statute that provided for a local forum. So what was the contrary law of Maryland in this case? The court never got there. With commendable understatement, it found that "[t]he Montana Supreme Court has taken a broad view of what constitutes public policy, declaring that '[f]or choice of law purposes, the public policy of a state is simply the rules, as expressed in its legislative enactments and judicial decisions, that it uses to decide controversies.'"[195] So if any difference between Montana and Maryland law constitutes a fundamental policy, then what is that difference? The court went on to say that "[i]n short, an unconscionable arbitration clause in an adhesion contract is unenforceable in Montana as a matter of public policy."[196] I have not researched the issue, but if I were a betting man, I would wager that it is also the law of Maryland that "an unconscionable arbitration clause in an adhesion contract is unenforceable," so it is hard to see any difference there. The court followed that statement by stating that "the Montana Supreme Court would likely hold that another state's contrary interpretation of contract unconscionability would contradict a fundamental public policy of Montana."[197] It is undoubtedly true that the Montana Supreme Court would so find, but is that a difference between Maryland law and Montana law? Rather than analyzing any difference, the majority seems to have cut to the chase and concluded that since the Montana Supreme Court would find a way to find the arbitration clause unenforceable, so

(Tashima, J., dissenting).

193. *Id.* at 938 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188).

194. *Id.* at 937 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b)).

195. *Ticknor*, 265 F.3d at 938 (quoting Phillips v. Gen. Motors Corp., 2000 MT 55, ¶ 75, 298 Mont. 438, ¶ 75, 995 P.2d 1002, ¶ 75).

196. *Id.* at 939.

197. *Id.*

must a court applying Montana law.

Having decided that Montana law applied, it was no great leap for the court to conclude that the arbitration agreement would be held unenforceable under Montana law.[198] But would such a hypothetical action by the Montana Supreme Court be preempted by the Federal Arbitration Act? No, the majority said, because under the limitations of the Federal Arbitration Act as recognized in *Casarotto III*, "Montana law pertaining to the unconscionability of arbitration clauses was the result of the 'application of general principles that exist at law or in equity for the revocation of any contract.'"[199]

Judge Tashima wrote a thoughtful dissent. For purposes of the dissent, he assumed *arguendo* that Montana law would apply in the absence of the parties' agreement and that the judicially created rule striking down one-sided arbitration clauses in contracts of adhesion did not run afoul of *Casarotto III*.[200] But he questioned whether this transaction involved a contract of adhesion, for it was a business transaction that was negotiated between experienced business people.[201] And even if it was a contract of adhesion, he did not find the arbitration clause to be the kind of provision that "shocked the conscience" of the court, which should be the standard for unconscionability.[202] Judge Tashima apparently found that the case involved parties who exercised their freedom of contract to choose Maryland law.[203]

In upholding the avoidance of the arbitration clause under general principles of contract law, it appears at first blush that the court in *Ticknor* was simply exercising the traditional police power of the court to overcome freedom of contract in instances of unconscionability. But it seems that a more narrow principle was being applied—the reality that arbitration clauses will always be found unconscionable in Montana. If that is the case, then it appears that the court did not heed the warning contained in footnote three to *Casarotto III*: "It bears reiteration, however, that a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that

198. *Id.* at 941.

199. *Id.* at 941 (quoting *Iwen*, ¶ 34).

200. *Id.* at 942 n.1 (Tashima, J., dissenting).

201. *Ticknor*, 265 F.3d at 942-43.

202. *Id.* at 944 (citing Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1040 (9th Cir. 2001)).

203. *Id.* at 942-55.

enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'"[204] But, you say, even emboldened by *Ticknor*, surely the Montana Supreme Court would not find *all* arbitration clauses unconscionable?

IV. THE WAR IS OVER—ARBITRATION HAS LOST

In *Kloss v. Edward D. Jones & Co.*,[205] plaintiff, a 95-year-old widow[206] had done business since 1985 with defendant brokerage house through stockbroker Paul Husted.[207] She opened a full service account in 1989 which permitted her to purchase securities. In 1992, she established a living trust. Both agreements contained mandatory arbitration clauses. In 1998, Kloss set up a charitable trust on the recommendation of Husted and executed another agreement with a mandatory arbitration clause. She did not sign this agreement, but signed a detachable card acknowledging that she received a copy of the agreement. The card incorporated an arbitration clause by reference. The agreements contained the following language:

> ARBITRATION
>
> 1. Arbitration is final and binding on the parties.
>
> 2. The parties are waiving their right to seek remedies in court, including the right to jury trial.
>
> 3. Pre-arbitration discovery is generally more limited than and different from court proceedings.
>
> 4. The arbitrators' awards is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.
>
> 5. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.[208]

Kloss then sued in district court to revoke the charitable trust and Edward Jones moved to compel arbitration.[209]

The court, in an opinion written by Justice Trieweiler and concurred in by Justices Cotter, Nelson, and Leaphart, grounded its decision in the doctrine of reasonable expectations. The court first discussed and distinguished two precedents in which it had

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204. 517 U.S. at 687 n.3 (citing Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).
205. 2002 MT 129, 310 Mont. 123, 54 P.3d 1, *cert. denied*, 538 U.S. 956 (2003).
206. End of necessary facts.
207. *Id.* ¶¶ 6-9.
208. *Id.* ¶ 9.
209. *Id.* ¶ 12.

found arbitration clauses in brokerage contracts enforceable: *Passage v. Prudential-Bache Securities, Inc.*,[210] and *Chor v. Piper, Jaffray & Hopwood, Inc.*[211] It is interesting to travel back in time to the pre-*Casarotto* world of those cases. In *Passage*, Justice Weber's opinion began by showing deference to the Supreme Court's decision in *Southland*.[212] It then extensively quoted from *Finkle and Ross v. A.G. Becker Paribas, Inc.*,[213] a New York federal case, on the issue of when arbitration clauses in contracts of adhesion are enforceable:

> Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms. [citation omitted.] Here, the investor is faced with an industry wide practice of including Arbitration Clauses in standardized brokerage contracts. As the investor faces the possibility of being excluded from the securities market unless he accepts a contract with such an agreement to arbitrate, such clauses come within the adhesion doctrine. However, mere inequality in bargaining power does not render a contract unenforcible, [citation omitted] nor are all standardized contracts unenforcible. [citations omitted.] As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside. [citation omitted.] For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable or against public policy. [citations omitted.]
>
> Such pre-dispute arbitration agreements are not outside the reasonable expectations of the investor. [citation omitted.] Nor are they contrary to public policy, as indicated by the judicial and legislative presumption favoring the arbitration of such disputes. [citation omitted.][214]

Applying these rules to the facts, the *Passage* court quickly concluded that there was no evidence to indicate that the arbitration clause was not within the party's reasonable expectations or was unconscionable.[215] Five justices concurred

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210. 223 Mont. 60, 727 P.2d 1298 (1986).

211. 261 Mont. 143, 862 P.2d 26 (1993).

212. 223 Mont. at 63-64, 727 P.2d at 1300.

213. 622 F. Supp. 1505 (S.D.N.Y. 1985).

214. *Passage*, 223 Mont. at 66, 727 P.2d at 1301-02 (quoting Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1511-12 (S.D.N.Y. 1985)).

215. *Id.*, 223 Mont. at 66, 727 P.2d at 1302.

in this opinion while only one, Justice Morrison, dissented. Curiously, this same passage from *Finkle and Ross* was quoted in *Kloss*, except that the last paragraph was omitted and it was cited on the issue of when arbitration clauses in contracts of adhesion are *unenforceable* rather than when they are enforceable.[216]

Chor was decided just a year before *Casarotto I*, but what a difference a year makes! One of the curious facts of *Chor* is that a National Association of Securities Dealers (NASD) Rule required that a broker obtain from a customer an acknowledgment of receipt of the arbitration agreement—in other words, evidence that the customer had notice that the agreement contained an arbitration provision. Justice Turnage, joined by two other justices, found that there was no such acknowledgment of one of the arbitration agreements, rendering that one invalid.[217] The court then found that the other arbitration agreements did not violate the doctrines of reasonable expectations and unconscionability.[218] Justice Nelson, with Justice Gray concurring, dissented on the first issue, arguing that the violation of the NASD Rule should result in sanctions against the dealer but should not affect the validity of the arbitration clause![219] Justice Trieweiler, in a dissent joined by Justice Hunt, argued that because it was overly broad, the arbitration clause was not within Chor's reasonable expectations and was unconscionable.[220] The dissent also found that the overly broad provision violated Montana Code Annotated section 28-2-708 and the notice requirement of section 27-5-114, which was not mentioned by the majority.[221] Nor did the majority discuss the district court's finding that the "effect of waiving the right to trial by jury" would be unconscionable, but the dissent agreed that Chor had been deprived of her constitutional rights:

> With court dockets being as overcrowded as they are, the rush of the federal judiciary and this Court to embrace arbitration is understandable. However, the majority's willingness to, in the process, ignore fundamental constitutional rights such as access to

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216. *Kloss*, ¶ 24.

217. Chor v. Piper, Jaffray & Hopwood, Inc., 261 Mont. 143, 148, 862 P.2d 26, 29 (1983).

218. *Id.*, 261 Mont. at 149-50, 862 P.2d at 30-31.

219. *Id.*, 261 Mont. at 153-54, 862 P.2d at 33 (Nelson and Gray, JJ., concurring).

220. *Id.*, 261 Mont. at 159-60, 862 P.2d at 36 (Trieweiler and Hunt, JJ., dissenting).

221. *Id.*, 261 Mont. at 156, 862 P.2d at 34 (Trieweiler and Hunt, JJ., dissenting).

our courts and the right to jury trial, is not so understandable.[222]

The *Kloss* court explained that "[i]n *Chor* . . . [w]e also held that the arbitration provision was clearly within Chor's reasonable expectations based on her own testimony that she understood her obligation to arbitrate based on her review of the agreement."[223] The court then distinguished the facts in *Kloss*, explaining that the arbitration provision was not within Kloss's reasonable expectations because "Kloss did not read the contract and was not aware of the arbitration provision in the contract."[224] This statement suggests a misreading of *Chor* but, more importantly—if it is saying that one can't claim the benefit of the doctrine of reasonable expectations if one has read the contract term—it badly misstates the doctrine.[225] First of all, in *Chor*, the plaintiff claimed that she had read the documents but had a misunderstanding of them and claimed that her understanding governed. The *Chor* court properly stated that "a party cannot avoid the legal consequences of an agreement simply by later claiming that she did not understand the impact of the plain language of the contract on her legal rights."[226] Most importantly, the court's implication that Kloss had not read the contract and therefore could still claim the benefit of reasonable expectations doctrine misses the point of the doctrine. *Reasonable* expectations are not *actual* expectations. To see why this is an important distinction, let's take a closer look at the doctrine.

According to the Restatement (Second) of Contracts, the doctrine of reasonable expectations applies because a person "has reason to believe that like writings are regularly used to embody terms of agreements of the same type."[227] In other words, when one enters into a standard form contract, like a brokerage contract, the person has certain expectations of the

222. *Id.*, 261 Mont. at 160, 862 P.2d at 37 (Trieweiler and Hunt, JJ., dissenting).

223. *Kloss*, ¶ 26.

224. *Id.* ¶ 28.

225. The court compounded the confusion about reasonable expectations in Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 Mont. 103, 79 P.3d 250, where it made such statements as "such contracts [form contracts] are only unconscionable if the terms are not within the reasonable expectation of the party who had no opportunity to negotiate." *Id.* ¶ 61. This is a misstatement. If a term is not within reasonable expectations, then it is not within reasonable expectations, but it is not necessarily unconscionable.

226. 261 Mont. at 149, 862 P.2d at 30 (citing Wright v. Blevins, 217 Mont. 439, 444, 705 P.2d 113, 117 (1985)).

227. RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981).

usual terms that such an agreement contains. It therefore follows that if the drafter incorporates unusual provisions, those provisions are presumptively not part of the agreed terms. This doctrine makes practical sense in an age of form contracts. But it also makes sense that a person should not be penalized for actually reading the document. If that were the case, then there would be an incentive to remain ignorant. So the rule properly provides that all parties are treated the same whether they read and understood the agreement or not.[228] The *Chor* majority seemed to get this, for under the doctrine, her subjective understanding would not be relevant. Justice Trieweiler's dissent seemed to get it too, for if the agreement were so broad as to cover the arbitration of transactions other than the ones made under the agreement, that would not be within reasonable expectations, and Chor's understanding of it would not matter.

On the other hand, the trial court judge in *Kloss* apparently found that "the arbitration provision was within Kloss's reasonable expectation simply because it was contained in the contract."[229] Mere inclusion of the provision in the contract, as the supreme court correctly pointed out, is not enough to bring a provision within reasonable expectations, for then every provision would qualify.[230] So what does it take to bring a contract provision within the scope of the doctrine of reasonable expectations? First of all, it takes a provision that, according to the Comments to the Restatement (Second) of Contracts, "is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction."[231] Did the court properly apply this standard in *Kloss*? The court stated

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228. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981) provides:

Standardized Agreements

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

229. *Kloss*, ¶ 29.

230. *Id.*

231. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

that:

> [T]he arbitration provision by which Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal were clearly not within Kloss' reasonable expectations.[232]

This reasoning makes sense only if an arbitration clause always satisfies the "bizarre or oppressive" standard—a determination that the court, because of its hostility to arbitration, apparently believes is self-evident, because it did not further elaborate.

But the court failed to continue the reasonable expectations analysis. Once it is determined that a provision is "bizarre or oppressive," can the drafter make the provision enforceable? The answer is yes. If the evil of the provision is that it is not reasonably expected, the cure is to make it reasonable expected. How? By giving notice of it! It then falls within the reasonable expectations of the other party. This makes sense because we know that one will not read *all* the provisions of a form contract, but the attention of the reasonable reader can at least be called to the bizarre or oppressive provisions. The drafter accomplishes this goal by putting those provisions in bold print, in a contrasting color, or, the wise guy reader is no doubt thinking, in underlined capital letters on the first page of the contract.[233] The majority in *Kloss* did not address this element of reasonable expectations, presumably because the drafter *did* call the provision to a reasonable person's attention.[234] If the

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232. *Kloss*, ¶ 28.

233. For example, the Dell, Inc. "Terms and Conditions of Sale" for a computer look like this:

> U.S. Terms and Conditions of Sale
>
> **PLEASE READ THIS DOCUMENT CAREFULLY! IT CONTAINS VERY IMPORTANT INFORMATION ABOUT YOUR RIGHTS AND OBLIGATIONS, AS WELL AS LIMITATIONS AND EXCLUSIONS THAT MAY APPLY TO YOU. THIS DOCUMENT CONTAINS A DISPUTE RESOLUTION CLAUSE.**
>
> These terms and conditions ("Agreement") apply to your purchase of computer systems and/or related products and/or services and support sold in the United States ("Product") by the Dell entity named on the invoice or acknowledgement ("Dell") provided to you.

Dell Online Policies, Terms and Conditions of Sale, *available at* http://www1.us.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~ck=lf&~section=012 (visited August 27, 2004).

234. In a concurring opinion, Justice Leaphart raised the additional fact that Kloss signed a detachable signature card that stated that she was aware of the pre-dispute arbitration clause before she received the agreement containing the language of waiver.

problem with the provision was its form, then the court, without analysis of the content, was determining that a contract of adhesion is per se unconscionable.[235] If the problem with the provision was its substance rather than its form, then the court was really analyzing it under the doctrine of unconscionability and effectively determining that all arbitration clauses are unconscionable. In fact, the court then went on to complete exactly this analysis in dicta.

Having decided the case on the grounds of reasonable expectations—or at least the doctrine of reasonable expectations as the court comprehended the doctrine—the court then said it did not need to determine whether the arbitration clause was unconscionable. However, it prepared attorneys for future cases by stating that the issue of whether an arbitration clause was unconscionable would be determined by looking at a number of factors:

> Furthermore, as a guide to future litigants who raise the issue of conscionability in the context of arbitration provisions, we take this opportunity to state that that issue cannot be decided without a more fully developed record. We have set forth the factors to be considered in *Iwen*, however, a number of factual issues should be addressed before those factors can be appropriately applied. For

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Therefore the waiver of rights, which she received later and did not sign, could not have been within her reasonable expectations since it was not called to her attention. *Kloss*, ¶ ¶ 46-47. Justice Rice agreed with this concurring opinion but not with the majority opinion. This reasoning, while consistent with the doctrine of reasonable expectations, would not have served the majority's purpose, for such a narrow holding could easily be distinguished in future cases when the arbitration provision was called to the attention of the other party at the time they signed the agreement.

235. One commentator thought the court did exactly this and found the decision "unique" in the law of contracts:

> The court emphasized that its holding was not based on a finding that the arbitration clause was unconscionable since unconscionability would require a complete analysis of the operation and effect of the arbitration clause in this case to determine whether it was oppressive. It would not, however, be unfair to construe the court's analysis as refusing to enforce the arbitration clause on the grounds of what other courts would characterize as procedural unconscionability, albeit the clause, itself, may be substantively conscionable. In this light, the court's analysis would suggest an uncommon holding, i.e., the refusal to enforce a provision because of procedural unconscionability alone. Courts typically suggest that unconscionability requires both procedural (bargaining imperfection) and substantive (oppression) elements. Courts may be moved to find a clause unenforceable because of substantive unconscionability alone. See, e.g., Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998); Maxwell v. Fidelity Financial Services, Inc., 184 Ariz. 82, 907 P. 2d 51 (1995). Holding a clause unenforceable on the sole basis of procedural unconscionability, however, would be unique.

1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.4, at 3 (LexisNexis Supp. Spring 2004).

example:

> 1. Are potential arbitrators disproportionately employed in one or the other party's field of business?
>
> 2. Do arbitrators tend to favor "repeat players" as opposed to workers or consumers who are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?
>
> 3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?
>
> 4. What are arbitrators' fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?
>
> 5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices?
>
> 6. To what extent are arbitrators bound by the law?
>
> 7. To what extent are arbitrators bound by the facts?
>
> 8. What opportunity do claimants have to discover the facts necessary to prove a claim such as a company's business practices?[236]

Is it possible to draft an arbitration clause that will not be deemed unconscionable under these criteria? I don't think so, for many of the criteria are simply descriptive of arbitration. It is, for example, generally thought of as a strength of arbitration that it does not involve complex discovery and procedural rules. Factor 6, "[T]o what extent are arbitrators bound by the law?" is especially troubling. The implication is that arbitration is unconscionable if the arbitrator is, to a great extent, not bound by the law. Yet that is the standard in arbitration, as provided by statute in Montana.[237]

As if that weren't enough to kill arbitration dead, Justice Nelson then added a specially concurring opinion. He described

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236. *Kloss*, ¶ 30.

237. Montana Code Annotated section 27-5-312(2) (2003) provides, "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award." Perhaps the court was referring to statutory claims, yet even those are subject to arbitration as long as the arbitration preserves the substantive rights under the statute. *See* Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002) (holding an arbitration agreement substantively unconscionable because the agreement forced the employee to arbitrate his statutory claims without affording him the benefit of the full range of statutory remedies). Interestingly, in 2003, the Georgia legislature amended the Georgia Arbitration Code to allow an arbitrator's award to be vacated upon a showing of the arbitrator's "manifest disregard of the law." GA. CODE ANN. § 9-9-13(b)(5) (2003).

adhesion contracts in the following terms:

> Likewise, these are the adhesion contracts that, as in the case *sub judice,* ordinary citizens and small business people are compelled to sign if they want to participate in the national/global economy, the profits of which fuel the very existence and growth of these same national and multi-national corporations (and the election and re-election of their benefactors in government).[238]

In this opinion, Justice Nelson provided "an additional rationale supporting our decision in this case—i.e., whether Kloss effectively waived her rights to a trial by jury and to access to the courts by executing Jones's 1992 and 1998 standard-form contracts."[239] This concurring opinion was joined by the same judges that signed the opinion. Because Justice Trieweiler's majority opinion cited the constitutional rights that Kloss gave up, the strong implication is that there is an alternative basis for the holding. In other words, a majority of the court appears to find that the rights of jury trial and access to the courts under the Montana Constitution apply to private transactions.[240] Justice Nelson suggested in a footnote that "other constitutional rights may be implicated in these sorts of cases, including the right to due process of law (Article II, Section 17, Montana Constitution) and equal protection of the laws (Article II, Section 4, Montana Constitution)."[241]

Justice Nelson forcefully argued that if a party to a transaction surrenders constitutional rights, then there must be a knowing and intelligent waiver of those rights. For this purpose he cited many authorities, from Blackstone to Montana

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238. *Kloss,* ¶ 62 (Nelson, J., concurring).

239. *Id.* ¶ 48 (Nelson, J., concurring).

240. In the U.S. Constitution, there is no right of access to the courts as such. There is a right to trial by jury in the Seventh Amendment. In Allstar Homes, Inc. v. Waters, 711 So. 2d 924 (Ala. 1997), the Alabama Supreme Court held that "any arbitration agreement is a waiver of a party's right under Amendment VII of the United States Constitution to a trial by jury and, regardless of the federal courts' policy favoring arbitration, we find nothing in the FAA that would permit such a waiver unless it is made knowingly, willingly, and voluntarily." *Id.* at 929. On the other hand, in Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004), the Sixth Circuit held that "[t]he Seventh Amendment confers not the right to a jury trial per se, but rather only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes." *Id.* at 506 (quoting Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 834 (S.D. Miss. 2001), *aff'd,* 34 Fed. App. 964 (5th Cir. 2002)).

241. *Kloss,* ¶ 48 n.1 (Nelson, J., concurring). The implications for private commercial transactions are staggering to comprehend.

cases.[242] Curiously, all of this authority lauding the importance of trial by jury involves the waiver of those rights in criminal cases. This is curious because in those cases the right is a shield against the power of the state to deprive a person of freedom.[243] Here, however, the state is using its power to deprive citizens of their cherished freedom of contract. It appears that there is no transaction that the Montana Constitution won't apply to, from the sale of land[244] to the giving of an engagement ring,[245] to a contract containing an arbitration clause. The Montana Constitution is now a mega-regulation, allowing the court rather than private ordering by the parties subject to legislation in the public interest to determine all rules of law.[246] It is ironic that this results from a document intended to limit the power of the state.[247]

Justice Nelson acknowledged that it is possible for a person to effectively waive those constitutional rights and, like Justice Trieweiler in the majority opinion with respect to unconscionability, he provided the attorney with some guidance for determining whether there has been an effective waiver:

> In applying these well-settled principles of law in the context of the issue presented here, a reviewing court must consider a totality of overlapping and non-exclusive factors including:

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242. *Id.* ¶ 54 (Nelson, J., concurring).

243. It makes no sense that the court should be so enthusiastic about upholding the Article II right of access to the courts in cases involving private parties while permitting the state to take away that right. For example, the state's right to compel arbitration in the Montana Wrongful Discharge From Employment Act, Montana Code Annotated section 39-2-914 (2003), was held constitutional in Meech v. Hillhaven West, Inc., 238 Mont. 21, 776 P.2d 488 (1989). Justice Nelson recognized this anomaly in *Kloss*, strongly suggesting that *Meech* will be overturned when the opportunity arises. *Kloss*, ¶ 59 ("I do not see how these decisions can be squared with, much less continue to exist beside, this Court's jurisprudence holding that other Article II rights are fundamental rights").

244. Cape-France Enters. v. Estate of Peed, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011. *See* Chase Naber, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment, An Examination of* Cape-France Enterprises v. Estate of Peed, 64 MONT. L. REV. 357 (2003).

245. Albinger v. Harris, 2002 MT 118, 310 Mont. 27, 48 P.3d 711.

246. Justice Nelson's reasoning makes us wonder, for example, whether all Article II rights (except where expressly stated otherwise) apply between citizens and not just between a citizen and the state. What about secured transactions? Does the right of due process apply to the taking of property pursuant to a security interest? Does merely stating, as most security agreements do, "I hereby grant lender a security interest in X," constitute a waiver? Would that be enough to create an effective waiver in a consumer goods transaction?

247. The process has hardly begun. At the 2003 University of Montana School of Law Hooding Ceremony, commencement speaker Justice Nelson advised graduating law students that the state Constitution is "a rich vein just waiting to be mined."

whether there were any actual negotiations over the waiver provision;

whether the clause was included on a take-it-or-leave-it basis as part of a standard-form contract;

whether the waiver clause was conspicuous and explained the consequences of the provision (e.g. waiver of the right to trial by jury and right of access to the courts);

whether there was disparity in the bargaining power of the contracting parties;

whether there was a difference in business experience and sophistication of the parties;

whether the party charged with the waiver was represented by counsel at the time the agreement was executed;

whether economic, social or practical duress compelled a party to execute the contract (e.g. where a consumer needs phone service and the only company or companies providing that service require execution of an adhesion contract with a binding arbitration clause before service will be extended);

whether the agreement was actually signed or the waiver provision separately initialed;

whether the waiver clause was ambiguous or misleading; and

whether the party with the superior bargaining power lulled the inferior party into a belief that the waiver would not be enforced.[248]

Needless to say, few arbitration provisions could qualify under the standards of reasonable expectations, unconscionability, and waiver enunciated in *Kloss*. Just in case there are any out there, however, Justice Nelson has been crisscrossing the state, presenting a Continuing Legal Education program in which he further elaborates on the standards the court has set. This is an excerpt from Justice Nelson's CLE outline:

V. Status of contractual waivers of fundamental rights in adhesion contracts after Kloss?

A. Arbitration clauses in adhesion contracts must be within the reasonable expectations of the party compelled to arbitrate.

B. A party seeking to void the arbitration clause on the basis of oppression or unconscionability must develop the record with sufficient specific facts to demonstrate why and how the clause meets those criteria.

248. *Kloss*, ¶ 65 (Nelson, J., concurring).

> C. Where arbitration clause requires forfeiture of constitutional rights – right of trial by jury and right of access to the courts – the waiver must be shown to have been made knowingly, voluntarily and intelligently and the waiving language must be expressed unequivocally and unambiguously. Again, the record must demonstrate the waiver by proof and consideration of a totality of various specific, non-exclusive and overlapping factors.[249]

The message seems to be: if you are so foolish as to think you can avoid the court system by putting an arbitration clause in your contract, think again. The brilliance of the *Kloss* decision is that it avoids the pitfalls of *Casarotto* by basing its reasoning on fundamental principles of contract law. Perhaps tired of fighting, the United States Supreme Court refused to grant certiorari in this case.[250]

V. CONCLUSION

Inevitably a national corporation, like the Subway sandwich franchisor in *Casarotto*, will not tailor its arbitration clause or its waiver of rights to the requirements the Montana Supreme Court enumerated in *Kloss* and the arbitration provision will be struck down. The U.S. Supreme Court held in *Casarotto* that the legislature could not enact provisions that restrict arbitration in that situation. And in footnote three to that case, it warned the courts not to do what the legislature may not do.[251] But the Montana Supreme Court has now accomplished what the legislature was unable to do—the regulation if not the prohibition of pre-dispute arbitration clauses in Montana. It is possible that the higher court will right this wrong, or even that a reconstituted Montana Supreme Court will see things differently. Until that time, however, arbitration is dead in Montana.

Is its death something to mourn? Let's start with the widely shared premise that the U.S. Supreme Court took a wrong turn in *Southland v. Keating*. It should never have held that the Federal Arbitration Act is applicable to the states. But

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249. Hon. James C. Nelson, *"Before Signing That Contract, You Must Understand Your Rights . . .": Contractual Waivers of Fundamental Rights in Contracts of Adhesion After* Kloss, Outline of address given at the State Bar of Montana Continuing Legal Education Seminar (Jan. 18, 2003) (copy on file with the author).

250. 538 U.S. 956 (2003).

251. *Casarotto III,* 517 U.S. 681, 687 n.3 (1996). *See supra* text accompanying notes 141-43.

that decision is water over the dam and our courts have to live with it. Alternatively, they can fight it by lobbing assorted weapons at it, but weapons unsuited for the job have a way of landing without precision and taking a toll among bystanders.[252] One of those bystanders is freedom of contract, which has been seriously wounded in Montana.

It must be hard for the Montana Supreme Court to imagine that someone would actually prefer arbitration to court, but the preference isn't so hard to comprehend. Arbitration is frequently "just, speedy, and inexpensive."[253] Those procedural and evidentiary "protections," so dear to the heart of the court, are not nearly so popular with litigants. People who are wronged are often happy if they can get someone to listen to their story, and all those protections often get in the way of storytelling.[254]

The mere fact that there is so much arbitration indicates that the system is working. One might argue that arbitration is not really preferred, but is forced on the little guy by the big business. That may be true, but don't the efficiencies of the business work to the benefit of the customers as well as to the owners of the business? And if enough customers expressed displeasure with arbitration, wouldn't a business compete by offering the service of taking its customers to court instead of to arbitration?[255]

My good friend Chuck Knapp has also given thought to arbitration and comes to different conclusions than I do, which should give me pause.[256] Seeing arbitration as a black hole down which all contract law is being sucked, Knapp states:

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252. Two superlative law review articles that debate these issues are Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, and Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998).

253. FED. R. CIV. P. 1.

254. A classic example is *Casarotto*, where the parol evidence rule would have prevented the Casarottos from telling their story in court while an arbitrator likely would have heard it. *See supra* text accompanying note 147.

255. It must be noted that most of the arbitrations that result from the arbitration clause contained in agreements such as credit card contracts are merely debt collections. The consumer rarely has a defense and an electronic, paper, or telephonic arbitration is certainly a far less costly procedure for everyone than a court action. Does the court system really want to process all of these cases? Does Justice Nelson really want banks to advertise, "Do business with us. We are the friendly folks who *sue* our customers when we have a dispute!"

256. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002).

> "[M]andatory" arbitration—arbitration imposed by pre-dispute clauses in contracts of adhesion which, as a practical matter, the non-drafting parties have no real power to avoid or disapprove—will, if allowed to continue unchecked, largely deprive American courts of the ability to play the important social role they played so effectively throughout the last century. And it will take away, from those individuals and enterprises who need it most, the protection of the law. Whatever else arbitration may be, it is not "law"—the kind of findable, studiable, arguable, appealable, *Restate*able kind of *law* that has characterized the Contract area for over a century. The piece-by-piece dismantling of American contract law is happening under our noses, right now. Maybe this process cannot be stopped, but at least we should recognize it for what it is: the abdication of any public responsibility for justice based on something more than raw economic power.[257]

Among other solutions to this problem,[258] Knapp sees hope in the liberal application of the doctrine of unconscionability.[25259] Having seen this approach used by the Montana Supreme Court, I am wary of it. I am reminded of the abiding dilemma

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257. *Id.* at 766.

258. Knapp's suggestions include improving the cost and structure of arbitration, increasing the remedies available through arbitration, requiring arbitrators' decisions to be written and reviewable, and making genuine the voluntariness of agreements to arbitrate. *Id.* at 790-795.

259. Knapp cites approvingly the Ninth Circuit case of Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002). *Id.* at 769 n.32. *Adams* gets off to a shaky start, with the court's unconscionability analysis beginning:

> The [Circuit City Dispute Resolution Agreement] is procedurally unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely. [*Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138, 145 (1997)] at 145-46 (indicating that a contract of adhesion is procedurally unconscionable). Circuit City, which possesses considerably more bargaining power than nearly all of its employees or applicants, drafted the contract and uses it as its standard arbitration agreement for all of its new employees. The agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms - they must take the contract or leave it.

Adams, 279 F.3d at 893.

If that were all it took to satisfy unconscionability analysis, 99.99% of contracts would be unconscionable, for the court in that passage describes most of the contracts we encounter in everyday life. Justice Nelson would be in hog heaven but a more tempered view might see the unconscionability exception swallowing up the rule of contracts. Fortunately, the court then undertook an analysis of substantive unconscionability, reasonably finding that this was an unconscionable provision because, it did not require the employer to arbitrate claims against the employee and it limited the remedies available to the employee. *Adams*, at 893-95. This analysis is similar to the analysis of the Montana Supreme Court in *Iwen v. U.S. West Direct.*, 1999 MT 63, 293 Mont. 512, 977 P.2d 989, discussed *supra* Part III.A. As with *Iwen*, I have no quarrel with *Adams* as employing unconscionability to defeat an arbitration clause.

concerning our freedom of speech—in order to preserve it, do we suppress the speech of those who would take it away? For it may be that the Montana Supreme Court's war on arbitration is destroying the very freedom that it is trying to preserve.[260]

I'm not an economist, but I play one in class. I'm a professor of contract law, and like Moliere's gentleman who discovered that he had been speaking prose,[261] I frequently discover that I have been speaking economics. And apparently free-market economics, for I have come to appreciate the glory of freedom of contract. Freedom of contract is, despite its lack of public awareness, a core freedom because it is at the heart of the free enterprise system. That system depends on millions of agreements that set not only the price of goods and services, but the other terms that govern buying and selling.

The system is, of course, subject to government regulation. Often that regulation exists to correct an inefficiency in the system that makes the system less competitive. Anti-monopoly and anti-fraud regulation would fit into that category. Other regulation is designed to facilitate disclosure, so that people may have the information they need to make the market function more effectively. It might be nice if all contract terms were "knowingly" agreed to. We might then attain that "meeting of the minds" hitherto available only on the planet Vulcan. But knowledge of all terms is a fantasy, and a costly one to perpetuate.[262]

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260. The issue was captured nicely in an exchange between Bassanio and Portia in WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1. Bassanio is trying to persuade Portia, the judge, not to enforce the contract in which his friend Antonio has agreed to lose a pound of flesh as damages for breach:

> Bassanio: To do a great right, do a little wrong.
> Portia: It must not be; there is no power in Venice
> Can alter a decree established:
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state: it cannot be.

WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1.

261. JEAN BAPTISTE MOLIERE, THE BOURGEOIS GENTLEMAN, act 2, sc. 4.

262. "Thus, disclosure is likely to be effective only where the public can understand the information disclosed, where it is free to choose on the basis of that information, and where it believes the information is materially relevant to the choice." STEPHEN BREYER, REGULATION AND ITS REFORM 164 (1982). The notice requirement in *Casarotto* can be seen as a disclosure requirement. As such, it seems inoffensive. It allows consumers to "shop" for contracts on the basis of the dispute resolution mechanism just as Truth-in-Lending assists them in shopping for interest rates or Magnuson-Moss assists them in shopping for warranties. I would have no objection to adoption of a federal law requiring disclosure of arbitration clauses.

But some regulation is merely paternalistic—it prevents people from making choices that the government does not want them to make. We have to be wary of paternalistic regulation, for it is often doomed. Americans notoriously don't like the government to tell them what to do, and will exercise their freedom of contract to the limit to get what they want. For the system to work, government has to trust people, even to the extent of letting them enter "bad" contracts, that is, contracts that may contain terms that are, on balance, unfavorable to them. The government does its best work when it sticks to furthering the competitive aspects of the system and leaves the deal-making to the parties. It may take some courage, but the Montana Supreme Court has to learn to say, "We think arbitration is bad for you, but if you are going to choose it, you have our blessing."