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Amending Maine's Plain Language Law to Ensure Complete Disclosure To Consumers Signing Arbitration Contracts

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AMENDING MAINE'S PLAIN LANGUAGE LAW TO ENSURE COMPLETE DISCLOSURE TO CONSUMERS SIGNING ARBITRATION CONTRACTS

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I. INTRODUCTION

Arbitration has been defined as an informal procedure used by disputants to resolve their differences in a forum other than a court of law.[1] By agreeing to arbitration, the parties submit their disputes to selected arbitrators, whose reasoning and final decisions or awards supplant the judgment of the established judicial tribunals.[2] Further, the decisions of arbitrators are usually binding and enforceable in courts.[3] Although arbitration has been lauded for being less expensive and time-consuming than litigation,[4] consumers arbitrating disputes with large companies may not be playing on a level field.[5]

It is important, however, to distinguish arbitration from mediation. Arbitrators, unlike mediators, are given the power to resolve the dispute before them and to force, if necessary, settlement upon the parties.[6]

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1. *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 199-211 (2d ed. 1992), *cited in* Darrien O. Shuquem, Note, *Moore v. Conliffe: Has the California Supreme Court Sanctioned Perjury in Private Arbitration?*, 30 U.S.F. L. REV. 861, 862 n.8 (1996).

2. *See* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 388 n.11 (1992) (quoting Castle-Curtis Arbitration, 64 Conn. 501 (1894) (other citations omitted)).

3. *See id. at 389; see also* United States Arbitration Act, 9 U.S.C. § 9 (1995); Maine Uniform Arbitration Act, ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980) (stating that arbitration agreements are "enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract").

4. *See, e.g.*, Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 333 (1996) ("Many consumer disputes . . . can be resolved quickly and relatively cheaply through arbitration."); Paul M. Barrett, *High Court to Consider Validity of State Shield on Arbitration*, WALL ST. J., Jan. 8, 1996, at B6 ("[B]usinesses in many fields, especially the securities industry, have pushed arbitration as a less costly alternative for resolving disagreements with customers and employees."); *What Price Justice? (A Survey of the Legal Profession)*, ECONOMIST, July 18, 1992, at 17 (Alternative Dispute Resolution (ADR) "dispenses with formality and cumbersome procedures and aims to settle cases faster than, but just as fairly as, normal courts."). *But cf. id.* ("ADR is no magic solution. In some of its forms it is as expensive as traditional litigation."). Note that arbitration is a subclass of ADR. *See* discussion *infra* accompanying notes 6-7.

5. *See* discussion *infra* Part IV; *see also* Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1 (Consumer advocates contend that arbitration "is fostering a system of private justice that conceals wrongdoing from public scrutiny, unlike a trial where allegations are made and rebutted in the open."); *Order in the Tort (A Survey of the Legal Profession)*, ECONOMIST, July 18, 1992, at 8 ("Increasingly, businesses are simply . . . hiring retired judges to rule on disputes. The drawback of 'rent-a-judge' for the public . . . is that cases are confidential, so controversial goings-on can be kept secret.").

6. *See* Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 889 (1997).

Alternative dispute resolution (ADR), meanwhile, is a term that subsumes both arbitration and mediation, as well as neutral evaluation, settlement conferences, and the use of special masters, minitrials, and summary jury trials.[7] Discussions and criticisms in this Comment focus only upon arbitration, emphasizing the use by financial institutions of that form of ADR to resolve disputes arising subsequent to their customers' execution of an arbitration agreement.

Arbitration is not a modern innovation. It has been utilized since biblical times.[8] By the nineteenth century, arbitration in Europe, and later in the United States, came to be seen as "a bastard remedy, incapable of being integrated into the self-respecting family of adjudication."[9] In England, arbitration lacked finality because courts could completely revise an arbitrator's ruling on any legal question arising in the course of the arbitration.[10] Whether at law or in equity, English courts would not compel parties to perform existing arbitration agreements.[11] This distrust of arbitration was imported into the United States, where courts declined to give binding effect to arbitration agreements until the arbitrator had afforded relief.[12] In spite of this widespread distrust, the process served a vital function for merchants seeking to resolve disputes expeditiously before a tribunal with the requisite expertise in commercial dealings.[13]

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7. *See* Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1330 (1994).

8. *See* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996) (focusing on the nineteenth and twentieth centuries, "the formative period of modern legal systems").

9. *Id.*

10. *See id.* at 1948.

11. *See* Shirley A. Wiegand, *Arbitration Clauses: The Good, the Bad, the Ugly*, 47 OKLA. L. REV. 619, 620 (1994) (citing Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14065)).

12. *See* Carbonneau, *supra* note 8, at 1949. Courts, at least until the early twentieth century, guarded their jurisdiction jealously, in order to preserve "[t]he normative function of law, as a guide through society's conflictual relationships." *Id.* This "normative function" is neglected in the arbitral process today, at least in the context of consumer arbitration. *See, e.g.*, Bruce E. Alexander, *The Arbitration of Disputes With Consumers: Some Practical Pointers*, 936 PRACTISING LAW INST. CORP. LAW AND PRAC. COURSE HANDBOOK SERIES 893, 915 (1996) (advising drafters of arbitration agreements to specify whether applicable law is to be followed by the arbitrator or whether the arbitrator may simply "apply his/her personal sense of fairness and equity" and ignore the law). For a concise study tracing the Supreme Court's transition from "overt hostility to warm receptivity" of arbitration, see Wiegand, *supra* note 11, at 619, 622-27, and *infra* text at Part II.B.

13. *See* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 88 (1992) (explaining that, with the growth of private arbitration, the demand for experts has come to exceed substantially the supply, and today's arbitrators, unlike those available to textile merchants, are often non-experts); *see also id.* at 88 n.30 ("Arbitrators can easily be appointed to panels merely by filing forms listing their experience. While arbitral organizations, in theory, review these forms for legitimacy, no thorough assessment or test of the arbitrator's knowledge of the substantive law of the specialty is conducted.").

In the early part of this century, courts, eager to preserve their jurisdiction, often refused to enforce arbitration agreements.[14] At the same time, fair resolution of commercial disputes may have required expertise in analyzing the underlying transactions.[15] Arguably, the need for experts familiar with commercial practices increased in proportion to the complexity of commercial transactions. Even the most qualified of judges recognized the need for experts to assist the courts in resolving disputes among merchants.[16] Nonetheless, the courts remained suspicious of arbitration in general and continued to invalidate agreements.[17]

To counter the courts' tendency to invalidate predispute arbitration agreements,[18] Congress passed the Federal Arbitration Act[19] (FAA) in 1925. Apparently, the narrow purpose of this Act was "to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it."[20] Thus, arbitration originally served the limited purpose of providing expert adjudication of disputes among consenting merchants of presumed equal

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14. *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 116 (1993).

15. *See, e.g.*, Strickland, *supra* note 2, at 388 ("Merchants and commercial interests have used arbitration to resolve disputes for centuries. Indeed, nearly all business disputes in England were decided by arbitration up to the time of Lord Mansfield [1705-1793].") (footnotes omitted).

16. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 136-45 (1994). Among his many other distinguishing attributes, Learned Hand achieved the "reputation as one of the nation's great patent judges." *Id.* at 138. Learned Hand debated the virtues of employing court-appointed experts even as he himself became well known for his expertise in cases "'covering almost every subject in the legal lexicon.'" *Id.* at 145 (quoting Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOK. L. REV. 6, 13 (1962)). At the same time, he adhered to a doctrine of judicial restraint. A system of arbitration wherein the arbitrator can appeal only to his/her sense of fair dealing and ignore the law would have been undesirable in many contexts; judges who decided whether a particular legislative purpose was legitimate "exceeded their legitimate powers unless they deferred to elected legislatures on debatable issues." *Id.* at 122. It is hard to imagine Judge Hand not applying the same rigorous standard to arbitrators. *See also* Brunet, *supra* note 13, at 117 (pointing to Julius Cohen's view of the FAA legislation he had drafted "as not setting forth a 'proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes,' subjects he felt were 'better left to the determination of skilled judges'") (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)). Finally, it is interesting to note that the State of New York has created a commercial court, called the "Commercial Division," which began operating on November 6, 1995. *See* Robert L. Haig, *New York Creates Business Courts*, BUS. LAW TODAY, Sept./Oct. 1996, at 33, 34.

17. *See* Green, *supra* note 14, at 116.

18. *See id.*

19. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (1995)).

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

bargaining power, and Congress enacted the FAA to counteract judicial hostility toward that form of arbitration.[21]

At the time of its passage, the FAA was viewed as a simple declaration of the new federal policy recognizing and enforcing agreements to arbitrate disputes among merchants.[22] Further, the FAA was not to "encroach upon the province of the individual States."[23] By 1996, however, the FAA was held to preempt state disclosure laws enacted to ensure that arbitration clauses contained in contracts be brought to the attention of all signatories.[24]

This Comment assumes that consumers, overall, benefit from these disclosure laws, whereas lenders and merchants find them cumbersome, due to the significant paperwork they must generate to remain in compliance. The Author argues that lenders have as many reasons to favor arbitration as consumers have to fear this method of resolving post-closing, consumer-lender disputes. Preemption of laws requiring heightened disclosure of arbitration clauses is good news for lenders but detrimental to the interests of consumers for reasons that are enumerated later in this Comment.[25]

Part II considers the effect of recent United States Supreme Court decisions on certain state disclosure laws, with primary focus on the Maine Plain Language Law[26] (Maine PLL). Part II begins by tracing the development of arbitration under the FAA and the Maine Uniform Arbitration Act[27] (Maine UAA). Next, several Supreme Court cases construing the FAA are outlined, with specific emphasis on the Court's recent decision in *Doctor's Associates, Inc. v. Casarotto*.[28] Part II concludes with the proposition that although *Casarotto* displaced some consumer protection laws, it did not impact the Maine PLL negatively.

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21. One commentary presents evidence that the FAA was an attempt "to devise a remedy entirely for commercial disputes." Brunet, *supra* note 13, at 117 (explaining Cohen & Dayton, *supra* note 16, at 281). The Supreme Court has "glossed over" the legislative history of the FAA "as it pertains to bargaining power." Green, *supra* note 14, at 116 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 42 (Stevens, J., dissenting)). The majority in recent Supreme Court cases has repeatedly failed to take account of this legislative intent. By doing so, it may have "put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer . . . on the other." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 43 (Stevens, J., dissenting).

22. *See* Cohen & Dayton, *supra* note 16, at 277.

23. *Id.*

24. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652 (1996) (invalidating MONT. CODE ANN. § 27-5-114(4) (1995), which provided that an arbitration clause would not be enforced unless notice of it was provided on the first page of the contract).

25. *See* discussion *infra* Part IV.

26. ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (West 1997). This law requires supervised lenders and lessors doing business in Maine to disclose contract terms to consumers in a straightforward manner, in "plain language."

27. ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (West 1980).

28. 116 S. Ct. 1652 (1996) (invalidating state laws that require heightened disclosure of arbitration clauses).

Part III demonstrates why the Maine PLL was not displaced by the Supreme Court's decision in *Casarotto*. This Author specifically advocates amending the Maine PLL to require financial institutions to warn consumers of the practical effect of signing predispute arbitration clauses and contracts.[29] Amending the Maine PLL would serve a dual purpose: first, it would be an effective way to regulate growing lender reliance on arbitration clauses without facing preemption under *Casarotto*; second, it would serve to preserve the substantial rights[30] of the populace without disturbing the considerable body of Maine law governing labor-related disputes.[31]

Part IV examines the reasons why heightened disclosure of arbitration clauses is desirable. Consumers are often disfavored under current arbitration proceedings because financial institutions have every incentive to impose agreements to arbitrate upon their customers without allowing for any negotiation.[32] This problem might be alleviated, and the playing field levelled, were the Maine Legislature to adopt the amendments to the Maine PLL proposed in this Comment.

Part V considers other potential means of protecting the interests of consumers who find themselves before an arbitrator. Most notably, this Author argues that arbitrators hearing disputes between consumers and lenders should be required to follow consumer protection law, which is not currently the practice. This Comment concludes with a brief

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29. Part III also suggests that amendments to the Maine UAA might be warranted. For example, courts might be empowered to stay arbitration upon a showing that the disclosure requirements of the newly amended Maine PLL were not met. *See* discussion *infra* Part III.B.

30. For example, the Maine Consumer Credit Regulation Office (MOCC) is concerned that consumers are unknowingly waiving important statutory rights including the right to contact that office in order to pursue complaints against lenders. *See* discussion *infra* Part IV.B. More important, by signing arbitration agreements, consumers are giving up the right to trial by jury and the right to redress for injuries. *See* ME. CONST. art. I, §§ 19-20. Meanwhile, where small amounts are in dispute, consumers are foregoing the right to litigate in small claims court, which is often quicker, less expensive, and more efficient than arbitration. *See* ME. R. SMALL CL. P. 3(d), 15 (setting claim limit at $3,000, and indicating that purpose of Small Claims Court Act was "to provide 'a simple, speedy and informal court procedure for the resolution of small claims'").

31. This Author does not contend either that arbitration conducted pursuant to collective bargaining agreements is inherently unfair, or that Maine courts have wrongly enforced those agreements; on the contrary, union members and employers are both "repeat players," so there is less likelihood that the arbitrator desiring future employment will favor one party over the other, especially when an ongoing relationship needs to be preserved. There is little need to disclose the terms of these agreements in as conspicuous a manner as is needed in the consumer context, because union representatives are often available to explain (and enforce) the terms of these agreements. Arbitrators resolving disputes that arise from transactions between major financial institutions and single borrowers, however, often encounter no need to preserve the relationship, because the lender is the only "repeat player" that will employ (or not employ) the arbitrator again in the future. *See* Brunet, *supra* note 13, at 91, 118-19.

32. Arbitrators have an interest in avoiding decisions adverse to the lenders that employ them on repeated occasions. Similarly, arbitrators have little incentive to favor consumers, who are only "one-shot" players in the process. *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995).

overview of potential responses by Maine courts,[33] as well as legislative solutions.

II. ARBITRATION IN THE UNITED STATES AND IN MAINE

A. The Role of the Federal Arbitration Act and the Maine Uniform Arbitration Act

After its passage by Congress in 1925, the FAA was reenacted and codified as Title 9 of the United States Code in 1947.[34] Maritime transactions, transactions "involving commerce," and contracts arising therefrom were made subject to the Act and were to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[35] The FAA further provides that the courts of the United States may order a stay of judicial proceedings upon a showing that "the issue involved in [the] suit or proceeding is referable to arbitration under [an arbitration] agreement . . . ."[36]

Julius Cohen, a leading member of the American Bar Association and the "initial drafter of the FAA,"[37] published his interpretation of the Act one month after its effective date.[38] Cohen pointed out that "[t]he primary purpose of the statute [was] to make enforceable in *Federal* courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."[39] As later argued by Justice O'Connor, the intent of Congress "was to create uniform law binding only in the federal courts."[40] Nonetheless, the Supreme Court, in a line of cases culminating in the 1995 decision in *Allied-Bruce Terminix Cos. v. Dobson,*[41] has held that the FAA preempts certain *state* laws drafted to

33. Maine courts may rely, for example, on the public policy exceptions articulated in both Supreme Court and Maine cases, and on the Maine Constitution. *See* ME. CONST. art. I, § 19 ("Right of redress for injuries").

34. Arbitration Act, ch. 213, §§ 1-15, 43 Stat. 883-86 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1994)). *See also* Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669 (reenacting and making positive law the 1925 Arbitration Act).

35. 9 U.S.C. § 2 (1994).

36. *Id.* § 3.

37. *See* Brunet, *supra* note 13, at 116. *See also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274 (1995) (noting that Cohen was "the drafter for the American Bar Association of much of the proposed bill's language").

38. *See* Brunet, *supra* note 13, at 116 (citing Cohen & Dayton, *supra* note 16, at 265).

39. Cohen & Dayton, *supra* note 16, at 277-78 (emphasis added).

40. Southland Corp. v. Keating, 465 U.S. 1, 35 (1984) (O'Connor, J., dissenting).

41. 513 U.S. 265 (1995). The Court discussed cases anticipating *Keating*, where the Court held that Congress could not possibly "have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Id.* at 271. Therefore, the Court in *Dobson* held that the "involving commerce" language of section 2 of the FAA "signal[led] an intent to exercise Congress's commerce power to the full." *Id.* at 276. Any state antiarbitration law or policy would now be preempted. *See id.* at 274.

protect consumers from "adhesive"[42] arbitration agreements.[43] The Court reasoned that it could not sanction any attempt by a state to "carv[e] out an important statutory niche in which [it] remains free to apply its antiarbitration law or policy."[44]

Dobson set the stage for the invalidation of state disclosure laws enacted to protect consumers from arbitration clauses hidden in fine print within the many pages of standardized contracts. One year later, the Supreme Court struck down a Montana statute[45] which provided that arbitration clauses would be invalidated unless the contract containing the clause indicated on the first page that it was subject to arbitration.[46] Because the disclosure requirement was "not applicable to contracts generally," the FAA was held to displace the Montana law, based on the reasoning that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[47]

States, meanwhile, have their own arbitration acts. Maine first adopted the Maine UAA in 1967.[48] Section 5927 reads as follows:

> 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 chapter also applies to arbitration agreements between employers and employees or between their respective representatives, unless otherwise provided in the agreement.[49]

The Maine UAA and the FAA are thus very similar. The operative language contained in both section 2 of the FAA and section 5927 of the Maine UAA is identical: each provides that predispute arbitration agreements shall be "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[50]

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42. "Adhesion contracts" have been defined as agreements offered on a "take-it-or-leave-it" basis, where there is no room for negotiation—the party who must adhere either signs the agreement or goes elsewhere. *See* Green, *supra* note 14, at 120 n.5.

43. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 272-73.

44. *Id.* at 273.

45. *See* MONT. CODE ANN. § 27-5-114(4) (1995), which provided: "Notice that a contract is subject to arbitration . . . 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."

46. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652, 1656 (1996).

47. *Id.* (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 280 (citations omitted)). As the Court points out, "[b]y enacting § 2 [of the FAA], . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

48. *See* P.L. 1967, ch. 430 (codified at ME. REV. STAT. ANN. tit. 14, §§ 5927-5948 (West 1980)).

49. ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980).

50. *Compare* 9 U.S.C. § 2 (1995) (providing for orders staying the judicial action or compelling arbitration) *with* ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980) (providing for orders either compelling or staying arbitration).

Whether under the FAA or the Maine UAA, courts decide at the onset of a dispute only the enforceability of an agreement to arbitrate.[51] Any contract "involving commerce," however, must be decided under the FAA, unless the parties expressly agree otherwise.[52]

Whether the FAA or the Maine UAA applies is not, therefore, a question without consequence to consumers. First, most consumer transactions arguably "involve commerce"[53] in some way, so disputes arising from the contract will be subject to the FAA and the federal common law of arbitration created by numerous Supreme Court cases.[54] Conversely, any dispute between the parties that does not fall within the reach of the FAA will be subject to the Maine UAA and the interpretation of Maine courts.[55] The rights of consumers, therefore, might depend upon whether federal or state law applies:

> The most obvious conflict between federal and state arbitration law arises in those states that still deem arbitration agreements unenforceable as a matter of public policy. Although nearly all states, now accept and promote arbitration in some or most contract disputes, three states still embrace the common law hostility toward arbitration and will enforce arbitration agreements only if the FAA applies.[56]

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51. *Compare* 9 U.S.C. §§ 3-4 (1995) (providing for orders staying the judicial action and compelling arbitration) *with* ME. REV. STAT. ANN. tit. 14, § 5928 (West 1980) (providing for orders either compelling or staying the arbitration). Although there are procedural differences, both the FAA and the Maine UAA provide for the judicial forum where the existence or making of the agreement is in dispute. The Maine UAA, however, enforces written contracts "to submit to arbitration any controversy thereafter arising between the parties," ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980), whereas the FAA applies to controversies "thereafter arising out of such contract or transaction." 9 U.S.C. § 2 (1995). Because the Maine UAA requires no nexus between the dispute and the original transaction, it is broader in scope than the FAA. Where the dispute arises out of the contract and the underlying transaction was one "involving commerce," the FAA would apply. *See id.* On the other hand, any dispute not "involving commerce," whether or not it arises out of the contract, is subject to the Maine Act, as long as the parties "have manifested in writing a contractual intent to be bound" by an agreement to submit any future controversy to arbitration. Nisbet v. Faunce, 432 A.2d 779, 782 (Me. 1981).

52. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984) (holding that the "involving commerce" language contained in section 2 of the FAA evidences Congress's intent that the FAA apply in both federal and state courts); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 278 (holding the FAA applicable, even where the parties did not contemplate interstate activity). Neither the Supreme Court nor the Maine Law Court, however, has specifically held the FAA to preempt any state arbitration act.

53. *See supra* note 51.

54. *See, e.g.*, Strickland, *supra* note 2, at 397 (discussing the "expanding federal common law of arbitration").

55. *See supra* text accompanying notes 51-53. Such controversies could include certain employer-employee disputes, which are specifically included in the Maine Act but not in the FAA. *See* ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980). Another potential controversy not specifically provided for in the FAA that could fall under the Maine UAA would be one between a bank and its customer based on an agreement that "any dispute hereafter arising between the parties" shall be heard by an arbitrator, and where the customer, injured on bank property, asserts that this kind of injury was not within the scope of the agreement.

56. Strickland, *supra* note 2, at 401 (footnotes omitted). The three states are Alabama, Mississippi, and Nebraska. *See* ALA. CODE § 8-1-41(3) (1993) (arbitration agreements cannot be

Although Maine is not one of those states, Maine courts considering the arbitrability of labor disputes under the Maine UAA have relied on a limited public policy exception, which applies only to government collective bargaining agreements.[57] Still, it might come to be invoked in determining the arbitrability of certain lender-consumer disputes.[58] Courts could justify the use of such an exception on grounds that the legislature did not enable lenders to "opt out" of consumer protection statutes.[59] In disputes involving commerce, however, the FAA would apply, as would the body of Supreme Court case law culminating in *Casarotto*. Because most consumer loan and lease transactions "involve commerce," they can easily be brought within the scope of the FAA. In most disputes arising from these transactions, state courts will therefore apply the FAA. For that reason, the primary focus of this Comment is on the FAA and applicable Supreme Court case law.

B. The Supreme Court's Interpretation of the Federal Arbitration Act

1. Distrust of Arbitration: Wilko v. Swan *(1953)*

Initially, the Supreme Court did not look favorably upon agreements to arbitrate entered into by securities investors. In *Wilko v. Swan*,[60] a securities customer alleged that, by relying on false representations of the selling brokerage firm, he was induced to purchase securities.[61] The defendants then moved to stay the trial pursuant to section 3 of the FAA.[62] The district court denied the stay,[63] but the Court of Appeals for the Second Circuit reversed, holding that the FAA "did not prohibit the

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specifically enforced); MISS. CODE ANN. § 11-15-101 (Supp. 1997) (only arbitration agreements involving specified construction projects will be enforced); *see also* State v. Nebraska Ass'n of Pub. Employees, 477 N.W.2d 577, 580 (Neb. 1991) (finding Nebraska's Uniform Arbitration Act unconstitutional to the extent that it requires enforcement of predispute arbitration agreements).

57. *See* discussion *infra* Part IV.D.

58. *See infra* notes 358-61 and accompanying text (discussing Article I, section 19 of the Maine Constitution). In basing a public policy exception on the Maine Constitution, courts would be relying on Maine organic law rather than the expanding scope of the "federal common law of arbitration." *See* Strickland, *supra* note 2, at 397. Concerns of federalism would justify such an approach.

59. *See* Budnitz, *supra* note 32,at 317.

60. 346 U.S. 427 (1953).

61. *See id.* at 428-29.

62. *See id.* at 429. Section 3 of the FAA 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 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1994).

63. *See* Wilko v. Swan, 346 U.S. at 430.

agreement to refer future controversies to arbitration."[64] The Supreme Court reversed the Second Circuit, holding that the anti-waiver provisions of the Securities and Exchange Act of 1933 (SEA) override any provision of the FAA that would otherwise compel a court to grant a stay of proceedings.[65]

In the past, courts in the United States were suspicious of arbitration. In certain respects, the Court in *Wilko v. Swan* continued this tradition of judicial hostility towards arbitration clauses by interpreting the SEA's protective provisions as requiring judicial direction in order to ensure their effectiveness.[66]

Today, the Supreme Court requires courts to avoid exactly this type of "suspicion" of the arbitral process.[67] Unable to reconcile *Wilko*'s mistrust of arbitration with subsequent decisions construing the FAA,[68] the Court found *Wilko*'s assumptions regarding arbitration to be invalid.[69] Continuing this line of reasoning in a subsequent case, the Court then came to overrule *Wilko* explicitly.[70]

2. *Preemption of State Law and Congress's "Expansive" Intent:* Southland Corp. v. Keating *(1983)*

Post-dispute arbitration agreements have created little controversy, whereas pre-dispute arbitration agreements have been more thoroughly scrutinized, especially within the areas of antitrust, employer discrimination, and in cases where parties have invoked federal statutory rights.[71] In the last ten years, however, this reluctance to enforce pre-dispute arbitration agreements has given way to a policy favoring enforcement.[72]

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64. *Id.*

65. *See id.* at 437-38; *see also id.* at 434-35. The Court viewed Congress's intent in passing section 14 of the SEA as an attempt to put sellers of securities and buyers of lesser bargaining power on an equal footing, and held that arbitration clauses are "stipulations" as reflected in the SEA that could not function so as to constitute a waiver of compliance with any "provision" of the Act. *See id.* The Court also held that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." *Id.* at 435; *see also* SEA § 14, 15 U.S.C. § 77n (1994).

66. *See* Wilko v. Swan, 346 U.S. at 437.

67. See, for example, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987), where the majority relied in part on Justice Frankfurter's dissent in *Wilko*, and rejected *Wilko*'s distrust of arbitration and the competence of arbitral tribunals.

68. *See id.*

69. *See id.* at 233. The Court also reasoned that, because the power of the Securities and Exchange Commission (SEC) had expanded significantly following the 1975 amendments to section 19 of the SEA, that agency could oversee arbitration proceedings involving securities transactions. *See id.*

70. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

71. *See* Wiegand, *supra* note 11, at 622.

72. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (holding that claims under the Sherman Act must be arbitrated where the arbitration agreement arises from an international transaction); Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. at 481, 484 (1989) (overruling *Wilko* after holding that the right to select a judicial forum is *not*, as previously determined, a "provision" within the meaning of the SEA that cannot

The Supreme Court in *Southland Corp. v. Keating*[73] determined that the FAA applies in both federal and state courts,[74] and thereby effectively foreclosed "the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[75]

Southland began as a class action brought on behalf of approximately 800 California franchisees of 7-Eleven stores.[76] The California Court of Appeal reversed the superior court's denial of a motion to compel arbitration, holding that claims under California's Franchise Investment Law[77] are arbitrable.[78] Reversing that decision, the California Supreme Court called for judicial consideration of the claims, and held that the California statute was not preempted by the FAA.[79] The United States Supreme Court reversed this decision, holding that the "involving commerce" clause of the FAA must be read as encompassing a reach as full as that of the Commerce Clause; the FAA was thus made applicable in both federal *and* state courts.[80] Because the provision for voiding the agreement was not based "upon such grounds as exist at law or in equity for the revocation of any contract,"[81] allowing that particular provision of the Franchise Investment Law to stand, the Court reasoned, "would frustrate congressional intent to place '[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs.'"[82]

Justice Stevens, concurring in part and dissenting in part, warned against the danger of "'encroach[ing] on the powers which Congressional policy, if not the Constitution, would reserve to the states.'"[83] Justice Stevens implied that the Court had read Congressional intent too expansively by "entirely . . . displac[ing] state authority in this field."[84] He emphasized the need to follow Congress's original intent, which was "'to make arbitration agreements as enforceable as other

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be waived); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (allowing the arbitration of an ADEA discrimination claim).

73. 465 U.S. 1 (1984).

74. *See id.* at 12.

75. *Id.* at 10, *quoted in* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting) (arguing that *Southland* was wrongly decided).

76. *See* Southland Corp. v. Keating, 465 U.S. at 4.

77. *See* CAL. CORP. CODE § 31512 (West 1977) (providing that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void").

78. *See* Southland Corp. v. Keating, 465 U.S. at 4-5.

79. *See id.*

80. *See id.* at 15 ("[S]ince the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction.") (citations omitted).

81. 9 U.S.C. § 2 (1994).

82. Southland Corp. v. Keating, 465 U.S. at 15-16 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

83. *Id.* at 19 (Stevens, J., concurring and dissenting) (quoting Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 386 (2d Cir. 1961) (Lumbard, C.J., concurring)).

84. *Id.* at 18 (Stevens, J., concurring and dissenting).

contracts, but not more so.'"[85] Justice Stevens then concluded that the California Supreme Court's decision not to enforce the arbitration agreement should be affirmed.[86]

In a strong dissent, Justice O'Connor argued that Congress intended the FAA to apply only in federal courts,[87] describing the legislative history of the FAA as unusually clear in this respect.[88] She viewed the FAA as a remedial statute, relating to procedure rather than substantive law[89] and, as such, not "encroach[ing] upon the province of the individual states."[90] Nevertheless, the Court had come to view the right to arbitration as substantive,[91] and Justice O'Connor did not take issue with this position. Rather, the numerous references in the legislative history to Congress's power to rely on its Article III control over federal-court jurisdiction constituted a clear indication that only a "flight of fancy [would] permit Congress to control proceedings in state courts."[92] Justice O'Connor cited the language of the FAA as proof that it was intended to apply only in federal courts,[93] then concluded that the FAA "should have no application whatsoever in state courts."[94] Instead, state courts should continue to be "permitted to apply their own reasonable procedures when enforcing federal rights."[95]

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85. *Id.* at 19 (Stevens, J., concurring and dissenting) (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).

86. *See id.* at 21 (Stevens, J., concurring and dissenting).

87. *See id.* at 23 (O'Connor, J., dissenting).

88. *See id.* at 25 (O'Connor, J., dissenting). *But see* Janet M. Grossnickle, Note, Allied-Bruce Terminix Cos. v. Dobson: *How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769, 773-74 (1995) (describing the legislative history as "murky"). Note that the majority in *Dobson* referred to Congress's "expansive intent," but offered no evidence that state law was intended to be preempted. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274-75 (1995). On the other hand, as Justice O'Connor pointed out in *Southland*, "the entire history contains only one ambiguity, and that appears in the single sentence of the House Report [upon which the majority bases its holding that the FAA was intended to apply also in state courts]." Southland Corp. v. Keating, 465 U.S. at 29 (O'Connor, J., dissenting). Justice O'Connor elaborated: "That ambiguity, however, is definitively resolved elsewhere in the same House Report, . . . and throughout the rest of the legislative history." *Id.* Justice O'Connor's interpretation also finds support in the literature of the period: Julius Cohen and Kenneth Dayton's article describes the purposes of the FAA as anything but "murky." *See* Cohen & Dayton, *supra* note 16.

89. *See* Southland Corp. v. Keating, 465 U.S. at 25 (O'Connor, J., dissenting).

90. *See id.* at 27 n.13 (O'Connor, J., dissenting) (quoting Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155 (1925)).

91. *See id.* at 26 (O'Connor, J., dissenting) (citing Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)).

92. *Id.* at 28 (O'Connor, J., dissenting).

93. *See id.* at 29 (O'Connor, J., dissenting) (discussing the implementing provisions of sections 3 and 4 of the FAA and their explicit references to federal courts).

94. *Id.* at 31 (O'Connor, J., dissenting).

95. *Id.* (O'Connor, J., dissenting).

In spite of Justice O'Connor's concerns, the Court in *Perry v. Thomas*[96] reaffirmed *Southland*'s holding that the FAA withdrew the power of the states to require the parties to arbitration agreements to resolve their disputes before a judicial forum.[97] The Court then held on the facts that the FAA preempted a California labor law that would have allowed a complainant to maintain a judicial action for wages,[98] "despite the existence of an agreement to arbitrate."[99] Under the Supremacy Clause, the state statute had to "give way."[100]

In his dissent, Justice Stevens echoed Justice O'Connor's concerns about the preemption problem:

> Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had preempted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a preemptive scope that Congress certainly did not intend.[101]

3. *The Federal Arbitration Act Hits Home:* Allied-Bruce Terminix Cos. v. Dobson *(1995)*

In *Dobson*, the Supreme Court reaffirmed *Southland* and concluded that any transaction *involving* interstate commerce would be subject to the FAA because the FAA was intended to reach "to the limits of Congress' Commerce Clause power."[102] The plaintiff homeowners' contention that they had not contemplated substantial interstate activity[103] by signing a termite prevention contract was therefore rendered moot. The United States Supreme Court reversed the Alabama high court's determination that the FAA did not apply to the contract in dispute.[104] Consequently, the FAA was imposed upon the Alabama court despite its finding that the underlying transaction was "primarily local" in character.[105] Because the termite control company shipped treatment and repair material from outside the state,[106] the requirements of the Commerce Clause were satisfied, and the FAA was held to apply. The new homeowners were thus denied redress in a judicial forum for the in-

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96. 482 U.S. 483 (1987).

97. *See id.* at 489 (quoting Southland v. Keating, 465 U.S. 1, 10 (1984)).

98. *See id.*

99. *Id.* at 486.

100. *See id.* at 491.

101. *Id.* at 493 (Stevens, J., dissenting).

102. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995); *see also* 9 U.S.C. § 2 (1994) (stating that arbitration provisions are enforceable if they are contained in "a contract evidencing a transaction involving commerce").

103. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 269.

104. *See id.* at 282.

105. *See id.* at 269.

106. *See id.* at 282.

state termite infestation that the company had recently guaranteed to treat and repair.[107]

Even more significantly, the Court noted that the application of the FAA was *not* limited by any "statutory niche in which a State remains free to apply its antiarbitration law or policy."[108] As one commentator concluded, "the [*Dobson*] Court has eviscerated numerous state statutes, including statutes designed to protect consumers, and expanded the FAA to cover transactions for which it was never designed."[109] In spite of such arguments, the Court declined to overrule *Southland*, even though this had been requested by twenty state attorneys general.[110]

In a concurring opinion, Justice O'Connor objected: "The reading of § 2 adopted [by the Court would] displace many state statutes carefully calibrated to protect consumers . . . ."[111] Justice O'Connor adhered to the belief that Congress never intended the FAA to apply in state courts.[112] Nonetheless, because more than a decade had passed since *Southland*, subsequent cases had built upon its reasoning, and parties had contracted in reliance on the Court's interpretation of the FAA, Justice O'Connor acquiesced in the Court's judgment.[113] In her view, the task of preserving state autonomy in state courts was thus left to Congress.[114]

In a dissenting opinion, Justice Thomas, joined by Justice Scalia, concluded that both holdings of *Southland* were "wrong."[115] Accordingly, the dissent did not reach the statutory construction issue.[116] Further, Justice Thomas felt that arbitration clauses were simply "a species of forum-selection clause" and were understood by "lawyers in 1925" as procedural in nature.[117] In response to Justice O'Connor's stare decisis concerns, Justice Thomas found "no reason to think that the costs of overruling *Southland* [were] unreasonably high."[118] He believed that Justice O'Connor's stare decisis concerns were without merit; because of the many similarities between state arbitration laws and the FAA, many people would "simply comply with their arbitration agreement" in order to cut costs.[119] Because Congress in 1925 had intended to preserve

107. *See id.* at 268.

108. *Id.* at 272-73.

109. Grossnickle, *supra* note 88, at 769.

110. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 272.

111. *Id.* at 282 (O'Connor, J., concurring).

112. *See id.* at 282 (O'Connor, J., concurring).

113. *See id.* at 284 (O'Connor, J., concurring).

114. *See id.* (O'Connor, J., concurring).

115. *See id.* at 286 (Thomas, J., dissenting) (referring to *Southland*'s conclusion that (1) the FAA applies in state and federal courts; and (2) withdraws the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to arbitrate).

116. *See id.* at 285 (Thomas, J., dissenting).

117. *Id.* at 289 (Thomas, J., dissenting).

118. *Id.* at 295 (Thomas, J., dissenting).

119. *Id.* (Thomas, J., dissenting). Justice Thomas went on to point out that "[o]nly Alabama, Mississippi, and Nebraska still hold all executory arbitration agreements to be unenforceable, though some other States refuse to enforce particular classes of such agreements." *Id.* (citing Strick-

state laws rendering predispute arbitration agreements unenforceable, Justice Thomas believed that the Court had no basis for "displac[ing] an enormous body of state law."[120]

4. *Disclosure Law Yields to the Commerce Clause:* Doctor's Associates, Inc. v. Casarotto *(1996)*

Justice O'Connor warned in *Dobson* that the Court's holding would result in the invalidation of "many state statutes carefully calibrated to protect consumers," such as disclosure laws enacted to ensure the consensual formation of agreements to arbitrate.[121] This, in fact, occurred one year later in *Casarotto*, where the Court again expanded the reach of the FAA at the expense of state disclosure laws.

At issue in *Casarotto* was a Montana disclosure statute applicable to arbitration agreements.[122] Under the statute, "'[n]otice that a contract is subject to arbitration'" had to be "'typed in underlined capital letters on the first page of the contract.'"[123] Failure to comply could result in the dispute being declared "'not subject to arbitration.'"[124]

Justice Ginsburg invoked *Southland*'s withdrawal of the "power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,"[125] and reasoned that unless such "special notice requirement[s were] applicable to contracts generally," the statutes creating them would be displaced by the FAA.[126] Thus, the Court held that state courts could no longer "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[127]

This holding erodes state power to ensure informed consent via countless disclosure statutes not "applicable to contracts generally" but rather to certain contract provisions.[128] The Supreme Court rejected

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land, *supra* note 2, at 401-03 n.93). Finally, some cases would be litigated in federal court, where the FAA would apply. *See id.*

120. *Id.* at 292 (Thomas, J., dissenting).

121. *Id.* at 282 (O'Connor, J., concurring) (citing S.C. CODE ANN. § 15-48-10(a) (Supp. 1993) and explaining that this statute "requir[ed] that notice of arbitration provision be prominently placed on first page of contract") (other citations omitted)).

122. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652, 1654 (1996).

123. *Id.* (quoting MONT. CODE ANN. § 27-5-114(4) (1995)).

124. *Id.* at 1655 (quoting Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994)). This language is also contained in the Montana statute. *See* MONT. CODE ANN. § 27-5-114(4) (1995).

125. Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1655 (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

126. *Id.* at 1656.

127. *Id.* (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 279-81 (1996)).

128. *See* Brief Amici Curiae of the American Association of Retired Persons and the National Association of Consumer Advocates in Support of Respondent at *18-*20, Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652 (1996) (No. 95-559), *available in* 1996 WL 115782 [hereinafter *Casarotto Amici Brief*] (citing California's requirement of bold type "to draw attention to a liquidated damages provision in a real property purchase contract," and similar disclosure statutes in Missouri, Texas, and Montana).

arguments that because disclosure statutes commonly apply to many contract provisions and not simply to arbitration clauses they should be construed as defenses "applicable to contracts generally," which the FAA identifies as grounds for invalidating arbitration agreements.[129] The Court left open, however, the question as to whether arbitration clauses could be invalidated "under general, informed consent principles" established in state disclosure statutes regulating standardized contracts but not limited to arbitration agreements.[130]

C. Casarotto*'s Effect on Disclosure Laws*

The disclosure law preempted under *Casarotto* was not by any means the only law "applicable to contracts" that also contained provisions for heightened disclosure of contract terms. For example, another Montana disclosure law applicable to retail installment contracts ensures that consumers are informed of their prepayment rights and warned not to sign the contract without reading it.[131] This warning must appear in at least ten-point type, and the entire contract may be printed in no smaller than eight-point type.[132] Despite the existence of these laws applicable to other classes of contracts, Montana's disclosure statute calling for the voiding of non-conforming arbitration contracts was held to be preempted by the FAA.[133]

Other states have either excluded certain transactions, such as leases, sales, loan contracts, or residential real estate contracts, from their arbitration statutes or required separate signing or initialling of arbitration clauses.[134] As long as any such transaction lies within the

129. *See id.* at *18 (arguing that disclosure laws are designed to ensure informed consent to unanticipated terms of standardized adhesion agreements).

130. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656 n.3.

131. *See* MONT. CODE ANN. § 31-1-231(2) (1995).

132. *See id.*; *Casarotto Amici Brief, supra* note 128, at *19.

133. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656. Laws in other states providing similar remedies would also be preempted, including the Missouri disclosure provision that was incorporated into its Uniform Arbitration Act, because it is applicable only to arbitration clauses and not to "contracts generally." *See* Budnitz, *supra* note 32, at 291. An Oklahoma provision, however, may lie beyond the reach of FAA preemption because a form of consumer protection applicable to all contracts is built into the Oklahoma Constitution: "Any provision of a contract, express or implied, made by any person by which any of the benefits of this Constitution is sought to be waived, shall be null and void." OKLA. CONST. art. XXIII, § 8. This clause, "unique in American organic law," was relied upon by an Oklahoma court in holding that any contract provision calling for submission of future controversies to arbitration would constitute a waiver, forbidden under the state constitution, of the right to jury trial. *See* Peter G. Pierce, III, *The Law's Excellent Banking Adventure—Recent Developments in the Bank-Customer Relation, Trends in Lender Liability and the Impact of New Articles 3 and 4*, 47 CONSUMER FIN. L.Q. REP. 309, 321 n.193 (1993) (citing Cannon v. Lane, 867 P.2d 1235, 1239 (Okla. 1993)); *see also* Wiegand, *supra* note 11, at 628-34 (discussing in the context of arbitration the Oklahoma constitutional provision prohibiting contractual jury waivers).

134. *See* Jonathan E. Breckenridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN.

reach of the Commerce Clause, the FAA may effectively preempt these efforts to insulate certain consumer transactions from the reach of arbitration, as the Supreme Court has repeatedly held.[135]

Many federal statutes also call for the disclosure of significant contract terms.[136] Typical consumer claims brought pursuant to these statutes are centered on specific documents, access to which is impeded by most arbitration rules.[137] It may, therefore, be "inappropriate for this type of claim to be decided by arbitration."[138] Still, the Supreme Court has in recent years enforced arbitration of claims brought under these statutes where the disputes arose from a transaction for which arbitration had been contractually prescribed.[139] Again, inasmuch as these statutes are applicable to arbitration contracts *specifically*, and not to "contracts generally," they would be displaced by the FAA under *Casarotto*.

One question arising out of *Casarotto* is whether state plain language laws will be displaced by the FAA. Certainly, any statute providing for the invalidation of arbitration clauses not written in plain language would be subject to attack.[140] Unless the statute renders *all* contracts not written in plain language unenforceable, the FAA would control.[141] To the extent that these laws cover only *consumer* contracts and render any *consumer* arbitration contract unenforceable, they may not survive an

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SURV. AM. L. 925, 959-60. States with such provisions include Indiana, Texas, Montana, and Georgia. *See id.*

135. *See* Southland Corp. v. Keating, 465 U.S. 1 (1983); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652 (1996); *see also* discussion *supra* Part II.A (discussing similarities between the FAA and the Maine UAA).

136. Examples include: Truth in Lending Act, 15 U.S.C. §§ 1601-1665(b) (1994); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1994); Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j (1994); and Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r (1994). These statutes are cited in Budnitz, *supra* note 32, at 313.

137. *See* Budnitz, *supra* note 32, at 314. Discovery is extremely limited in arbitration. Usually, consumers may rely only on the use of a subpoena *duces tecum*, which makes the process ineffective because consumers are often not able to identify all the documents needed at the outset of the dispute. *See id.*

138. *Id.*

139. *See* Southland Corp. v. Keating, 465 U.S. at 16; Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656.

140. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656. Such requirements would "singl[e] out arbitration provisions for suspect status," contrary to *Casarotto*'s mandate. *Id.*

141. For a criticism of that approach, see Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 108 (1995). Although New York's 1978 mandate "that all consumer contracts be written in plain English" has resulted in the achievement of "many of its major objectives," critics of similar laws argue that the attempt to streamline contracts requires drafters to eliminate certain contingencies, thereby "increasing the risk of liability for the parties." *Id.* at 105, 108 (citing Albert J. Millus, *Plain Language Laws: Are They Working?*, 16 UCC L.J. 147, 152-53 (1983)). Such criticism is not without merit, for, "[e]ven when a contract is streamlined and simplified, the resulting document may be even more complex than the original." *Id.* at 108. For example, "[m]erely saying 'holder in due course' does not begin to reduce the vast complexity of that law. Thus, 'clarity does not automatically follow verbal brevity.'" *Id.* at 107 (quoting Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain Nonsense?*, 78 LAW LIBR. J. 683, 683 (1986)).

attack based on *Casarotto*'s interpretation of the FAA requirement that the courts invalidate arbitration agreements only by allowing defenses "applicable to contracts generally."[142]

The Maine PLL does not provide for the invalidation of arbitration clauses.[143] Rather, the Maine law, which applies to consumer loan and lease agreements, provides for administrative disciplinary action, injunctive relief, and civil penalties.[144] Should an arbitration clause contained in a consumer loan or lease agreement violate the statute, action could be brought by the Attorney General and the statute would not be preempted. In that respect, the Maine PLL remains unaffected by *Casarotto*.[145]

States can also "delegate to a government agency the task of issuing format guidelines. Examples of appropriate agencies [include] . . . departments of consumer affairs and consumer protection divisions of offices of the Attorney General . . . ."[146] In Maine, the Superintendent of the Bureau of Consumer Credit Protection administers consumer credit laws, including the Maine PLL.[147] Arbitration clauses are subsumed under the broad language of that law because they constitute "writing[s] . . . substantially prepared in advance of a consumer loan or consumer lease and which a supervised lender or lessor furnishes to a consumer for the consumer to sign in connection with that loan or lease."[148] The operative part of the statute sets no guidelines for arbitration clauses, however, so amendments might be warranted to make it explicit that arbitration clauses are included under the Maine PLL.[149]

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142. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656. One provision of Maine law that might be affected by *Casarotto's* reasoning is the uninsured motorist provision of the Maine UAA. *See* ME. REV. STAT. ANN. tit. 14, § 5948 (1964) ("This chapter shall not apply to any provision contained in a policy of automobile insurance for arbitration of a claim under the uninsured motorist coverage."). Maine courts could not construe this statute to invalidate such a clause, but rather, would be obliged to apply the FAA and enforce the clause under *Casarotto*. Perhaps, however, courts might invoke a public policy exception. *See* discussion *supra* notes 57-59 and accompanying text; *infra* notes 352-61 and accompanying text.

143. *See* ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (West 1997). *See also* Friman, *supra* note 141, at 106 (describing similar laws in other states).

144. Section 1125 of the Maine PLL reads: "A supervised lender's or lessor's failure to comply with the requirements of section 1124 shall constitute a violation of Title 9-A which shall be enforceable under Title 9-A, section 6-108." ME. REV. STAT. ANN. tit. 10, § 1125 (West 1997). The latter provision provides for an administrative order to cease and desist from engaging in violations of section 6-108 of the Maine Consumer Credit Code. *See* ME. REV. STAT. ANN. tit. 9-A, §§ 1-101 to 11-121 (West 1997). The administrator may, through the Attorney General, bring a civil action seeking an injunction restraining persons from violating the Act. *See id.* § 6-110.

145. *But see* discussion *infra* Part III.A (arguing that revisions applicable specifically to arbitration clauses may be possible).

146. Budnitz, *supra* note 32, at 333.

147. *See* ME. REV. STAT. ANN. tit. 9-A, §§ 6-103, 6-104 (West 1997) (defining "administrator" and "administrator's powers"); *see also* ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (West 1997) (Plain Language Law).

148. ME. REV. STAT. ANN. tit. 10, § 1122(1) (West 1997).

149. Of course arbitration and collective bargaining agreements would be unaffected. The PLL covers only loan and lease agreements entered into between supervised lenders or lessors and does not apply to transactions exceeding $100,000. *See* ME. REV. STAT. ANN. tit. 10, § 1123 (West 1997).

III. THE MAINE PLAIN LANGUAGE LAW AND THE MAINE UNIFORM ARBITRATION ACT POST-*CASAROTTO*

A. Amending the Plain Language Law

Statutes such as those preempted by *Casarotto* are designed to ensure the consensual formation of arbitration agreements. Contracts are premised on mutual consent.[150] Nonetheless, the Supreme Court in *Casarotto* reversed the Montana Supreme Court and invalidated the Montana disclosure statute despite arguments that "[a] decision affirming the Montana Supreme Court [would] further the bedrock principle that enforceable contracts require the knowing, voluntary consent of the parties."[151] Still, the Supreme Court was adhering to the federal policy favoring arbitration, and the Petitioners were not unsophisticated or uneducated consumers.

The Maine PLL, insofar as it does not "single out" arbitration agreements for special treatment, seems in fact to be unaffected by *Casarotto*.[152] The Maine PLL, unlike the Montana statute displaced by *Casarotto*, does not condition the enforceability of agreements to arbitrate on statutory compliance; rather, it provides for administrative enforcement orders and civil actions for injunction brought by the Attorney General.[153] Although the Maine PLL does not apply to all "contracts generally," it does apply to all consumer loan agreements and

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150. *See, e.g.*, Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CAL. L. REV. 1123, 1124 (1986) (discussing the necessity of parties freely consenting "to undertake duties to each other," but noting that the historical debate whether to apply an objective or subjective standard has been largely resolved in favor of objective manifestations); *see also* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1459 (1991) (advocating reliance by courts on the nineteenth century "consent-based" approach when analyzing the formation of arbitration contracts); *cf.* Lea Brilmayer, *Consent, Contract, & Territory*, William B. Lockhart Lecture (Mar. 30, 1989), *in* 74 MINN. L. REV. 1, 9 (1989) ("The application of a legal rule is necessary to find an effective expression of consent . . . ."). Professor Brilmayer argues that courts, when deciding where to draw the line between enforceable and unenforceable adhesive contracts must rely on external legal standards, and need legal rules in order to infer consent. *See id.* at 25, 27. Seen in this light, consent-based arguments are "sometimes misleading and often superfluous." *Id.* at 35. Under the law of contracts, however, consent is a prerequisite to contract formation, whether the subjective or objective standard is applied; as Professor Brilmayer acknowledges, "silence usually does not constitute consent." *Id.* at 8 (citing 1 A. CORBIN, CONTRACTS § 72, at 304, § 73, at 310 (1963)).

151. *Casarotto Amici Brief*, *supra* note 128, at *3.

152. *See* discussion *supra* Part II.C; *see also* Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652, 1656 (1996) (stating that where state law "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally," such law will be displaced by the FAA).

153. *See* ME. REV. STAT. ANN. tit. 10, § 1125 (West 1997); ME. REV. STAT. ANN. tit. 9-A, § 6-108 (West 1997) (stipulating that the administrator may, for example, order party in violation to cease and desist, take corrective action, and, through the Attorney General, seek judicial enforcement of the order or injunction in superior court).

leases within the statutory definition.[154] Arguably, therefore, the PLL would not be preempted by the FAA under *Casarotto*, insofar as it does not "singl[e] out arbitration provisions for suspect status,"[155] but rather applies to all contracts of that class.[156]

Although the Maine PLL may be considered a general disclosure statute, it contains none of the conspicuous notice requirements at issue in *Casarotto*. Nor does it refer specifically to arbitration agreements, but its general language is certainly broad enough to include arbitration agreements formed in connection with covered loans.[157] Still, the statutory definition of "agreement" could be amended by adding the following italicized sentence:

> "Agreement" means any writing which is substantially prepared in advance of a consumer loan or a consumer lease and which a supervised lender or lessor furnishes to the consumer for the consumer to sign in connection with that loan or lease. *Without limiting the generality of the foregoing, 'writing' shall be construed to include any agreement to submit future disputes to arbitration or mediation.*[158]

Such an amendment would make explicit the legislature's intent to include predispute arbitration agreements within the statutory framework, without singling them out for suspect treatment.

The Maine PLL would also benefit from an amendment meant to ensure the consensual formation of arbitration contracts formed in connection with consumer loan and lease agreements. Currently, although loan and lease agreements must be written in a clear and coherent manner using words with common and everyday meanings, they need only be "[a]ppropriately divided and captioned by [their] various sections."[159] Sections pertaining to arbitration, therefore, can easily be buried among a myriad of other provisions. Where rights as fundamental as the right to redress in court are being waived, public policy dictates more explicit plain language requirements in order to ensure knowing assent to the contract terms.

Therefore, the Maine PLL could also be amended to require notice in large, bold type if the agreement contains provisions constituting

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154. *See* ME. REV. STAT. ANN. tit. 10, § 1122(1) (West 1997). Section 1122 defines "agreement" to include writings furnished by supervised lenders or lessors in connection with a loan or lease. *See id.* "Consumer loan" is a loan made by a supervised lender for personal, family, or household purposes, and includes loans made pursuant to credit cards. *See id.* § 1122(4); *see also* ME. REV. STAT. ANN. tit. 9-A, § 1-301(39) (West 1997) (defining "supervised lender" as any "person authorized to make or take assignments of supervised loans, either under a license issued by the Administrator (section 2-301), or as a supervised financial organization (section 1-301, subsection 38)").

155. Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656.

156. *See* ME. REV. STAT. ANN. tit. 10, § 1122 (West 1997).

157. *See id.* § 1122(1). An arbitration agreement would qualify as a "writing" furnished to consumers in connection with loans or leases.

158. *Cf. id.*

159. *Id.*

possible waivers of Maine constitutional rights, including but not limited to Article I, section 20 right to trial by jury, and Article I, section 19 right of redress for injuries.[160] Adding such a provision to the Maine PLL would serve two purposes. First, it would help ensure informed consent while also avoiding arguments that the law singles out arbitration agreements for suspect status; on the contrary, the provision would apply to many other contract provisions, such as waivers of class actions and punitive or treble damage awards, and would be applicable to all contracts within the reach of the current Plain Language Law.[161]

Second, providing for arbitration agreements under the existing statute rather than in a separate title would effectively utilize the existing administrative structure created pursuant to the Maine Consumer Credit Code.[162] The State would be relying on the Tenth Amendment and its police power to protect the welfare of its citizens.[163] More important, the amended law would withstand challenges based on either *Dobson* or *Casarotto* insofar as current administrative remedies would be relied upon for enforcement rather than any equitable remedy providing for the invalidation of agreements formed in violation of the statute.[164] The Attorney General would be exercising powers of enforcement similar to those contained in the Maine Consumer Credit Code,[165] the Maine Unfair Trade Practices Act,[166] and the Federal Home Ownership and Equity Protection Act of 1994.[167]

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160. *See* ME. CONST., art. I, §§ 19-20.

161. At the same time, the proposed changes would leave unaffected the arbitrability of disputes arising from collective bargaining, construction contracts, and post-dispute arbitration agreements. This has long been a concern of the Maine legislature. In fact, the Maine UAA was originally made applicable only to "construction contracts and collective bargaining agreements." P.L. 1967, ch. 430, *amended by* P.L. 1969, ch. 287, § 1; P.L. 1971, ch. 544, § 46.

162. *See* ME. REV. STAT. ANN. tit. 10, § 1125 (West 1997); ME. REV. STAT. ANN. tit. 9-A, § 6-108 (West 1997). Similarly, provision could be made for the imposition of sanctions by the Administrator or the Attorney General against lenders who incorporate distant forum clauses with arbitration clauses. This would alleviate consumer hardship, especially where the claim is minimal and the forum is considered "seriously inconvenient." *See generally* Stempel, *supra* note 150, at 1410-11 (discussing several federal cases where consumers successfully argued in favor of invalidating arbitration agreements that were formed in conjunction with distant forum clauses by portraying the seriously inconvenient forum as a form of substantive unconscionability).

163. *See* U.S. CONST. amend. X.

164. Note that the Maine PLL does not provide for any private cause of action. *See* ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (West 1997).

165. ME. REV. STAT. ANN. tit. 9-A, §§ 6-101 to -204 (West 1997).

166. ME. REV. STAT. ANN. tit. 5, §§ 205-A to 214 (West 1980).

167. 15 U.S.C. § 1604(e) (1994). *See* Gary Klein, *Preventing Home Equity Lending Fraud: Special Truth in Lending Protections Enacted*, 7 LOY. CONSUMER L. REP. 126, 136 (1995) (indicating that state attorneys general are empowered to bring actions to enforce the new amendments).

These statutes also allow for private causes of action.[168] When an arbitration agreement is signed in connection with a loan, however, these private actions will be argued in front of an arbitrator, absent a showing that one of the parties did not intend the dispute to be decided by arbitration.[169] To get to court, a plaintiff would need to overcome the "strong policy favoring arbitration" by showing that the claim, on its face, is not governed by the arbitration agreement.[170] Note that the court and not the arbitrator would decide the question of substantive arbitrability.[171]

The PLL could also be amended to provide for similar private causes of action by aggrieved consumers attempting to invalidate the arbitration agreement by showing that provisions of the PLL were violated. Under the Law Court's construction of the Maine UAA, however, such a showing might not survive a motion for summary judgment.[172] In cases where the language is unclear or ambiguous, however, courts could conclude that no arbitration agreement was formed and invalidate the agreement. The proposed amendments to the Maine PLL would aid courts in making such a determination, but for private causes of action under the PLL to be heard in court, the Maine UAA might require modification.[173]

B. Amending the Maine Uniform Arbitration Act

The Maine UAA might also be amended to allow courts to stay consumer arbitration proceedings upon a showing that there was no agreement to arbitrate meeting the requirements of the amended PLL. Conversely, a showing by the adverse party that the statutory disclosures were made would constitute prima facie evidence that an arbitration

168. *See* 15 U.S.C. § 1640(a) (1994) (litigant can recover actual and statutory damages, attorney's fees, and costs); ME. REV. STAT. ANN. tit. 9-A, §§ 5-201 to -202 (West 1997) (aggrieved consumer may recover actual damages and attorney fees); ME. REV. STAT. ANN. tit. 5, § 213 (West 1997) (provides for a private cause of action).

169. *See* Westbrook Sch. Comm. v. Westbrook Teachers Ass'n, 404 A.2d 204, 207-08 (Me. 1979).

170. *See id.* at 208.

171. *See id.* at 207. *But see* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (stating that the question of arbitrability is to be heard by the arbitrator if the agreement so provides). In any event, the Maine PLL could be amended to provide for action by the Attorney General on behalf of individual consumers aggrieved by lenders who persistently violate these statutes by ignoring the mandates issued from prior state enforcement actions.

172. *See* Westbrook Sch. Comm. v. Westbrook Teachers Ass'n, 404 A.2d at 207-08 (strictly construing sections 5928 and 5938 of the Maine UAA).

173. For example, the Maine PLL could stipulate that consumers may bring a private action in the courts to invalidate unclear or grossly ambiguous agreements to arbitrate. This would not contradict the Maine UAA, which provides that "the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." ME. REV. STAT. ANN. tit. 14, § 5928(2) (West 1997). Creating a private cause of action under the Maine PLL would survive preemption because all covered contracts, not simply arbitration agreements, would be included. *See* discussion *infra* Part III.B.

agreement existed, in which case the court would be obliged to compel arbitration.[174] In this way, consumers bringing actions against supervised lenders under the PLL and the Maine UAA would not be forced to sacrifice the right to trial by jury and redress for injuries guaranteed by the Maine Constitution,[175] unless a waiver of those substantial rights had been secured in advance. The proposed amendments would ensure the knowing and consensual execution of such waivers.

The FAA applies to disputes involving commerce, so actions brought under the Maine PLL as amended would need to survive preemption arguments based on *Casarotto*. The amendments should therefore be broadly drafted to invoke the substantial rights of consumers under the Maine Constitution and to apply to an entire class of contracts. Admittedly, providing for private causes of action could weaken the effect of the law by exposing it to the invalidation prong of *Casarotto*. Preemption arguments might be avoided, however, by invoking the Maine Constitution as suggested. The Supreme Court would then need to invoke the Commerce Clause in order to trump Maine organic law, but concerns of federalism might caution against that approach.

IV. WHY CHANGE IS NEEDED: THE PROS AND CONS OF RESOLVING CONSUMER-LENDER DISPUTES THROUGH ARBITRATION

A. The Growth of Consumer Arbitration: How Consumers Are Affected

As shown above, arbitration initially served the purpose of providing expert and timely adjudication of disputes that arose between merchants of presumed equal bargaining power.[176] Since the early part of this century, arbitration has expanded its reach to embrace disputes between securities investors and sellers. Many securities investors may be more sophisticated than average consumers who lack the resources to invest. Still, investors have been called "'novices' or rookies in the dispute resolution" process.[177] Moreover, a growing number of consumers have

174. *See generally* ME. REV. STAT. ANN. tit. 14, § 5928 (West 1980). This statute provides:

> On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

Id. This could be amended without difficulty by referencing the amended Maine PLL and specifying that violation or compliance therewith would be prima facie evidence of the non-existence or existence of covered consumer loan and lease agreements.

175. ME. CONST. art. I, §§ 19-20.

176. *See* discussion *supra* Part I.

177. Brunet, *supra* note 13, at 104 (quoting Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974)).

begun investing in securities.[178] A recent survey conducted by the Securities and Exchange Commission (SEC) shows that "96% of all margin accounts were covered by arbitration agreements as were 95% of all options accounts and 39% of all cash accounts."[179] This widespread reliance on arbitration by the securities industry has not, however, resulted in dispute resolutions that are always fair to the consumer.[180]

Arbitration of disputes between investors and securities dealers has been shown to disfavor the consumer. Investors, unlike industry litigants who are "repeat players" in the arbitral process, often have little or no access to information about the arbitrator assigned to hear the dispute. Although the Code of Arbitration Procedure of the National Association of Securities Dealers (NASD) allows "disqualification of an arbitrator 'for cause,' and . . . the right to a single peremptory challenge,"[181] the NASD does not require a written record that reflects the arbitrator's reasoning and analysis; the consumer's peremptory challenge thus becomes meaningless.[182] Lacking prior exposure to particular arbitrators, the consumer is handicapped: the NASD writes the rules and chooses the arbitrators.[183] Finally, the lack of knowledge of an arbitrator's past decisions places consumers at an extreme disadvantage to industry representatives, who have access to such information because they are directly involved in the 6000 reports written annually.[184]

Although securities investors may arguably be at a disadvantage in terms of bargaining power as compared with merchants, they do have the

178. *See, e.g., Concerning the Commission's Appropriations Request for Fiscal Year 1998*, 105th Cong. (1997) (statement of Arthur Leavitt, Chairman, U.S. SEC), *available in* 1997 WL 8220218 ("Today, one out of three American households invests in mutual funds. The number of first-time investors grows daily, and will accelerate if Congress acts to privatize a portion of the Social Security program.").

179. Brafford, *supra* note 4, at 333 n.10 (citing C. EDWARD FLETCHER, ARBITRATING SECURITIES DISPUTES 176 (1990)). Although Brafford explains that consumers seeking to invalidate arbitration agreements must show that they would be denied a fair hearing in arbitration, *id.* at 350, she later concedes that "the sometimes competing values of freedom of contract and fairness of enforcing arbitration clauses as drawn by the parties will have to be balanced against one other [sic], and a compromise will have to be made if Congress determines that businesses are abusing arbitration clauses." *Id.* at 361.

180. According to a telephone survey of 402 American Bar Association members conducted in April 1996 by Research USA with a margin of error of ± 5%, "73% of defense lawyers and 70% of plaintiff's lawyers worry about biases or qualifications of arbitrators, mediators or other neutrals." Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 58. Their worries are not unfounded; although the "secrecy" of ADR proceedings has resulted in a lack of meaningful statistics, arbitration of consumer disputes has been seen as inherently unfair. *See infra* notes 250-54 and accompanying text.

181. Norman Brand, *Unbiased Arbitration? It Depends On Who Is Making the Rules*, LOS ANGELES DAILY J., Aug. 5, 1994, at 2.

182. *See id.* Further, the names of arbitrators are excluded from the written record and "[a]ll you can tell is who won and who lost." *Id.*

183. *See id.*

184. *See id.*

added protection provided by the SEC's oversight authority.[185] Consumers and homeowners signing loan agreements lack this administrative umbrella. Nonetheless, a growing number of financial institutions are incorporating arbitration clauses into their consumer loan agreements.

In recent years, major lenders have begun utilizing arbitration clauses in consumer credit card agreements. Many consumers, however, are not aware of either the clauses themselves or the fact that they entail a waiver of the right to litigate any claims before a judge or jury. In the past, states have enacted consumer protection laws to help combat the problem of consumer ignorance associated with arbitration clauses in consumer credit agreements by requiring lenders to disclose these clauses adequately to ensure informed consumer consent.[186] These laws were invalidated by *Casarotto*.[187]

Due perhaps to the "warm receptivity" afforded to arbitration contracts of all sorts by the Supreme Court in recent decisions, in "the past decade alone, arbitration clauses have become commonplace in commercial contracts and have been honored in circumstances never before possible."[188] During the spring of 1992, Bank of America, headquartered in California, announced that it would impose binding arbitration on its credit card, checking, and savings account customers.[189] Shortly thereafter, a consumer group, joined by the California Trial Lawyers' Association and others, filed suit in San Francisco County Superior Court.[190] Their complaint alleged that Bank of America was "'unilaterally imposing this [arbitration provision] based on a signature card that a person might have signed twelve years [earlier]'"[191] and thereby forming an agreement to arbitrate without informed consumer consent.[192]

185. *See* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 233 (1987) (arbitration of disputes in context of securities exchanges no longer to be distrusted due to expansion of SEC authority). *See* discussion *infra* Part IV.B.1.

186. *See* Paul M. Barrett, *High Court to Consider Validity of State Shield on Arbitration*, WALL ST. J., Jan. 8, 1996, at B6 ("In addition to Montana, eight states, including Missouri, South Carolina and Vermont, [had] special notice requirements for arbitration clauses.").

187. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652 (1996). *Casarotto* overruled the Montana Supreme Court's finding that Montana law written to ensure that arbitration contracts "be entered knowingly" was not preempted by the FAA and its underlying "goals and policies." *See id.* at 1655 (quoting Casarotto v. Lombardi, 886 P.2d 931, 939 (1994) and citing MONT. CODE ANN. § 27-5-114(4) (1995)).

188. Wiegand, *supra* note 11, at 619; *see also* discussion *supra* Part II.B (discussing development of Supreme Court cases).

189. *See* Sam Zuckerman, *BankAmerica to Force Lawsuits into Arbitration*, AM. BANKER, June 4, 1992, at 1.

190. *See* Walter Hamilton, *Group Files Suit Over Arbitration*, LOS ANGELES DAILY NEWS, Aug. 5, 1992, Bus. Sect. at 1.

191. *Id.* (quoting Ken McEldowney, Executive Director, Consumer Action).

192. *See id.*

Prior to the filing of the complaint in *Badie v. Bank of America*,[193] other courts had invalidated arbitration agreements on grounds of unconscionability.[194] In doing so, some have relied in part on arguments that contracts of adhesion formed between parties of imbalanced bargaining power are grounds for a finding of unconscionability.[195] Nevertheless, "adhesion itself does not appear to constitute a sufficient basis for invalidating arbitration agreements."[196] The California Supreme Court has, however, invalidated an arbitration agreement as adhesive, reasoning that it lacked an express waiver of the parties' right to a jury trial.[197] Soon after the decision, however, the court ordered this opinion not to be published in official reports, perhaps because another court was to deliver its opinion in *Badie*, which has been described as a "high-profile" arbitration case.[198]

In *Badie*, the trial court found for the defendant bank, holding that the clause was neither unfair nor unconscionable.[199] The court further found that the bank had reserved the right to modify its agreements at any time and that the notice to consumers was "effectively communicated."[200] More important, the contract was not invalidated on grounds of adhesion due to the presence of meaningful choice: people could terminate their accounts and go to another lender. The court reasoned that "at the time the Bank adopted the ADR Clause, there was

193. No. 94-4916, 1994 WL 660730 (Cal. Super. Aug. 18, 1994).

194. *See* State Farm Mut. Auto. Ins. Co. v. Poyhanya, No. 92AP-40, 92AP-41, 1992 Ohio Ct. App. LEXIS 5095, at *7 (10th App. Dist. Ct., Sept. 29, 1992); Trupp v. State Farm Mut. Auto. Ins. Co., 575 N.E.2d 847, 852 (Ohio Ct. App. 1989); *cf.* Ex Parte Redshaw, Inc., 524 So.2d 367, 369 (Ala. Civ. App. 1987) (finding abuse of discretion by trial judge who invalidated agreement to arbitrate on grounds that hearing in distant forum was undue burden on one party, but suggesting that unconscionability would be grounds for invalidation). Finally, unconscionability is grounds for the revocation of any contract. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

195. *See* Stempel, *supra* note 150, at 1412 (citing Pittsfield Weaving Co. v. Grove Textiles, Inc., 430 A.2d 638 (N.H. 1981), and Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960), for the proposition that courts may invalidate warranty disclaimers for consumer purchases on grounds of adhesion and unconscionability).

196. *Id.* One commentator has argued that courts do not rely on any independent doctrine of adhesion without invoking unconscionability as an additional ground for invalidating arbitration agreements. *See* Brafford, *supra* note 4, at 348-49. Another legal scholar suggests that courts could use the doctrine of adhesion as "an alternative to unconscionability." *See* Budnitz, *supra* note 32, at 306. Consumers could only waive their rights to a judicial forum "knowingly and intelligently," and this only becomes possible where they are given information about the applicable procedural rules upon signing the arbitration contract. *See id.*

197. *See* Bell v. Congress Mortgage Co., 30 Cal. Rptr. 2d 205, 209-10 (Cal. Ct. App. 1994); *see also* Budnitz, *supra* note 32, at 305 n.323 (noting that the petition for review was denied and the opinion was ordered unpublished as a result of indirect pressure from Bank of America) (citations omitted).

198. *See* Brafford, *supra* note 4, at 347.

199. *See* Badie v. Bank of Am., No. 94-4916, at 19 (Cal. Super. Ct., Nov. 18, 1994) (notice of entry of final judgment after trial) (copy on file in the MOCC).

200. *See id.* at 9-11.

vigorous competition for deposit account and credit card account customers."[201]

On appeal, the Appellate Department upheld the lower court's decision.[202] In an oral decision, Judge Mellon adhered to state precedent according to which arbitration was viewed as "a favored means of resolving disputes by the law."[203] He relied further on the fact that all plaintiff customers had received and read the "succinct" notice and that adequate alternatives existed in the marketplace.[204] Finally, because the bank had retained the right to modify its agreement, neither the defendant's conduct nor the clause was found to be unfair or deceptive; the arbitration clause was, therefore, enforced.[205] Yet, as Judge Mellon hinted, "[t]he question of whether [the] choice [among lenders offering alternatives to arbitration would] continue to exist in the future"[206] could pose a significant problem to consumers and render certain adhesive arbitration agreements unconscionable.[207] Such would be the case, for example, were most lenders to resort to arbitration.

In fact, Wells Fargo, California's second largest bank, soon joined in the parade by imposing upon its customers a mandatory arbitration program.[208] Other lenders, including lenders doing business in Maine, soon followed suit.[209] Maine leaders may have been responding to the removal in 1994 by the Maine Legislature of the previous eighteen percent cap on credit card interest rates in order to "slow the tide of credit card operations moving from Maine to other, less regulated states."[210] In 1995, restrictions on late fees, return-payment fees, and

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201. *Id.* at 22.

202. *See* Badie v. Bank of Am., No. 94-4916, 1994 WL 660730 (Cal. Super. Aug. 18, 1994).

203. *Id.* at *4.

204. *See id.* at *6.

205. *See id.* at *7. *Badie* has been appealed to the California Court of Appeal. *See* Badie v. Bank of Am., CIV. # A 068753 (Cal. Ct. App., App. Dist. 1, Div. 2). Oral argument was orginally scheduled for February 1997, but was postponed until a new panel of judges could be assigned. The prior judges recused themselves due to personal involvement with Bank of America. Telephone interview with Attorney Patricia Sturdevant, Lead Trial Counsel for Plaintiff and General Counsel to the Nat'l Ass'n of Consumer Advocates (Sept. 15, 1997). As this Comment went to press, a new date for oral argument had not been set. Telephone Interview with Attorney Kim E. Card, Lead Counsel on Appeal for Plaintiff (Jan. 20, 1998).

206. Badie v. Bank of Am., No. 94-4916, 1994 WL 660730, at *6 (Cal. Super. Aug. 18, 1994).

207. This concern was not relevant to the case at bar because, the court found, customers had sufficient options in 1992, when the plaintiffs' claim arose. *See id.*

208. *See* Green, *supra* note 14, at 115 (citing Stephen G. Hirsch, *Wells Fargo Ventures into ADR*, THE RECORDER, July 7, 1992).

209. The Maine Office of Consumer Credit Regulation (MOCC) has examined the arbitration clauses contained in several agreements currently used by supervised lenders doing business in Maine. Interview with William N. Lund, Maine Credit Regulator, in Freeport, Me. (Jan. 31, 1997). *See* discussion *infra* accompanying notes 229-41.

210. DOWNEASTER GUIDE TO CREDIT CARDS at *ii* (6th ed. 1989) (formerly provided to consumers by and available at the MOCC); *see also* ME. REV. STAT. ANN. tit. 9A, § 2-202(3) (West 1997) (exempting credit card issuers from 18% cap).

other credit card account charges were removed.[211] Caps on annual fees were also repealed.[212] In part to increase the tide of lenders coming into the state, the Legislature further amended the Consumer Credit Code by repealing restrictive small loan laws and deregulating credit cards issued by supervised lenders.[213] The effects of this legislation were felt immediately. By April 1996, representatives from several major consumer lenders were "scouring commercial locations in several Maine cities, looking for appropriate office space."[214]

Although the incoming tide may have resulted in a broader range of lenders from which Maine consumers may choose, the number of lenders using arbitration clauses is also increasing.[215] At the same time, agreements to arbitrate are being combined with "choice of distant forum" clauses and inserted in the fine print of credit card solicitations. For example, some Maine residents have recently received credit card applications containing a succinct statement that "[a]ny disputes or claims over $5000 will be decided by arbitration. . . . Any arbitration will be heard in Richmond, Virginia."[216] In these two finely printed sentences, no explanation is given of what the arbitral process means for consumers, nor of what is given up by signing the clause.[217]

In the past, similar forum selection clauses have been enforced even with minimal manifestations of assent. Such was the case, for example, where American passengers of the ill-fated Achille Lauro cruise ship were forced to litigate in Naples, Italy, based on a forum selection clause printed on a ticket that was given to them only at the time they boarded

211. Public Law 1995, chapter 137, "An Act to Create Additional Employment Opportunities," became effective "immediately upon its May 22, 1995 signing." *See Credit-Related Laws Enacted*, MAINE CREDITOR UPDATE, Aug. 1995, at 1; P.L. 1995, ch. 137 (codified at ME. REV. STAT. ANN. tit. 9A, § 2-501(4) (West 1997)).

212. *See* P.L. 1995, ch. 84, §§ 2-4 (codified at ME. REV. STAT. ANN. tit. 9-A, § 2-202 (West 1997)).

213. *See* P.L. 1995, ch. 614 (effective July 4, 1996) (codified at ME. REV. STAT. ANN. tit. 9-A, § 2-501(4) (West 1997)).

214. *New Code Law Sparks Lender Activity, Protects T-i-L Exemption*, MAINE CREDITOR UPDATE, Apr. 1996, at 1.

215. Interview with William N. Lund, Maine Credit Regulator, in Freeport, Me. (Jan. 31, 1997).

216. Visa Agreement of FNANB (Winter 1997) (on file in the MOCC).

217. The Supreme Court is reluctant "to scrutinize carefully consumer contracts for possibly adhesive agreements to arbitrate." Brunet, *supra* note 13, at 108. Even agreements to arbitrate in a distant forum contained in boilerplate language on the back of cruise tickets have been enforced. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590-91 (1991). "Judge Learned Hand reasoned that '[a] man must indeed read what he signs, and he is charged, if he does not.'" Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947). Still, imposing arbitration in distant fora on unwitting consumers seems to stretch this reasoning to its limits. Although one might argue that enforcement of such provisions could result in fewer unsuspecting customers, consumer education would be by word-of-mouth, because commercial arbitration proceedings are most often conducted in secret. *See* Brunet, *supra* note 13, at 84-85. Relying on a trickle-down approach to consumer education seems unduly harsh and ineffective.

the ship.[218] Justice is arguably served where, "[a]fter signing [an] agreement, the party is held strictly accountable for all terms in the contract whether or not the terms were read and understood."[219] On the other hand, where the party did not *sign* the agreement, and is "totally unaware that [it is] waiving any legal rights simply by accepting [a] ticket," justice could be better served by rendering the agreement voidable.[220] Although acceptance of the ticket could be characterized as an objective manifestation of assent, actual or subjective assent might be lacking. This lack of assent warrants the application of a subjective standard in such cases. Nonetheless, distant forum clauses have been upheld.[221] At the same time, inequality of bargaining power does not often invalidate agreements to arbitrate.[222] Until courts adopt a subjective standard, consumers fail to read the fine print at their own peril, even when they are given no time to do so.[223]

In Maine, lenders may avoid the reach of statutes enacted for the protection of consumers. Such would be the case under Maine's usury statutes.[224] Borrowers affected by the statutes are particularly "unaware or unconcerned" about the rights they are waiving when they sign loan agreements containing arbitration clauses.[225] The unfairness of the arbitral process to certain consumers thus becomes evident: "It would completely undermine the usury laws if lenders could evade them by

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218. *See* Hodes v. S.N.C. Achille Lauro, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed* 490 U.S. 1001 (1989). The Third Circuit reversed the lower court, rejecting arguments that overwhelming bargaining power had been used to deny passengers any real opportunity to read the forum selection clause contained on the ticket, even if that meant that "Neapolitan litigation would effectively deprive the appellees of a meaningful day in court." *Id.* at 912; *see also* Stempel, *supra* note 150, at 1388 ("Although *Hodes* reached an outrageous result, it represents a significant line of cases treating boilerplate ticket language as enforceable contracts." (citations omitted)). Most astonishing is the fact that the plaintiff passengers did not receive their tickets until arriving at the pier. *See id.* at 1388 n.57.

219. Green, *supra* note 14, at 113 (citation omitted).

220. Hodes v. Achille Lauro, 858 F.2d at 907.

221. *See id.* The appellees were forced to "pursue their action in Italy." *Id.* at 916. Consumers should be forewarned, therefore, to read the "very small but readable print, less than 1/16 inch high." *Id.* at 910. *But see* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) (affirming Second Circuit's refusal to hear interlocutory appeal of decision that had refused to require Achille Lauro passenger to bring suit in Italy).

222. *See* Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 226 (1995) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991)). Professor Resnick acknowledges, however, that "[o]ne set of cases continues to explore themes of contracts of adhesion among parties with disparate bargaining power." *Id.* at 226 n.63 (citations omitted).

223. *See* discussion *infra* note 236 and accompanying text (supporting the application of a subjective standard to adhesive consumer arbitration contracts).

224. *See* ME. REV. STAT. ANN. tit. 9-A, § 2-401 (West 1997) (establishing caps on interest rates for consumer loans between 15% and 30% depending on the amount of the loan); ME. REV. STAT. ANN. tit. 9-A, § 2-201 (West 1997) (establishing similar caps on interest rates in consumer credit sales).

225. *See* Budnitz, *supra* note 32, at 326 (citing Stewart S. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 526 (1981)).

diverting all consumer loan disputes to arbitrators to whom lenders could make an appeal to fairness or justice."[226] Arbitration is attractive to lenders for many of the same reasons it should be rejected—and would be rejected were the parties fully informed—by the average consumer. Ironically, the most vulnerable consumers are the least likely to be aware of any reasons not to enter into arbitration agreements.[227] The amendments proposed in this Comment would serve to level the playing field.

B. Amendments Will Ensure Fair Disclosure and Serve to Inform Consumers

Why are the amendments necessary?[228] Is not arbitration effective and fair under the current system? First, the amendments are necessary so that consumers signing agreements to arbitrate future disputes with their lenders understand the process for which they are contracting, as well as the substantive rights they are sacrificing. Consumers should know that they are waiving the right to redress in court, and they should be familiar with the arbitration procedures, as well as the location of the forum. The proposed amendments might encourage consumer inquiry and heighten consumer awareness during the loan origination process, or at least at the closing table.

Finally, amendments providing for the clear and unambiguous disclosure of the terms contained in arbitration contracts are warranted because many Maine lenders engage in inconsistent practices, the effect of which is to impede consumers' ability to discern the actual terms of arbitration contracts. Following routine compliance examinations, the arbitration clauses utilized by several lenders were challenged by the Maine Office of Consumer Credit Regulation (MOCC).[229] For the sake of brevity, only two lenders will be discussed in this Comment.[230]

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226. *Id.*

227. This is especially true for consumers who are borrowing from lenders of last resort and who are consequently forced to accept extremely unfavorable terms, such as high origination fees, exorbitant interest rates, and pre-payment penalties. The lack of sophistication and legal representation of many of the consumers who "agree" to these unfavorable terms aggravates the situation. This problem is compounded further when consumers signing arbitration agreements are told at closing only, "by signing this you agree that if you have a claim against the lender, you cannot go to court to resolve it." Having served as a loan closing agent for several years, this Author can attest that it is not uncommon for such generalizations to be made during the closing.

228. It might be objected that major lenders may leave Maine if these proposals were adopted, thereby negatively impacting consumers' ability to obtain credit. These proposals, however, are intended to ensure the consensual formation of arbitration contracts and to insulate Maine consumers from lenders that abuse the arbitration process.

229. Agency examinations were conducted on November 21, 1996. Copies are on file in the MOCC. *See supra* note 209.

230. All documents pertaining to the investigations of these and other lenders are on file in the MOCC. The agreements used by these lenders are not atypical. A cursory search in the several county registries of deeds in Maine will reveal similar clauses contained in recorded mortgages, and one has only to open the daily mail and read the fine print to discover such clauses in credit card applications.

The first lender investigated was AVCO, whose arbitration plan stipulates that the consumer must pay a non-refundable filing fee of between $500 and $5000, depending on the amount of the claim asserted, in order for the dispute to be heard.[231] The creditor reserves the right of access to the courts in the event of default, whereas the consumer must resort to arbitration in all cases.[232] The pre-closing information sheet given to consumers provides that "[e]ither party may request that the award include findings of fact and conclusions of law," whereas the actual contract clause requires the consumer to waive any request for findings of fact.[233] Similarly, the arbitration clause states that costs shall be split equally, whereas the information sheet indicates that the arbitrator may assess costs to either party exclusively.[234] The disclosure statement provides for the arbitration to be heard in the consumer's county of residence, whereas the actual contract provides for a location designated by the arbitrator as "reasonably convenient to the Parties."[235] Adoption of the proposed amendments might at least serve to counter the effect of such discrepancies and inconsistencies.[236]

Other potential problems are found in AVCO's documents. For example, although the contract provides that "[t]he Arbitrator shall determine the rights and obligations of the Parties according to the substantive and procedural rules of the state where the Arbitration is held," it also provides that each party shall pay the expenses of its own counsel,[237] even though this is in direct contradiction to Maine law.[238]

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231. *See* Arbitration Fee Schedule furnished by AVCO (Nov. 21, 1996) (on file in the MOCC). The contours of the fee schedule are as follows: for claims up to $10,000, a $500 filing fee must be paid by the consumer filing the complaint; claims between $50,000 and $250,000 require a fee of $1500; and, any claim over $1,000,000 involves a filing fee of $5000. *See id.* Obviously, the greatest hardship is on the average consumer who may have a claim of under $500, still a substantial amount for many, yet that consumer will not be allowed to pursue the claim in small claims court.

232. *See* Arbitration Disclosure and Agreement furnished by AVCO and corresponding Examination Report issued by the MOCC (Nov. 21, 1996) (on file in the MOCC).

233. *Id.*

234. *See id.*

235. *See id.*

236. This problem could also be addressed by adopting a subjective standard for the review of consumer arbitration contract formation. *See* discussion *infra* notes 307, 410-12 and accompanying text.

237. AVCO Agreement on file in the MOCC; *see also* Examination of AVCO, Nov. 21, 1996, on file in the MOCC, where Maine Credit Regulator William N. Lund reported:

> The Maine Consumer Credit Code allows a consumer who claims that he or she has been harmed to seek redress in civil court. Further, the Code prohibits a creditor from requiring that a consumer waive any rights granted by the law. Finally, the Code provides that, upon a finding of a violation, the Court shall award attorney's fees to the consumer.

238. *See* ME. REV. STAT. ANN. tit. 9-A, § 5-201(1), (9) (West 1997) (noting that the consumer has a right to bring court action for violation of enumerated provisions of the Consumer Credit Code and that the court may award costs and reasonable attorney's fees); *id.* § 1-107 ("Except as otherwise provided in this Act, a consumer may not waive or agree to forego rights or benefits under

Might this clause lead consumers to believe that they have no right even to contact the MOCC for a speedy resolution of disputes with lenders? Fearing this to be the case, that agency requested that AVCO provide statements affirming the ability of consumers to file such complaints.[239]

Similar concerns are raised in documents utilized by United Companies Lending Corporation (UCLC). The MOCC complains that the Maine Consumer Credit Code prohibits creditors from requiring consumers to waive their rights under the Code: "Those rights include the right to seek the assistance of the Office of Consumer Credit Regulation, or to bring a civil action seeking damages and costs (including attorney's fees) if the consumer demonstrates that the creditor has violated the law."[240] UCLC's contract provides that "[t]he laws applicable to the arbitration proceeding shall be the laws of the state in which the Property is located."[241] Although Maine law provides the aforementioned civil remedies, arbitrators are likely to guard jealously their jurisdiction and find that, by signing the arbitration agreement, the aggrieved consumer waived those remedies. The legislative amendments proposed in this Comment would at least ensure that consumers make informed choices when executing such waivers.[242]

C. Because Arbitration Often Disfavors Consumers, Conspicuous and Unambiguous Disclosure Is Warranted

Whether arbitration is effective and fair depends upon whom you ask. Lenders often resort to arbitration to avoid punitive damages and costly class actions.[243] Although the American Arbitration Association (AAA) does not prohibit arbitrators from awarding punitive damages, the Supreme Court has indicated that they may be avoided altogether by resorting to arbitration.[244] In an attempt to avoid such damages, many

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this Act. Any such waiver or agreement is unenforceable; and no creditor may take any such waiver or agreement to forego rights or benefits under this Act.").

239. *See* Examination of AVCO, Nov. 21, 1996, on file in the MOCC. It was also feared that in the event that the lender exercised its right to bring a collection action in the courts, the consumer would remain obliged to refer any counterclaims to arbitration. *See id.* Although some lenders responding to investigations of the MOCC, including AVCO and United Companies Lending Corporation, have promised that consumers will be afforded the same remedies in arbitration as would be available in any Maine court, such as attorney fees and treble damages, most have also indicated that arbitration is here to stay. Telephone Interview with William N. Lund, Maine Credit Regulator (Sept. 13, 1997).

240. Examination of UCLC, Nov. 21, 1996, on file in the MOCC; *see also supra* note 168 (citing Maine statutes providing consumer remedies).

241. Contract contained in Mortgage from consumer to UCLC, on file in the MOCC.

242. *See* discussion *supra* Part III.

243. *See* Budnitz, *supra* note 32, at 286.

244. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995) (holding that arbitrators may award punitive damages if the contract so provides, even if state law does not grant arbitrators these powers). The Court explained that, where state law allows arbitrators to award punitive damages but the rules of the arbitral forum do not, those rules would control due to the federal policy favoring arbitration. *See id.* at 62.

lenders incorporate into their contracts express provisions prohibiting the award of punitive damages altogether, or providing a cap in jurisdictions that void such provisions for reasons of public policy.[245] Even where punitive damages are available, an arbitrator, often an attorney or business person, is less likely to render such an award than juries, composed of consumers, who may empathize with the plaintiff because they share unsatisfactory experiences with financial institutions.[246]

Consumers, however, may not always fare better with a jury. For example, "where the consumer is in default on a debt or has a claim based on a legal technicality or boring, complicated facts, an arbitrator might be at least as favorable as a . . . jury."[247] Interestingly, many lenders exempt from arbitration those collection and foreclosure proceedings initiated by the lender.[248] Does that mean that consumers cannot file counterclaims in a foreclosure proceeding? At least one state regulator thinks that might be the case.[249] At the same time, consumers who initiate actions based on particularly egregious lender practices will "lose the opportunity to play upon the jury's emotions."[250] Avoiding jury sentiments is the precise result sought by lenders, who retort that consumers knowingly consenting to arbitration contracts get the forum for which they bargained,[251] and that the Contracts Clause demands that courts uphold these agreements.[252]

Meanwhile, financial institutions have other reasons for favoring arbitration. Under most arbitration rules, substantial limits are placed upon discovery, and these limits have been shown to disfavor consumers who usually lack critical information and documents within the control of the lender.[253] Alternatively, one can argue that limited discovery helps cut costs on both sides of the dispute. At the same time, there is some evidence that discovery in arbitration is becoming more

245. *See, e.g.*, Alexander, *supra* note 12, at 899 (advising lenders to draft contracts in this manner).

246. *See* Budnitz, *supra* note 32, at 286.

247. *Id.* at 285.

248. *See* discussion of UCLC *supra* Part IV.B.

249. Interview with William N. Lund, Maine Credit Regulator, in Freeport, Me. (Jan. 31, 1997). When asked about a clause which required a consumer to take a counterclaim to arbitration rather than raising it in court, UCLC's attorney told Maine state credit regulators that the challenge addresses issues of federal law, and that the lender "know[s] of no Maine law that prohibits unilateral or bifurcated arbitration clauses." Letter from Michaela Albon, Vice President and Legal Counsel, UCLC, to Del Pelton, Principal Examiner, Office of Consumer Credit Regulation (Apr. 14, 1997) (on file with the MOCC).

250. *See* Budnitz, *supra* note 32, at 285.

251. Again, this argument assumes that the parties freely entered into a bargain, and bargained at arm's length: "But an alternative is only an alternative if it is freely chosen." *Tested But Untried (A Survey of the Legal Profession)*, ECONOMIST, July 18, 1992, at 13.

252. *See* Brafford, *supra* note 4, at 361; U.S. CONST. art. I, § 10. As Brafford recognizes, however, freedom of contract must be balanced against the unconscionability evident in the drafting of contracts by lenders in such a way as to create a grossly uneven playing field.

253. *See* Budnitz, *supra* note 32, at 283-84.

sophisticated, complex, and costly.[254] It is ironic that consumers may now be gaining access to documents heretofore beyond the reach of limited discovery rules only to be faced with the same adjudicatory inefficiencies that arbitration was intended to eliminate.

The lending industry also stands to benefit by avoiding class actions. Although, in theory, class actions are more efficient than arbitration of singular disputes, they may be avoided altogether by "expressly negating them in an arbitration agreement."[255] Even where the arbitration agreement contains no such exclusion, courts have declined to compel arbitration on a class basis.[256] Because this area is subject to dispute and courts may differ as to the result, practitioners are advised to "specifically state in the arbitration clause whether class actions are permissible or not."[257] Thus, it may be inferred, arbitration remains a viable method for avoiding costly class actions and might therefore become the preferred dispute resolution forum of financial institutions.

Even where there is no potential for class actions, lenders may prefer arbitration because arbitrators are not required to furnish written opinions explaining their decisions.[258] Moreover, most arbitration awards are private, so lenders may avoid the unwanted negative publicity that often attends litigation. Thus, lenders need not be fearful of unfavorable decisions that could encourage other consumers to sue on similar grounds, or other judges or arbitrators to follow the same reasoning.[259]

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254. *See, e.g.*, John F.X. Peloso & Stuart M. Sarnoff, *Securities & Commodities Litigation: Appellate Review of Arbitration Decisions*, 213 N.Y. L.J. 3 (1995) ("Although customers and securities industry personnel alike initially heralded arbitration as a more efficient and less expensive dispute resolution mechanism for resolving customer claims, the increasing stakes and complexity of securities arbitrations have resulted in a process almost as extenuated, costly and complex as court litigation."). *But cf.* Ellen Joan Pollock, *Mediation Firms Alter Legal Landscape*, WALL ST. J., Mar. 22, 1993, at B1 ("Last year alone, more than 40,000 civil cases that once would have been handled in the nation's courts were resolved by four major firms that sell quicker, less costly, less procedurally complex dispute resolution.").

255. Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 OR. L. REV. 639, 685 n.257 (1994).

256. *See* Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673, 674 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994); *cf.* Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991) (remanding for class certification proceedings in arbitration of claim under arbitration agreement that is silent on issue of class action).

257. Alexander, *supra* note 12, at 900.

258. *See, e.g.*, Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 138-39 (1994) ("there are no transcripts of arbitration proceedings or reported decisions"); Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required in All Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 AM. U.L. REV. 151, 166 (1995) ("Before 1990, a party to an arbitration hearing had difficulty obtaining a written opinion. Under the arbitration rules, a party could obtain a written decision only if both parties and the arbitrator consented."). Beginning in June 1990, the NASD, NYSE, AMEX, and AAA approved an amendment allowing parties to obtain written decisions only in "large and complex cases." *See id.*

259. *See* Budnitz, *supra* note 32, at 272. Courts, meanwhile, have reasons to favor arbitration:

Generally, arbitrators are not required to follow the law, but rather may reach their decisions based on their notions of what is fair and just.[260] Some states adhere only to the "manifest disregard" standard, which precludes consideration of "'even gross errors of judgment in law' unless they are apparent on the face of the award."[261] As a practical matter, that means that consumer arbitration decisions will not often be reversed in courts because there is no requirement that the arbitrator explain or justify the decision "on the face of the award."[262]

The use of arbitration clauses becomes especially appealing to lenders that make loans based not on the consumer's ability to repay, but only on "underwriting procedures [that] begin and end with an appraisal that reveals a level of sufficient equity to assure repayment through the foreclosure process."[263] The Home Ownership and Equity Protection Act of 1994 prohibits lenders from making such loans, but only where the lender is engaged in "a pattern or practice" of doing so.[264] Consumers attempting to show lender violations of this provision may have to state their claims in an arbitration proceeding, where the arbitrator may be partial to the lender that hires him or her repeatedly, or may be able to ignore the regulations' complexity and instead appeal to his or her own sense of fairness.[265] Similarly, state attorneys general

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> The average suit takes over a year to finish. In Chicago, the backlog for civil cases is eight years; in New Orleans, courts are so overcrowded that a judge recently declared the system unconstitutional—no one, he said, was getting a fair trial. Part of the problem is due to increases in criminal cases, which take precedence over civil ones. But the antics of civil lawyers do not help.

Order in the Tort (A Survey of the Legal Profession), ECONOMIST, July 18, 1992, at 8.

On the other hand, one federal judge indicated that justice can be obtained more efficiently in the Federal District Court for the District of Maine than is often possible in most arbitration proceedings. Interview with Judge Gene Carter, U.S. Dist. Ct. for the Dist. of Me., in Portland, Me. (Mar. 4, 1997).

260. *See* Budnitz, *supra* note 32, at 295; *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (affirming that the parties are bound by all arbitrator decisions not in "manifest disregard of the law"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 649 (1985) (Stevens, J., dissenting) ("an arbitrator, unlike a federal judge, has no institutional obligation to enforce federal legislative policy"); Caribou Bd. of Educ. v. Caribou Teachers Ass'n, 404 A.2d 212, 215 (Me. 1979) (applying the manifest disregard standard).

261. Budnitz, *supra* note 32, at 295 (quoting Johnson v. Baumgardt, 576 N.E.2d 515, 519 (Ill. App. Ct. 1991)).

262. *See* Budnitz, *supra* note 32, at 295 (citing Batten v. Howell, 389 S.E.2d 170, 172 (S.C. Ct. App. 1990)).

263. Klein, *supra* note 167, at 134. Apparently, "lenders make these loans based on the value of the property involved and the advantages they expect to reap upon foreclosure." *Id.* at 133.

264. *See id.* at 134 (noting that 15 U.S.C. § 1639(h) prohibits lenders "from engaging in a pattern or practice of extending credit to consumers in covered loans based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment"). A "pattern" exists, for example, where loans repeatedly are made "in low-income neighborhoods with relatively high property values." *Id.*

265. Moreover, the fact that decisions are often not reported increases substantially the plaintiff's burden in attempting to show a pattern or practice.

and regulatory agencies might be forced to bring consumer grievances before an arbitration panel.[266]

Arbitrators might also ignore state unfair and deceptive acts and practices statutes in their entirety.[267] Even if such statutes are generally followed, an arbitrator may be persuaded to ignore provisions for consumer treble damages and attorney's fees.[268] In Maine, for example, consumers may be denied the benefit of treble damages and attorney's fees imposed against consumer reporting agencies that knowingly or willfully violate applicable provisions of Maine's Fair Credit Reporting Act.[269] It is at least questionable, however, whether it is appropriate for lenders and others to be able to avoid the decision of the Maine Legislature to protect consumers.[270]

Maine courts have considered the ability of arbitrators to ignore the law. In 1979, Maine adopted the "manifest disregard" standard.[271] The Maine Law Court, borrowing from a Third Circuit case,[272] reasoned that if an arbitrator's award can

> in any rational way be derived from the [arbitration] agreement, viewed in the light of its language, its context and any other indicia of the parties' intention, it will be upheld. Only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.[273]

Further, "the agreement must be broadly construed, and all doubts will usually be resolved in favor of [the arbitrator's] authority."[274] This position favoring arbitration has continued to date.[275]

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266. The MOCC is empowered to enforce the Truth in Lending Act, 15 U.S.C., Subchapter I, Parts B (credit transactions), D (credit billing), and E (consumer leases). States may request exemption from certain classes of transactions, and exemption will be granted if the state rules or statutes are "substantially similar" to the Federal Truth in Lending Act and Regulations. Once the exemption has been granted, state agencies may enforce the state statutes and regulations, which will not be preempted by the Federal TILA. Effective October 1, 1982, Maine was granted such an exemption. *See* 12 C.F.R. pt. 226, §§ 226.29, 29(a)(1), (2), (4) (1996). To what extent the FAA would preempt enforcement in court by the Attorney General of these *state* statutory and regulatory provisions remains to be seen.

267. *See* Budnitz, *supra* note 32, at 316.

268. *See id.* (citing JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 422, 442-43 (3d ed. 1991)).

269. *See* ME. REV. STAT. ANN. tit. 10, § 1322 (West 1997).

270. *See* Budnitz, *supra* note 32, at 316. Some lenders, including UCLC, stipulate in their contracts that the transaction "involves interstate commerce." *See supra* note 241. This has the effect of making the FAA applicable to any subsequent dispute between the lender and the borrower. Still, lenders should not be able to use arbitration as a means of circumventing consumer protection laws.

271. *See* Caribou Bd. of Educ. v. Caribou Teachers Ass'n, 404 A.2d 212 (Me. 1979).

272. *See* Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3rd Cir. 1969).

273. Caribou Bd. of Educ. v. Caribou Teachers Ass'n, 404 A.2d at 215.

274. *Id.*

275. *See, e.g.*, City of Lewiston v. Lewiston Firefighters Ass'n Local 785, 629 A.2d 50, 52-53 (Me. 1993) (holding that the court may not substitute its judgment for that of the arbitrator, for whose reasoning the parties in fact bargained).

In searching for reasons to favor arbitration, advocates point to the cost savings that can be shared by disputants and passed on to all customers of institutions utilizing arbitration.[276] Yet, investor dissatisfaction with securities arbitration is growing. Complaints focus on "the adversarialization of the proceedings that proceeds from growing lawyer participation in the process."[277] The expenses of litigation that arbitration was designed to avoid now seem to be similarly incurred in arbitration: "Lawyering practices—extensive, party-conducted pre-trial discovery, depositions, direct and cross-examination—are redefining the character of arbitral procedure and justice."[278]

Finally, credit card customers with limited resources may be forced to incur costs usually associated with litigation, or worse, discouraged by high filing fees from pursuing their rights at all.[279] By signing agreements that contain arbitration clauses, credit card customers not only waive their rights to trial by jury but sacrifice the convenience and efficiency of certain judicial fora, such as the small claims court. Ironically, these courts were designed to provide a forum for persons seeking small monetary awards where they might be spared the high cost associated with litigation in district or superior court; where they would be able to argue their own case without facing the significant obstacle created by the use of jargon, rules of evidence, and the lawyers themselves; and where cases are "heard fast, generally within a month or two of filing."[280] In contrast, some egregious consumer arbitration procedures involve excessive filing fees, delays, and complicated, undisclosed rules.[281] Credit card customers might not experience a great savings by resorting to arbitration.[282]

Consumers should be warned, therefore, that by signing arbitration agreements, they are waiving the right to litigate in small claims court. According to one commentator, "There are few other places in America [outside of small claims court] where the average consumer is as likely to get a result."[283] Arbitration is certainly more expensive than small claims litigation. One solution would be to "make customer initiated

276. *See* Bruce Fein, *Keeping Bank Customers Out of Court*, TEX. LAW., Oct. 5, 1992, at 15; Brafford, *supra* note 4, at 357. *But cf.* Budnitz, *supra* note 32, at 331-32 (noting that the vast number of bank failings, mergers, and buyouts suggests that emerging institutions have little if any incentive to pass such savings on); Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 59 (stating that some companies no longer use predispute arbitration clauses because of the perception that the process was slow, expensive, and unsatisfying).

277. Carbonneau, *supra* note 8, at 1959 n.42.

278. *Id.* at 1959.

279. *See supra* text accompanying notes 231-34.

280. *When You Need a Lawyer*, CONSUMER REP., Feb. 1996, at 34-39; *see also supra* note 30 (explaining Maine Small Claims Court Procedure).

281. *See* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 567 (1993), discussed *infra* text accompanying notes 308-14.

282. This holds true unless, of course, one accepts without question the idea that the trickle-down theory of economics results in substantial consumer savings.

283. *When You Need a Lawyer*, CONSUMER REP., Feb. 1996, at 36 (quoting Ralph Warner).

arbitration costs comparable to court filing fees."[284] The proponent of this solution, however, also advocates that only one day's worth of all other arbitration fees be borne by the lender.[285] Under such a system, consumers could face the threat of exorbitant charges in the event the lender employs "lawyering" tactics to delay the arbitration proceedings. Although it has been proposed that on appeal the non-prevailing party might be required to pay all arbitration fees,[286] this provides little solace for the would-be small claims litigant.[287]

The fairness to the consumer of the arbitral process has been questioned by courts in other states:

> Let us assume for a minute that for some reason all the rabbits and all the foxes decided to enter into a contract for mutual security, one provision of which were that any disputes arising out of the contract would be arbitrated by a panel of foxes. Somehow that shocks our consciences, and it doesn't help the rabbits very much either.[288]

Similarly, where the panel of arbitrators consists of all rabbits but they are paid by the foxes, the fairness of the process is at least questionable. As one commentator reasoned, "'Anytime [sic] you are paying someone by the hour to decide the rights and liabilities of litigants, and that person is dependent for future business on maintaining good will with those who will bring him business, you've got a system that is corrupt at its core.'"[289] Lenders appear to have much to gain and consumers

284. Alexander, *supra* note 12, at 903.

285. *See id.*

286. *See id.*

287. *See supra* notes 279-84 and accompanying text. Many consumer disputes involve amounts significant to the consumer but minuscule in comparison with lender assets. A system imposing costs on the non-prevailing party would be more detrimental to the average consumer, whose lack of resources would also become a major factor in the decision not to pursue the claim.

288. Board of Educ. of Berkeley v. W. Harley Miller, Inc., 236 S.E.2d 439, 443 (W. Va. 1977). A subsequent Oklahoma case used this analogy in discussing a contract that called for a panel of three RE/Max agents to arbitrate disputes between RE/Max and its customers. *See* Ditto v. RE/Max Preferred Properties, Inc., 861 P.2d 1000 (Okla. Ct. App. 1993), *quoted in* Wiegand, *supra* note 11, at 637. Interestingly, the MOCC is currently investigating a similar occurrence in Maine. A buyer's broker who signed an arbitration agreement as a condition of benefitting from the board of realtor's multiple listing service was forced to arbitrate before the board of realtors when the selling broker refused to split the commission. Meanwhile, the buyers, not parties to the arbitration agreement, felt the effect of this proceeding when the board of realtors denied relief to the realtor, who then looked to the buyers for his commission. *See* Letter from Gordon T. Holmes, Jr., Peterson Realty of Falmouth, to William N. Lund (Dec. 7, 1996) (on file with the MOCC); Letter to Arthur Gilbert (on file with the MOCC). Most recently, the Law Court refused to enforce a similar arbitration provision as against a third party. *See* Roosa v. Tillotson, 1997 ME 121, 695 A.2d 1196 (holding that purchaser who was not party to the arbitration agreement signed by co-owner could not be bound by its terms).

289. Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53, 54 (quoting Joseph A. Yanny); *see also supra* text accompanying notes 236-48 (discussing inequalities inherent in the arbitration of disputes between consumers and financial institutions).

much to lose by entering into predispute arbitration agreements.[290] The proposed amendments would serve to notify consumers of what they are losing.

D. Current Maine Arbitration Law Allows for the Fair and Effective Resolution of Labor-Related Disputes, but Provides Inadequate Safeguards for Consumers

It should be stressed that the proposed amendments to the Maine PLL would not affect the arbitration of labor disputes. Maine courts have ruled on numerous arbitration-related disputes in the collective bargaining context, whereas they have yet to consider the validity of arbitration contracts between consumers and supervised lenders or lessors. Accordingly, the proposed amendments would provide the courts with needed guidance without disturbing the considerable body of common law rulings on collective bargaining arbitration agreements.

This result is desirable because that body of law currently contains adequate safeguards. For example, "parties to a dispute cannot be compelled to submit their controversy to arbitration unless they have manifested in writing a contractual intent to be bound to do so."[291] Thus, in *Maine State Employees Ass'n Local 1989 v. Bureau of Employee Relations*,[292] the Maine Law Court held that employee grievances could not be heard by the arbitrator where the collective bargaining agreement, which contained an agreement to arbitrate, had expired.[293] The court based this rule "on the principle that unilateral alterations of the collective bargaining agreement are in contravention of the statutory duty to bargain in good faith."[294] One may speculate, however, whether the court could impose a similar duty to bargain in good faith in cases where lenders unilaterally impose arbitration agreements on consumers, or where consumers lack bargaining power.[295]

One commentary indicates that the process of mandatory arbitration of employment disputes "currently favors employers," and advocates that the interests of employers and employees, especially nonunion

290. For a convincing exposé of the numerous ways in which arbitration benefits large companies at the expense of the "little guy," as well as a lucid summary of applicable Supreme Court cases, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

291. Nisbet v. Faunce, 432 A.2d 779, 782 (Me. 1981).

292. 652 A.2d 654 (Me. 1995).

293. *See id.* at 655.

294. *Id.* (quoting Lane v. Bd. of Dirs., Sch. Admin. Distr. No. 8, 447 A.2d 806, 810 (Me. 1982)).

295. *See supra* text accompanying notes 193-207 (discussing Badie v. Bank of Am., No. 94-4916, 1994 WL 660730 (Cal. Super. Aug. 18, 1994)); *see also* discussion *supra* Part IV.B (discussing confusion created by inconsistencies between arbitration disclosures and the actual agreements given to Maine consumers today); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

employees, be balanced more fairly.[296] Often, it is argued, "[a]rbitrators may have a strong bias in favor of the employer because the employer is the one who pays the arbitrator's bills."[297] Nonetheless, in the context of collective bargaining, the process may not be inherently unfair. In that case, the union representing the employee is a repeat player. It is perhaps for that reason that *employees* have sought to *compel* arbitration.[298] The United States Supreme Court continues to hold that arbitration is no longer to be disfavored or viewed with distrust.[299] Likewise, the Maine Law Court has held that courts, in reviewing arbitral decisions under the Maine UAA,[300] are to "assume arbitrators [are] faithful to their obligation [not to exceed their powers] absent some clear showing of a violation of the obligation."[301]

Favorably viewing arbitration in the collective bargaining context might also be justified by policy considerations. One commentator has remarked that, in spite of "the prevailing norm that legal rights need not be adhered to by an arbitrator, labor arbitrators do not systematically ignore assertions of constitutional rights."[302] Rather, a doctrine has developed in the context of labor arbitration known as "industrial due process."[303] This doctrine evolved because of the need to foster the ongoing relationship between the parties and "preserve harmony between labor and management."[304]

Outside of the collective bargaining context, however, the need to foster the ongoing relationship between the parties may be absent and therefore the arbitrator has little incentive to balance the equities fairly.

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296. *See Developments in the Law—Employment Discrimination: Mandatory Arbitration of Statutory Employment Disputes* (pt. VI), 109 HARV. L. REV. 1568, 1670-71 (1996) [hereinafter *Emp. Disc. Part VI*].

297. Nina Schuyler, *Expensive Cost Cutting: Mandatory Arbitration Clauses May Cut Litigation Costs, But at What Expense?*, CAL. LAW. Jan. 1995, at 37.

298. *See* Maine State Employees Ass'n Local 1989 v. Bureau of Employee Relations, 652 A.2d 654, 655 (Me. 1995). Consumers, however, are often at a disadvantage as compared with employees. Unlike many employees, they lack the added protection of unions, who are "repeat players" in collective bargaining disputes; because they are "one-shot players," they have no interest in fostering a continuing relationship with their adversaries. *See* Budnitz, *supra* note 32, at 321-22.

299. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 231-32 (1987) ("It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act."); *see also* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) (noting that one problem Congress sought to eliminate in passing the FAA was "the old common-law hostility toward arbitration").

300. *See* ME. REV. STAT. ANN. tit. 14, § 5938 (West 1980) (allowing courts to vacate awards "procured by corruption, fraud or other undue means;" or where there was "evident partiality by an arbitrator," the "arbitrators exceeded their powers," or "refused to postpone the hearing upon sufficient cause being shown therefor . . . as to prejudice substantially the rights of a party;" or where "the award was not made within the time fixed therefor by the agreement").

301. Seppala and Aho-Spear Assocs. v. Westbrook Gardens, 388 A.2d 88, 90 (Me. 1978).

302. Brunet, *supra* note 13, at 91.

303. *See id.* at 91 n.42 (citations omitted) ("Most arbitrators endeavor to give meaning and application in labor arbitration to the principles of 'due process' established in the law of constitutional criminal procedure.").

304. *Id.* at 118.

This is true of the "one-time player" who participates in securities arbitration.[305] Similarly, "the dynamic of an ongoing relationship . . . will not spur the arbitrator of a tort accident dispute to create harmony among the disputants by assuring a fair procedure."[305] Even in the collective bargaining context, where the relationship has terminated, the incentive for achieving fairness may be lacking.[307]

In the consumer loan context, this lack of fairness becomes more apparent, for example where the consumer has no choice among lenders and is required to travel to a distant forum in order to arbitrate the dispute before an arbitrator controlled by the lender. Thus, in *Patterson v. ITT Consumer Financial Corp.*,[308] the plaintiffs were "individuals of modest resources who believed they would not have qualified for a conventional loan from a bank."[309] Moreover, although the dispute involved only $2000, the filing fee for a participatory hearing was $850.[310] Finally, although residents of California at the time the agreement was signed, their grievances had to be "'resolved by binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota.'"[311]

Where arbitration clauses are coupled with distant forum clauses, one might argue that judicial enforcement of the agreement constitutes an unconstitutional denial of due process.[312] Although the court did not reach this argument in *Patterson*, it did conclude that the arbitration agreement was void because it evidenced elements of both substantive and procedural unconscionability.[313] The fairness to consumers of arbitration becomes questionable when one considers the aftermath of *Patterson*: After ITT had sold most offices and receivables, and "its credit and loan volume [had fallen] to nearly zero[,] . . . National Arbitration Forum, the

305. *See* Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988).

306. Brunet, *supra* note 13, at 119.

307. It has been argued that employees should "*actually* know they are waiving their rights to a judicial determination of statutory claims[, and that a] subjective knowledge requirement would address some of the most troublesome concerns that plague mandatory arbitration." *Emp. Disc. Part VI*, *supra* note 296, at 1683-84. Proposed solutions, however, require Congressional approval. *See id.* at 1684 (recommending the codification of a knowing waiver "requirement in the civil rights statutes themselves"). Until then, Maine courts might continue to enforce arbitration agreements where the parties "have manifested in writing a contractual intent to be bound." Nisbet v. Faunce, 432 A.2d 779, 782 (Me. 1981); *see also supra* note 291 and accompanying text.

308. 18 Cal. Rptr. 2d 563, 566 (1993).

309. *Id.* at 567.

310. *See id.* at 566.

311. *Id.* (quoting distant forum clause contained in arbitration agreement litigated before the court and explaining that the location of the hearing could not be identified for the consumer before an actual dispute had arisen, and that "the provision on its face suggests that Minnesota would be the locus for the arbitration").

312. Courts have generally been unwilling to heed such arguments. Nevertheless, in labor arbitration the "industrial due process" doctrine might be invoked. *See* Brunet, *supra* note 13, at 117-20 (advocating the adoption of a related doctrine, "commercial due process," according to which commercial arbitrators would strive for integrity in the process in order to preserve any ongoing relationship between commercial disputants).

313. *See* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d at 567.

neutral arbitrator named in ITT's mandatory arbitration clause, reportedly filed for bankruptcy."[314] This suggests that National Arbitration Forum depended on ITT as a major source of its business, and undermines many arguments that commercial arbitrators are unbiased.

Consumer arbitration contracts providing for arbitration in a seriously inconvenient forum could be invalidated on grounds of public policy. Distant forum clauses standing alone, however, are not always invalidated on grounds of adhesion. Some courts have ignored adhesion arguments, even when made by passengers who purchased a travel "package" through a domestic travel agency but did not receive the tickets containing the finely printed distant forum clause until moments before boarding the ship in a foreign country.[315] Indeed, there are important policy reasons for upholding distant forum clauses in certain contexts. As the court in *Hodes v. Achille Lauro* reasoned, "the cruise attracted passengers from the world over . . . . The forum selection clause operated to dispel uncertainty as to where suit could be brought and assured the appellants they would not face global litigation," especially where the vessel would be "departing from and returning to Italy."[316]

This reasoning would become strained, however, if applied to instances where American lenders doing business in all fifty states attempt to shepherd borrowers into an arbitration forum in one state. First, consumers could not be said, as they could in *Hodes v. Achille Lauro*, to have submitted to the jurisdiction by completing a transaction in the forum state. Second, the lender's right to "dispel uncertainty" must be weighed against the "minimum contacts" requirement of *International Shoe Co. v. Washington*[317] and its progeny. By

314. Will Lund, *Consumer Law: Mandatory Arbitration Clauses in Consumer Contracts*, ME. LAW. REV., Jan. 18, 1995, at 23; *see also* Martin v. ITT Commercial Fin. Corp., 876 F. Supp. 824, 825 n.1 (W.D. Va. 1995) ("Shortly [after Plaintiff filed her application to stay arbitration in 1993] Equilaw [a/k/a National Arbitration Forum] filed bankruptcy in the United States Bankruptcy Court for District of Minnesota."); Wrightson v. ITT Fin. Servs., 617 So. 2d 334, 336 (Fla. Dist. Ct. App. 1993) (reversing trial court's order compelling arbitration because "alleged bias of appellee Equilaw" presented substantial question as to the validity of the arbitration agreements); ITT Commercial Fin. Corp. v. Wangerin, No. C9-95-163, 1995 WL 434459, at *1 (Minn. Ct. App. July 25, 1995) (finding no evidence of partiality where "former general counsel for ITT Consumer Financial Corp. . . . was a director, officer and shareholder of Equilaw, Inc., the parent company of the National Arbitration Forum").

315. *See, e.g.*, Hodes v. Achille Lauro, 858 F.2d 905, 913 (3d Cir. 1988) ("[T]he Hodeses had little bargaining power and some jurists have characterized contracts of passage as contracts of adhesion."). Nevertheless, the court reasoned, "[i]n the words of Professor Ellinghaus, 'just because the contract I signed was proffered to me by Almighty Monopoly Incorporated does not mean that I may subsequently argue exemption from any or all obligation.'" *Id.* (quoting M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 766-67 (1969)) (other citations omitted).

316. *Id.*

317. 326 U.S. 310 (1945). The United States Supreme Court established in *International Shoe* the precedent that a business submitted to a forum state's jurisdiction by establishing minimum sufficient contacts or ties with that state. *See id.* at 320. Under an *International Shoe* analysis, a lender actually doing business in a state would be required to arbitrate in that forum, just as a consumer having no contacts with a far-off state should not be compelled to resolve disputes there, especially where he or she has not subjectively agreed to do so.

establishing substantial contacts in a state, lenders would be consenting to at least state enforcement of consumer protection laws.[318] Finally, even commentators attacking arguments that arbitration clauses may be invalidated on grounds of adhesion admit that the use of distant forum clauses in arbitration agreements is problematic; "[a]rbitration should take place where the transaction occurred."[319]

With increasing frequency, lenders are relying on arbitration to settle disputes with their credit card customers.[320] Bank of America currently uses arbitration clauses in its credit card agreements nationwide.[321] The Bank of America contract, however, does not require the arbitration to be heard in Arizona, although the AAA, in conducting the arbitration, will apply Arizona law. Still, there is no stipulation that the arbitrator follow the law, not even Arizona law.[322] In Maine, credit card agreements containing arbitration-in-distant-forum clauses are surfacing.[323] Courts in other states have found such clauses to be unconscionable in certain circumstances.[324] At the same time, Professor Budnitz argues that legislation calling for the prohibition of distant forum clauses as a "minimum standard" is long-overdue: "Because of limited consumer resources and relatively small amounts involved in most consumer suits, the expense and inconvenience of arbitration hearings great distances from a consumer residence effectively precludes the consumer from exercising contractual rights to arbitrate."[325] This problem is exacerbated, of course, where consumers are dissuaded by high filing fees and complicated procedures from seeking any redress whatsoever.[326] Courts, however, are free to invalidate the agreement to arbitrate on

318. The MOCC has attempted to obtain statements from certain lenders that consumers have not waived the right to contact that agency or have the agency seek to enforce consumer protection laws on their behalf. *See supra* note 249 and accompanying text.

319. Brafford, *supra* note 4, at 361 (citing Patricia Sturdevant & Dwight Golann, *Should Binding Arbitration Clauses Be Prohibited in Consumer Contracts?*, DIS. RESOL. MAG., Summer 1994, at 6).

320. *See, e.g., supra* text accompanying notes 229-41 (discussing clauses under examination of the MOCC).

321. The enforceability of these agreements, at least those imposed on consumers without their consent, is still being litigated, however. *See supra* text accompanying notes 193-207 (discussing *Badie*).

322. *See* Bank of Am. Credit Card Agreement (Fall 1996) (on file with the MOCC).

323. *See, e.g.*, Visa Agreement of FNANB (Winter 1997) (on file with the MOCC).

324. *See* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 567 (1993); *see also* William H. Blessing, *ITT Financial Loses $1.5 Million Jury Verdict in Home Equity Scam*, 13 NCLC REPORTS, CONSUMER CREDIT AND USURY ED., Jan./Feb. 1995, at 13 (discussing Williams v. Aetna Fin. Corp., d.b.a. ITT Fin. Servs., 602 N.E.2d 246 (Ohio 1992), and explaining "arbitration with National Arbitration Forum would have required [debtor] to pay a $3,000 filing fee, $1,000-per-day for a hearing, $120 for each document that she filed, and would require she attend the arbitration hearing at a place selected by NAF"). At the same time, "ITT was not required to arbitrate if it wanted to foreclose on the customer's real estate." *Id.*

325. Budnitz, *supra* note 32, at 335 (explaining that Florida has amended its Arbitration Code to allow either party to void such a provision).

326. *See* discussion *supra* Part IV.B (discussing concerns of the MOCC).

grounds of unconscionability.[327] This Author's proposed amendments would provide courts with additional ammunition for the readjustment of the equities benefitting currently disfavored consumers.

V. OTHER POTENTIAL MEANS OF PROTECTING CONSUMER INTERESTS

A. Existing Proposals

Whether or not the Maine Legislature adopts the amendments to the Maine PLL proposed in this Comment, the rules for arbitrating consumer disputes could be changed. Scholars and practitioners have proposed several such changes. One proposal provides for de novo appeal to a three-member panel in order to alleviate problems of unfairness and protect against "'rogue' arbitrators."[328] This solution, however, raises the same concern as with the original arbitrators: Who is to pay the members of such a panel and to whom would they be accountable? Should they be required to report their decisions and follow the law? Who is to pay their fees? Is a system under which judges are to some extent accountable to higher courts worth preserving?[329] Given that arbitration has generally been lauded as best serving the purposes of expediency, certainty, and finality, proposals to incorporate additional adjudicative layers into the arbitral process, in order to purge it of its ills, represent the ultimate irony.

Another suggested solution is a call for guarantees of neutrality: "'Arbitration administrators . . . should meet minimum requirements for independence from litigants; they should not depend for more than a minor portion of their revenue on any single customer.'"[330] Again, an arbitration firm meeting these requirements may depend for its revenue on a single industry, so that it may be in its interest to gain a favorable reputation among industry representatives, and the requirement of having multiple customers becomes moot. From this vantage point, it becomes difficult to accept the assertion that arbitration clauses "have proven their value by giving consumers speedy, inexpensive, access to justice."[331]

Some attempts have been made to incorporate arbitration into the court system, which might resolve problems of fairness and

327. *See supra* notes 303-04, 314 and accompanying text (discussing ITT litigation in California, Florida, Virginia, Minnesota, and Ohio). Unfortunately, "[m]ost courts are not persuaded by the 'unconscionable contract of adhesion' argument. The clear trend is to judge the validity of arbitration clauses in standard form consumer contracts by the same standard used in other commercial contexts." S. Gale Dick, *ADR at the Crossroads,* DISP. RESOL. J., Mar. 1994, at 55.

328. *See* Alexander, *supra* note 12, at 903.

329. Although most judges are not elected and so not per se accountable to the public, the common law system of reporting and elaborating upon decisions could be said to create de facto accountability.

330. Brafford, *supra* note 4, at 361 (quoting Sturdevant & Golann, *supra* note 319).

331. Brafford, *supra* note 4, at 362.

accountability, but may do little to cut costs or reduce court dockets. In reducing costs, court-annexed arbitration may prove to be more a poison than a panacea. Studies have been conducted that show that court-annexed arbitration saves neither public money nor time.[332] ADR has in some places been institutionalized and transformed into the same adversarial process its creators had sought to avoid.[333] Meanwhile, those who "would value, cherish, fund, encourage and sometimes insist on adjudication" may indeed find that their complaints fall on deaf ears.[334] Consumers should at least be aware that they are contracting for such a result. The amendments proposed in this Comment would serve to generate that understanding.

B. Requiring Arbitrators to Follow Consumer Protection Laws

Arbitrators are required neither to follow the law in reaching decisions nor to explain the basis of those decisions, so no interpretive gloss is given to state or federal statutory law. Like the Equal Credit Opportunity Act,[335] the Truth in Lending Act[336] (TILA) was passed by Congress "specifically to protect a given disadvantaged segment of the population against documented systematic abuse by an industry."[337] The complex set of regulations issuing from this often-amended Act may be difficult for bankers and others to interpret.[338] Traditionally, the judiciary has provided a much-needed gloss on these statutes and regulations. To the extent that an increasing number of disputes based on the TILA will be heard by arbitrators, aid from the judiciary may be disappearing.[339] Banks rely on reported case law for guidance, and "[a]rbitration eliminates that source of guidance."[340]

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332. *See* Resnick, *supra* note 222, at 264-65 (citing Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 230 (1991)).

333. *See id.* at 262-63 (citations omitted).

334. *See id.* at 263.

335. 15 U.S.C. §§ 1691-1693r (1994).

336. 15 U.S.C. §§ 1601-1681t (1994).

337. Budnitz, *supra* note 32, at 324. Professor Budnitz draws a distinction between private and public disputes, and argues that it is inappropriate to allow arbitrators, whose mission is to decide individual controversies, to resolve actions brought under statutes with "social goals beyond achieving justice among the parties." *See id.* at 322-26.

338. *See* Home Ownership and Equity Protection Act of 1994, Pub. L. No. 130-325, §§ 151-158, 108 Stat. 2190-2198 (1994); Subtitle B of Title I of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. Nos. 103-325, 108 Stat. 2160 (1994) (codified as amended at 15 U.S.C. § 1639 (1995)). The final regulations implementing these amendments to TILA, 15 U.S.C. §§ 1601-1681t, may be found at 12 C.F.R. § 226 (1997). *See also* Klein, *supra* note 167 (discussing the legislative history and scope of the 1994 amendment, as well as the lender abuses the Act was intended to alleviate).

339. *See* Budnitz, *supra* note 32, at 325 (TILA "cases focus, not on factual disputes, but on how to interpret and apply the Act and regulations.... [TILA] has greatly confused banks.").

340. *Id.* at 326. Predatory lenders, meanwhile, can take advantage of the Act's complexity or evade its provisions entirely by "rush[ing] the consumer to complete a loan transaction before

Arbitrators may have little incentive to interpret the law in as careful a fashion as judges, and may be even less motivated to develop a coherent theory for building upon common law jurisprudence.[341] The common law may, therefore, evolve at a much slower pace. It may be argued that because industrial arbitrators are not required to report their decisions, they are only interpreting the law in a way that will not affect the outcome in future cases. Thus, they are not adding to any body of law. That may be warranted in certain cases, such as where the parties have knowingly waived their rights to a judicial forum and where there is no great disparity in bargaining power.[342]

Where, on the other hand, Congress or state legislatures have seen fit to protect consumers who may be unsophisticated or disadvantaged in terms of bargaining power, it is inappropriate to allow arbitrators to apply the law differently in like cases, thereby stagnating the evolution of the common law and inequitably administering justice. In the words of one commentator:

> There can be no moral justification for rewarding one person for his behavior in certain circumstances and then turning around and punishing another person for the same conduct in the same situation. To the extent actions are morally justified, a moral actor is compelled to respond in a like manner to persons in comparable situations. As has been recognized at least since Aristotle, justice requires treating like persons in a like manner.[343]

Commercial arbitrators hearing disputes between consumers and financial institutions thus could be required to rule on the law and report their decisions, thereby developing a body of arbitration jurisprudence. Under the current system, arbitrators are not publicly accountable.[344] To

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the consumer understands the nature of the loan or can obtain advice from a lawyer, friend, or relative.... [Lenders may also evade TILA by] misdating documents...." Klein, *supra* note 167, at 131.

341. For an example of the way Maine judges might build upon common law jurisprudence, see Eric R. Herlan, *Law as Integrity: Chief Justice McKusick's Common Law Jurisprudence*, 43 ME. L. REV. 321 (1991). Judges, acting as interpreters, may "proclaim rights that [had] not been recognized previously, but only when those rights reflect[ed] the judge's best interpretation of the guiding principles implicit in the relevant area of law." *Id.* at 326. This entails adding not simply "an additional holding to the common law pool, but . . . an interpretive reconstruction of the principles involved. The channeled creativity of Law as Integrity explains well the capacity of the common law to grow and develop over time." *Id.* at 329.

342. *See* discussion *supra* Part IV.D (discussing Maine cases involving a disparity in bargaining power).

343. Herlan, *supra* note 341, at 350.

344. Arbitrators, unlike judges, are employed by the private sector. Judges must justify the decisions they make in written opinions and are subject to appellate review. They have a public reputation to protect and are therefore less likely to act simply according to personal biases and ignore the law. The decisions of arbitrators, on the other hand, are subject to limited review, such as where there has been a manifest disregard of the law, and arbitrators are not generally required to follow the law. The contract could stipulate that they do so, of course, but lenders are unlikely to draft their form contracts in this way, especially where they know that the arbitrator depends on them, rather than on the one-shot consumer, for repeat business.

make arbitrators more accountable, the same standard could be applied as is now applied to judges, who "are not elected legislators, and should not be in the business of declaring new law based simply on their personal predilections."[345] That cannot be accomplished, however, without requiring arbitrators to follow the law or at least justify their decisions in a reported opinion that reveals more than the final outcome and the amount of the award.

C. Judicial Responses

1. Introduction

Common law countries have traditionally valued judicial systems under which judges are expected to develop and adhere to a theory of common law jurisprudence in order to promote justice. Similarly, Supreme Court justices have argued in favor of preserving the common law jurisprudence of the states and against "placing the protection of rights in an ancillary position among protected values."[346] At the close of the twentieth century, the words of one commentator ring ominous:

> If we are unable to afford some of the social institutions we have, we should at least be allowed to vote upon which ones we are willing to expunge from our social life. The institution of arbitration is not simply being adapted to embrace a larger dispute resolution destiny. It is being exploited as a tool by which to achieve a surreptitious reduction of justice services in our society. American society is no longer characterized by a transcending rule of law, but rather by an expiring legal culture. Commercial expediency and privatized justice through arbitration may produce the desired efficiency in the short run, but what manner of political society will the United States be in the twenty-first century if, in desperation and despair, we rid it of the normative function of the law and basic procedural justice?[347]

In cases such as *Casarotto*, we have seen state laws, intended to level the playing field and protect consumers possessing lesser bargaining power than the organized industry representatives with whom they contract, yield to commercial expediency.[348] By refusing to stay certain

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345. Herlan, *supra* note 341, at 349.

346. Carbonneau, *supra* note 8, at 1966 (discussing Justice Douglas's "prophetic dissent in *Scherk v. Alberto-Culver, Inc.*," 417 U.S. 506, 521 (1974) (Douglas, J., dissenting); Justice Stevens's "poignant critique of the arbitrability of antitrust claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*," 473 U.S. 614, 660 (1985) (Stevens, J., dissenting), and his dissent in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 542-56 (1995) (Stevens, J., dissenting); and Justice Thomas's "rigorous and trenchant analysis of the Court's inconsistency on the state-law question" in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting), and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (Thomas, J., dissenting)).

347. Carbonneau, *supra* note 8, at 1967.

348. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. 1652 (1996).

consumer arbitration proceedings, judges may be permitting the courts, in the words of Justice Frankfurter, "to be used as instruments of inequity and injustice."[349]

2. *Staying Arbitration*

As the law currently stands, Maine courts could void arbitration contracts on the grounds that they are unconscionable or unconstitutional waivers of rights guaranteed by the Maine Constitution. One Maine judge has already done so.[350] Examples of unconscionable contracts include instances where the lender reserves the right to appeal an award that exceeds a pre-established ceiling or the right to use the courts for purposes of collecting debts.[351] Again, where the consumer is discouraged altogether from seeking redress, the contract to arbitrate could be invalidated.[352] In such cases, courts could order a stay of arbitration, whether the Maine UAA or the FAA is applied.[353]

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349. United States v. Bethlem Steel Corp., 315 U.S. 289, 326 (1942), *quoted in* Unico v. Owen, 232 A.2d 405, 411 (N.J. 1967).

350. *See* Cogliola v. Royal Globe Ins. Co., CV-95-04 (Me. Super. Ct., Lin. Cty., July 26, 1995) (Marsano, J.). Relying on the "sacred tenet of public policy . . . found in Article 1, Section 20 of the Constitution of Maine," Justice Marsano vacated the arbitration award because the agreement as written constituted an unconstitutional waiver of the right to trial by jury. *Id.* slip op. at 3. The agreement was written so that neither party could appeal awards less than the statutory minimum for uninsured motorist coverage, whereas awards exceeding that minimum could be appealed by either party. Reasoning that only the insurance company would want to appeal a higher award, Justice Marsano invalidated the entire agreement as unconscionable. This was a case of "first impression in Maine." *Auto Policy Arbitration Clause Invalidated*, ME. LAW. REV., Sept. 13, 1995, at 5. In deciding that question, Justice Marsano chose to follow the Delaware rather than the New Jersey approach. *See id. Compare* Worldwide Ins. Group v. Klopp, 603 A.2d 788 (Del. 1992) (holding that the arbitration agreement between insurer and insured allows insurer escape hatch and is therefore unconscionable contract of adhesion and void as violative of public policy), *with* D'Antonio v. State Farm Mut. Auto. Ins. Co., 620 A.2d 1060 (N.J. Super. Ct. App. Div. 1993) (awarding insurer no more than statutory minimum for underinsured motorist coverage, and finding that arbitration clause and subsequent award is binding on the parties).

351. *See, e.g.*, ROBERT J. HOBBS, FAIR DEBT COLLECTION, § 13.9.1.1 (3d ed. 1996) ("The Bank of America procedure allowed either party to invoke binding arbitration. This allowed the bank to continue to file routine collection matters in court, but if the bank was sued, the bank could require the matter to be turned over to ADR."); *id.* § 13.9.2.1.1 (explaining that a customer relying on an arbitration agreement purporting to resolve "financial problems" by ADR was denied any hearing concerning *his* financial problems and instead was faced with a default arbitration award of the alleged loan balance). The MOCC is concerned that consumers might be precluded from filing counterclaims in collection actions brought against them because they have agreed to arbitrate all disputes. *See supra* text accompanying notes 237-39.

352. *See* discussion *supra* Part IV.B.

353. *Compare* ME. REV. STAT. ANN. tit. 14, § 5928 (West 1980) ("On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate."), *and* Westbrook Sch. Comm. v. Westbrook Teachers Ass'n, 404 A.2d 204, 207 (Me. 1979) (stating that the question of substantive arbitrability is decided by the court), *with* 9 U.S.C. § 4 (1994) (providing that the court determines question of arbitrability where the making of the arbitration agreement is in issue). *See also* Stempel, *supra* note 150, at 1426-27 (proposing that courts render contracts to arbitrate voidable if not the "product of sufficiently genuine consent," a major indicium of which "would be the degree of disclosure of the arbitration provision and its

Contracts to arbitrate are invalid, revocable, and unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[354] Unconscionability was grounds for the revocation of any contract, even prior to the adoption of this principle in the Uniform Commercial Code.[355] Courts may therefore invalidate arbitration agreements where the terms are particularly oppressive and unfair, and where true consent is lacking.

Agreements to arbitrate disputes between merchants and consumers that are coupled with distant forum clauses could be invalidated as unconscionable by Maine courts.[356] In a recent California case, the inconvenience of the forum to consumers of modest means was a major factor in the decision to invalidate an arbitration agreement.[357] The California Court of Appeal viewed the procedure as "designed to discourage borrowers from responding at all."[358] The arbitration contract was therefore held to be unenforceable on grounds of unconscionability.[359] Maine courts could follow this reasoning in staying arbitration in situations where the underlying agreement provides for such unconscionably expensive access to the arbitral forum.

Although Maine courts look favorably upon arbitration, they have invoked a public policy exception on occasion: "A court may not substitute its judgment for that of the arbitrator. It is the arbitrator's

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impact on the resisting party's knowledge or access to knowledge of the differences between arbitration and its alternative forums"). Stempel outlines the history of the doctrine of unconscionability and suggests that courts will allow parties to avoid contracts on grounds of unconscionability where both lack of choice and unreasonable terms are in evidence. *See id.* at 1428-33.

354. 9 U.S.C. § 2 (1995); *see also* ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980) (operative provision of Maine UAA).

355. *See* Stempel, *supra* note 150, at 1430 n.252 (citing U.C.C. § 2-302 and Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d. Cir. 1948)).

356. *See, e.g.*, Alexander, *supra* note 12, at 902 (advising drafters of ADR clauses to provide for arbitration in county of customer's residence, in order to avoid "closer scrutiny and possible non-enforcement of arbitration") (citation omitted).

357. *See* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 566 (1993); *see also supra* text accompanying notes 308-14.

358. *See* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d at 566 (finding that the National Arbitration Forum's rules and procedures came "perilously close" to denying the borrower a "'fair opportunity to present his position'") (citation omitted).

359. *See id.* at 567. It seems unconscionable for a lender to extend credit without regard for the borrower's ability to repay. *See, e.g.*, Klein, *supra* note 167, at 133-34 (describing how predatory lenders sometimes close their eyes to a borrower's inability to pay in order to reap the rewards of foreclosure). Where loans are extended in violation of the Home Ownership and Equity Protection Act of 1994, courts could refuse to enforce the accompanying arbitration agreements on grounds of unconscionability. *See, e.g.*, Green, *supra* note 14, at 119 (proposing, *inter alia*, that courts should look at the "totality of the circumstances" to see "whether the individual knowingly and voluntarily consented to waiver of his substantial rights"). *But cf.* Stempel, *supra* note 150, at 1415 (explaining that although some argue that lack of choice alone makes a contract provision unconscionable, most courts rightly reject this argument). Professor Stempel does, however, recommend that courts require a "higher level of consent" before consumers will be deemed to have waived the right to litigate. *See id.* at 1432-33 & n.261.

construction of a contract that is bargained for, . . . [but if] the award contravenes public policy we will disturb the award."[360] To date, this exception has only been invoked in disputes involving public employers and employees.[361] The Maine Law Court first recognized the exception in 1989, but after a review of the record, found no public policy violation.[362] Borrowing from an earlier Massachusetts decision, the court explained the limited scope of the exception: "[A]n arbitrator exceeds his power when the award contravenes public policy requiring conduct 'beyond that which [a] public employer may bind itself or allow itself to be bound.'"[363] Although the court discussed the exception subsequently,[364] in no case has it found a public policy to have actually been violated. The Supreme Court, however, has articulated a broader public policy exception:

> As with any contract, . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy [and] the question of public policy is ultimately one for resolution by the courts. . . . Such a public policy, however, . . . is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[365]

Maine courts could rely on yet another source of law in deciding whether they should enforce consumer agreements to arbitrate. Article I, section 19 of the Maine Constitution provides that "[e]very person . . . shall have remedy by due course of law; and right and justice shall be administered *freely and without sale* . . . ."[366] Maine courts could refuse to enforce those consumer arbitration contracts that provide for exorbitant filing fees, complicated and poorly disclosed procedures, or hearings in seriously inconvenient fora, by invoking the state

360. City of Lewiston v. Lewiston Firefighters Ass'n Local 785, 629 A.2d 50, 52-53 (Me. 1993) (quoting Dep't of Transp. v. Maine State Employees Ass'n Local 1989, 606 A.2d 775, 777 (Me. 1992)).

361. *See, e.g.*, Bureau of Maine State Police v. Pratt, 568 A.2d 501 (Me. 1989).

362. *See id.* at 505-06.

363. Dep't of Transp. v. Maine State Employees Ass'n Local 1989, 606 A.2d at 777 (quoting Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 467 N.E.2d 87, 91 (Mass. 1984)).

364. *See id.*

365. W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)) (internal citations omitted).

366. ME. CONST. art. I, § 19 (emphasis added). At least 36 other states have similar provisions. *See* Cary L. Fleisher, Comment, *Article I, Section 19 of the Maine Constitution: The Forgotten Mandate*, 21 ME. L. REV. 83, 83 n.1 (1969) (collecting state constitutions with similar provisions). This largely ignored constitutional provision has roots in the Magna Charta. *See id.* at 84-85. The language of the Magna Charta is strikingly similar to that in the Maine Constitution, and is relevant to arbitration agreements: "We will sell to no man, . . . either justice or right." Magna Charta, 9 Hen. 3, c. 29 (1225), *quoted in* Fleisher, *supra*, at 84-85.

constitution's guarantee of a remedy for injury by the course of the law, "freely and without sale."[367]

It has been argued that Article I, section 19 of the Maine Constitution creates a "presumption for relief," which defendants can overcome only by establishing "competing negatives" or interests.[368] Courts, holding a "judicial thumb on the [consumers'] side of the scale,"[369] would then weigh in the balance interests of public policy, and "'such qualifications and limitations as other principles of law equally sound and important impose upon it.'"[370] Courts would thus uphold arbitration contracts that on their face have the effect of neither violating nor circumventing existing consumer protection laws, as long as there are no grounds for a finding of unconscionability such as that found in *Patterson*.[371] Conversely, where defendants fail to overcome the Maine Constitution's presumption for relief without sale, the contract would not be enforced.

3. *Vacating Awards*

Courts may also vacate arbitration awards under both the UAA and the FAA.[372] Arguments that agreements to arbitrate constitute unconstitutional waivers of substantive rights have, however, been relatively unsuccessful in persuading both the Supreme Court and Maine courts to stay arbitration proceedings or vacate awards.[373] Consumers seeking to vacate arbitration awards could, however, look to the language of both the FAA and the UAA to buttress their due process arguments. Both statutes allow courts to vacate awards procured by

367. *See* ME. CONST. art. I, § 19; *see also* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 567 (1993) (holding that costs imposed on consumer seeking redress constituted grounds for finding of unconscionability).

368. *See* Fleisher, *supra* note 366, at 107-08.

369. *Id.* at 107.

370. *Id.* (quoting Garing v. Fraser, 76 Me. 37, 41 (1884)).

371. *See supra* notes 308-14 and accompanying text.

372. *Compare* 9 U.S.C. § 10 (1995) (stating that arbitration awards may be vacated "where the award was procured by corruption, fraud, or undue means," and upon showing "of any . . . misbehavior by which the rights of any party have been prejudiced"), *with* ME. REV. STAT. ANN. tit. 14, § 5938 (West 1980) ("[T]he court shall vacate an award where . . . the award was procured by corruption, fraud or other undue means [or] [t]here was evident . . . misconduct prejudicing the rights of any party.").

373. *See, e.g.*, Edgecomb v. Town of Limestone, 538 A.2d 767, 770 (Me. 1988) (holding that because a complaining police officer did not avail himself of statutory review procedures, he cannot later assert due process violation affecting property interest); Anderson v. Elliott, 555 A.2d 1042, 1049 (Me. 1989) (holding that a court may exercise power to regulate the bar by requiring a simplified, expeditious, and fair way of resolving fee disputes between attorney and client without violating the attorney's right to trial by jury). *But cf.* Buckminster v. Acadia Village Resort, Inc., 565 A.2d 313, 316 (Me. 1989) (holding that an arbitration clause did not foreclose ability of architect to perfect statutory mechanic's lien). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (recognizing that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by [a] statute; it only submits to their resolution in an arbitral, rather than a judicial, forum") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

"undue means."[374] One commentator suggests that practitioners could base their due process arguments on this phrase.[375] In doing so, they would argue that procedural unfairness is grounds for vacating arbitration awards granted under either the FAA or the UAA. Although this may be an "uphill battle,"[376] due to the policy of Maine and federal courts favoring arbitration, in particularly egregious cases, arguments of procedural unfairness are not without merit.

In Maine, awards have been vacated where the arbitrator has exceeded his authority or where the arbitration proceeded from an agreement later found by the court to be non-existent or invalid.[377] Maine has not seen, however, a large number of cases seeking vacation of consumer arbitration awards.[378] Despite the millions of customers signing consumer arbitration agreements, relatively few Maine consumers appear before arbitration panels. It may be that they have no disputes. More likely, however, is the possibility that substantial costs, complicated procedures, reports of arbitrator bias, or perhaps fear of the unknown have persuaded them to ignore their claims. Under these circumstances, the Maine Law Court could adopt a policy that scrutinizes certain consumer arbitration agreements on grounds of procedural unfairness or "undue means." Until arbitration proceedings are more fully reported, however, this tack may prove difficult.[379]

The FAA also provides for vacation of awards where the "rights" of the parties were "prejudiced."[380] Drafters of the FAA may have intended to preserve constitutional rights by including this section.[381] The Maine UAA contains similar language.[382] Maine courts could, therefore, look to the language of either the FAA or the UAA for authority to vacate awards on grounds of substantive unconscionability where "rights" of the parties have been prejudiced. This would help justify the constitutional reasoning espoused in *Cogliola v. Royal Globe Insurance*

374. *See* 9 U.S.C. § 10(a)(1) (1995); ME. REV. STAT. ANN. tit. 14, § 5938(1)(A) (West 1980).

375. *See* Brunet, *supra* note 13, at 114-15.

376. *See id.* at 115.

377. *See, e.g.*, Pelletier & Flanagan, Inc. v. Maine Court Facilities Auth., 673 A.2d 213, 216 (Me. 1996) (vacating award where opposing party preserved objection that there was no valid agreement to arbitrate); Buckminster v. Acadia Village Resort, Inc., 565 A.2d 313, 314 (Me. 1989) (vacating judgment where arbitration agreement did not contain express waiver of party's statutory right to file mechanic's lien).

378. Most cases involve collective bargaining agreements or disputes between contractors and subcontractors. Clauses calling for arbitration of claims under uninsured motorist clauses of insurance policies are specifically exempted from the Maine UAA. *See* ME. REV. STAT. ANN. tit. 14, § 5948 (West 1980).

379. *See* Brunet, *supra* note 13, at 115.

380. *See* 9 U.S.C. § 10(a)(3) (1995); *see also* Brunet, *supra* note 13, at 115-17 (arguing that the inclusion of this concept is evidence that Congress intended to provide a mechanism for the preservation of constitutional rights).

381. *See* Brunet, *supra* note 13, at 116 (arguing that Julius Cohen envisioned arbitration that included a process for appeals in order to preserve substantial rights of the parties).

382. *See* ME. REV. STAT. ANN. tit. 14, § 5938(1)(B) (West 1988) ("The court shall vacate an award where . . . [t]here was . . . misconduct prejudicing the rights of any party.").

Co.[383] This approach would avoid preemption by the FAA in that it relies on both the words of the statute itself and Maine organic law, such as the right of redress for injuries and the right to trial by jury.[384]

Although courts until now have been hesitant to review arbitral awards,[385] the time may have come for them to take a second look. With the advent of arbitration in areas of consumer loans and purchases, citizens are unlikely to have "intentionally or intelligently" waived their constitutional rights.[386] Where they are borrowing from a lender of last resort, borrowers arguably have no real choice, and may lack the means to seek counsel informing them of viable alternatives to either the lender or the arbitration the lender requires. These policy considerations might justify a finding of unconscionability sufficient to allow Maine courts to invoke a public policy exception.

D. Legislative Action

Congress[387] could amend the FAA in order to prevent the preemption of state disclosure laws, and thereby dispel any uncertainty about the conflict between the FAA and federal disclosure statutes.[388] This would clarify that Congress does not intend the FAA to preempt state legislation enacted to protect consumers from lenders violating state disclosure requirements.[389]

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383. CV-95-04 (Me. Super. Ct., Lin. Cty., July 26, 1995) (Marsano, J.); *see supra* note 350 and accompanying text.

384. *See* ME. CONST. art. I, §§ 19-20.

385. *See* Brunet, *supra* note 13, at 119.

386. *See id.*

387. The following discussion is applicable to both state and federal legislative action, but reference will be made only to Congress because most consumer loan disputes would fall under the FAA, and Congressional action would therefore be more comprehensive. The arguments apply, however, with equal weight to both the FAA and the Maine UAA.

388. Most consumer loan transactions can easily be shown to involve interstate commerce, which means that the FAA will apply at least where loan documents are drafted to include arbitration clauses. Assuredly, the number of such transactions has increased substantially since 1925, when the FAA was drafted. *See, e.g., Nationwide Banking and Insurance Activities, 1993: Oversight Hearings on Interstate Banking and Branching (P.L. 102-242) Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. (1993) (statement of Hon. Frank N. Newman, Undersecretary for Domestic Finance, United States Treasury), *available in* 1993 WL 747903 (explaining how financial markets, once locally controlled, have evolved dramatically so that banks are now funded across state and national boundaries and extend credit beyond in-state markets); *Bank Supervision, 1997: Hearings on the Future of Bank Examination and Supervision Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 105th Cong. (1997) (statement of Andrew C. Hove, Jr., Acting Chairman of the Federal Deposit Ins. Corp.), *available in* 1997 WL 621761 (indicating that in the past thirteen years, the percentage of the nation's banking assets controlled by multi-state organizations has increased from 33% to over 66%). Amendments to the FAA are thus essential to fulfill needs that simply did not exist seventy years ago.

389. *See* Budnitz, *supra* note 32, at 336. Professor Budnitz notes further: "Congress should make it clear that it does not intend the FAA to take from state legislatures the authority to exempt consumer transactions from arbitration." *Id.*

First, arbitrators could be required to follow the law in consumer disputes of a certain class, such as those covered under the Maine PLL.[390] For example, New Jersey requires "a 'reasoned' decision which includes findings of fact and determinations of law."[391] Arbitrators would thus be required to explain, at least minimally, the basis of decisions arising from consumer disputes. Related legislation could require training of arbitrators in consumer protection.[392] On the federal level, this would involve many consumer protection statutes, such as the Securities Exchange Acts of 1933 and 1934, and the TILA. In Maine, arbitrators would need training under Maine's consumer credit laws[393] and Unfair Trade Practices Act.[394]

Second, provision could be made for appeal to a judicial forum in cases where the arbitrator resolving a consumer-lender dispute has failed to apply the law correctly.[395] Alternatively, arbitration rules could allow the decision to be appealed within the arbitration system.[396] The latter approach, however, may present the same problems of accountability and bias encountered with present arbitration rules, and undermine arbitration's goal of expediency.[397] It is more appropriate that actions brought by consumers be appealed to a judicial tribunal, because consumers' grievances may be classified as "public" and are often regulated under state police powers.[398]

Third, the privacy of arbitration proceedings could be limited to the identity of the complaining consumer. In this way, certain lenders would be motivated by potentially negative publicity to make amends for, and avoid in the future, truly egregious conduct.[399] At the same time, publication of the arbitration proceedings and final outcomes would encourage other lenders to resist the temptation to engage in similar behavior, such as the violation of disclosure statutes. Pressure on the

390. *See id.* at 336-37.

391. *Id.* at 338 (citing N.J. STAT. ANN. § 2A:23A-12 (West 1962)).

392. *See id.*

393. *See, e.g.*, ME. REV. STAT. ANN. tit. 9-A §§ 1-101 to 11-121 (West 1997) (Maine Consumer Credit Code); ME. REV. STAT. ANN. tit. 10, §§ 1311-1329 (West 1997) (Fair Credit Reporting Act); ME. REV. STAT. ANN. tit. 5, §§ 4595-4598 (West 1989 & Supp. 1996-1997) (Fair Credit Extension Subchapter of Maine Human Rights Act); ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (West 1997) (Plain Language Law); ME. REV. STAT. ANN. tit. 32, §§ 11001-11054 (West 1988 & Supp. 1996-1997) (Maine Fair Debt Collection Practices Act). This list is not all-inclusive, but the volume and complexity of these consumer protection laws alone underscores the need for arbitrator education.

394. ME. REV. STAT. ANN. tit. 5, §§ 205-A to 214 (West 1989 & Supp. 1996-1997).

395. *See* Budnitz, *supra* note 32, at 338 (citing N.J. STAT. ANN. § 2A:23A-13(c)(5) (West 1962)).

396. *See* Alexander, *supra* note 12, at 902-03.

397. *See* discussion *supra* Part IV.

398. *See* Budnitz, *supra* note 32, at 322-23 (arguing that the arbitral forum is not the appropriate place to resolve disputes arising from alleged violations of consumer-protective statutes, which are intended to preserve "public" rights).

399. Although one might argue that frivolous proceedings might harm lenders, publishing the underlying decision would eliminate the possibility of undue prejudice adversely affecting lenders.

arbitrator to apply these statutes fairly would increase, and perhaps counteract any existing bias in favor of the lender. Consumers, even if they do not prevail, will have consented to the proceedings and at least leave with a sense that the process was conducted fairly.[400]

Finally, Congress should make it clear that the FAA should not be construed to preempt state laws designed to protect those consumers "who, without these laws, would not be in a position to protect themselves."[401] Of course, if all parties knowingly and voluntarily consent to the use of ADR, "true justice will have been achieved."[402] Note, however, that "[j]ustice does not follow from a situation where consumers are forced to adhere to an arbitral forum and process that they would not have chosen once the dispute arose."[403] Congress could rectify this problem by amending the FAA to specify that it is to be applicable only in federal court.[404] Meanwhile, amendments to the Maine UAA and PLL could be drafted to avoid preemption under recent Supreme Court case law.[405]

VI. CONCLUSION

Consumer protection laws were not drafted to enable lenders to "opt-out" of disclosure requirements. Nevertheless, the United States Supreme Court has effectively sanctioned such a process.[406] The Maine PLL can be amended to withstand preemption, and yet remain within the parameters created by these decisions, by providing for state enforcement of new disclosure laws rather than the invalidation of arbitration agreements. Meanwhile, the Maine State Bar Association, Office of Consumer Credit Regulation, or Bureau of Banking should publish articles or use other fora to educate consumers.[407] Lenders

400. *See, e.g.*, Green, *supra* note 14, at 119 (stating that parties coerced into adhesion agreements that are enforced by courts without hesitation interpret the process as unfair). Green agrees with Justice Marshall that the "'governing principle of a humane society and a good legal system . . . [is to] recognize the worth and importance of every person . . . [and] be *perceived by all the people* as providing equal justice.'" *Id.* (quoting statements by Justice Thurgood Marshall at the Eighth Conference on the Law of the World, 1977, *Mr. Justice Marshall Lives on His Words*, NAT'L L.J. Feb. 8, 1993, at 8) (alterations and emphasis in original).

401. *Id.*

402. *Id.*

403. *Id.* at 119-20.

404. *See id.* at 118 (proposing Congressional amendments to the FAA).

405. See generally *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) and *Doctor's Assocs. v. Casarotto*, 116 S. Ct. 1652 (1996), both discussed *supra* Part II.B.3, 4.

406. *See* Doctor's Assocs. v. Casarotto, 116 S. Ct. at 1656; Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 277-81.

407. Professor Budnitz proposes that industry representatives, in spite of complaints about the administrative costs, should be responsible for consumer education. *See* Budnitz, *supra* note 32, at 334. Consumer education is also to be desired by proponents of alternative dispute resolution, who should be "critical of certain businesses or industries that abuse arbitration and coerce consumers to agree to it." Green, *supra* note 14, at 118. Industry representatives could also

wishing to refer future consumer disputes to arbitration could also be required to publicize the effects of arbitration on consumer rights.[408]

Freedom of contract remains essential both to the current economic system and to the preservation of justice.[409] Society also needs certain "traffic rules," including rules for the enforcement of arbitration agreements.[410] Still, those rules should also protect the "helpless, ignorant buyer" whose "consent is doubly unreal—the buyer [or borrower who] has no real choice . . . and . . . neither knows nor understands what he is signing."[411] Only those consumers who knowingly contract to resolve future disputes before an arbitrator should be obliged to do so. Without informed consent, there can be no contract.[412] Disclosure statutes ensure that contracts are consensually created. Lenders who violate those statutes should not be able to seek refuge in arbitration by exploiting recent Supreme Court holdings to the detriment of some consumers.

The amendments to the Maine PLL proposed in this Comment would withstand preemption by the FAA and preserve consumers' constitutional rights to a jury and a fair trial. Consumers wishing to waive those rights should at least know they are doing so. The specific costs and procedures should also be clearly disclosed in advance. Currently, consumers are vulnerable to arbitrators, who, by neglecting to follow the law, demonstrate that a sort of "judicial" intervention is alive and well in the nineties. Judge Learned Hand would have denounced such a practice as anti-democratic:

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engage in broad-based educational campaigns to counter the unfair advantage some of their competitors may gain by cutting administrative corners.

408. Certain lenders may not wish to participate in such a campaign and may indeed exert efforts to promote arbitration. *See* Budnitz, *supra* note 32, at 332. If all lenders using arbitration were required to publicize, the playing field between those who do and those who do not might be levelled.

409. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

410. *See* LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE 62 (1990). In post-industrial society, we are faced with "a situation of weird duality," in which individuality and free choice are valued and expected, but where external controls are nonetheless imposed upon us by strangers. *See id.* at 72-73. Because society has become technologically complex, a vast network of "traffic rules" is needed to provide "orderly access to scarce resources." *Id.* at 62. Still, in order for individuality to survive, we must recall that the essence of contract is free choice, and "a social order based on contract is a social order which exalts the individual and his options above all else." *Id.* at 81. Analyzed in this way, the amendments proposed in this Comment come to be seen as traffic rules enacted to ensure that externally-created controls do not extinguish individuality and free choice.

411. *Id.* at 82 (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)).

412. Even if one applies an objective theory of contract to consumer arbitration agreements, one must admit that the "*external* manifestation[s] of mutual assent" required under that standard of contract formation are premised upon *internal* consent. 13 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1536 (3d ed. 1970), *cited in* GRANT GILMORE, THE DEATH OF CONTRACT 43 (1974).

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[413]

Maine consumers who consent to arbitration without adequate warning and information merit the protection that their elected representatives are able to provide. Unless adequate steps are taken to protect consumer interests, the uninformed will continue to waive their rights to judicial review—that "old and powerful weapon in courts of the United States"[414]—without becoming aware of what they have lost until it is too late. The statutory amendments proposed in this Comment would ensure that consumers understand the nature of the process for which they are bargaining and that an actual bargain takes place.

Andrew R. Sarapas

413. LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958), *quoted in* GUNTHER, *supra* note 16, at 659.

414. FRIEDMAN, *supra* note 410, at 22.