

DEMOCRACY AND DISPUTE RESOLUTION: THE PROBLEM OF ARBITRATION

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I INTRODUCTION

Scholars have approached arbitration, especially under the Federal Arbitration Act,¹ from a variety of perspectives, including doctrinal,² historical,³ empirical,⁴ and practical.⁵ One aspect that has not yet been fully considered, however,

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1. 9 U.S.C. §§ 1-16 (2000).

2. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401; Stephen J. Ware, *Consumer Arbitration as Exceptional Contract Law (With a Contractualist Reply to Carrington and Haagen)*, 29 MCGEORGE L. REV. 195 (1998).

3. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992) (providing the definitive history of the Federal Arbitration Act); Sarah E. Rudolph, *Blackstone's Vision of Alternative Dispute Resolution*, 22 MEMPHIS ST. L. REV. 279 (1992); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 335-36 (1996) (suggesting less deference may be appropriate for “new” forms of alternative dispute resolution (ADR) than “old” ADR, in part because of changes in arbitration usage); Jean R. Sternlight, *Compelling Arbitration of Claims under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273 (1999).

4. See, e.g., Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695; Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55 (Winter/Spring 2004); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

5. See, e.g., Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (Winter/Spring 2004); Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998).

is the relationship between arbitration and constitutional democracy.⁶ Yet, as a dispute-resolution process that is often sanctioned by the government,⁷ that sometimes inextricably intertwines governmental and private conduct,⁸ and that derives its legitimacy from the government,⁹ it is appropriate—indeed, our responsibility—to ask whether arbitration furthers the goals of democratic governance.¹⁰ It is only sensible that state-supported dispute resolution in a democracy should strengthen, rather than diminish, democratic governance and the civil society that supports it.¹¹

The debate over “mandatory arbitration”¹²—that is, the imposition of binding arbitration through contracts of adhesion, employee handbooks, consumer terms and conditions, and other unilaterally drafted documents, under the authority of the Federal Arbitration Act and related state laws—seems to call the question. Since the late 1980s, plaintiffs’ and defense lawyers have been engaged in an intense battle over mandatory arbitration in the courts, the legislatures, and the media.¹³ This is not merely a fight over a pocketbook issue.

6. I have hinted at this in earlier works, as have others. See, e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 631 (1997) [hereinafter Reuben, *State Action*]; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, *passim* (2000) [hereinafter Reuben, *Constitutional Gravity*]; Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 90-91 (2002); Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT’L ECON. L. 587, *passim* (1998).

7. See UNIF. ARBITRATION ACT (2000) [hereinafter U.A.A.]. For a full listing of states adopting the Uniform Arbitration Act, see Reuben, *Constitutional Gravity*, *supra* note 6, at 976 n.108.

8. See Reuben, *State Action*, *supra* note 6, at 609-31 (describing court-related ADR programs, as well as contractually enforced ADR under the Federal Arbitration Act).

9. The history of arbitration and the ouster doctrine demonstrate how the willingness of the courts to participate in and enforce the results of so-called “alternative” or “appropriate” dispute-resolution methods has been essential to the legitimacy of these processes. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U. MO. K.C. L. REV. 449, 459-72 (1996); Reuben, *State Action*, *supra* note 6, at 598-609.

10. See Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?* 18 OHIO ST. J. ON DISP. RESOL. 93, 97 (2002) (“[T]he public’s trust and confidence in the courts is their most precious and essential asset.”).

11. This concept borrows loosely from two premises of John Hart Ely’s representation-reinforcing theory of judicial review, concisely described by Professor White: “[t]he Constitution’s concern with creating and maintaining a democratic society, and . . . its expectation that open-ended, potentially ambiguous constitutional provisions [will] be construed in accordance with this central concern.” G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 551 (2002). For more extensive descriptions by Ely himself, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87-88, 101-04 (1980).

12. Mandatory arbitration is so controversial that even the use of the term draws fire. See, e.g., Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105-10 (1996) (explaining the confusion and controversy over the use of the terms “voluntary” and “mandatory” in the employment-arbitration context). To be clear, all references to mandatory arbitration in this Article are to arbitration imposed upon an employee or consumer as a condition of employment or the provision of services, the results of which are binding upon the parties and enforceable in court under the Federal Arbitration Act.

13. During this period, there was a formal shift of judicial policy, at least within the U.S. Supreme Court, away from hostility and toward enforcement of arbitration agreements. Compare *Wilko v. Swan*, 346 U.S. 427 (1953) (concluding that the right to select a judicial forum is not the kind of right

Rather, the deeply felt arguments of both sides resonate with the most fundamental of democratic virtues: individual liberty, the rule of law, and fundamental fairness.

This is not surprising considering the profound importance of the rule of law and dispute resolution in the daily functioning of any democracy. What is surprising, however, is how little scholarly or judicial attention has been given to the topic. With rare exception,¹⁴ the question of the relationship between arbitration and democracy, or for that matter, democracy and dispute resolution generally,¹⁵ has simply fallen through the cracks of scholarly attention.

A full exploration of the relationship between democracy and dispute resolution is beyond the scope of this inquiry. This Article seeks only to bring the submerged issue of arbitration's relationship to democracy to the surface of the mandatory arbitration debate. Its goal is relatively modest: to recognize and articulate the relationship between democracy and arbitration as an issue worth considering, to analyze the democratic character of arbitration, and to suggest some implications of this assessment. The discussion draws primarily upon U.S. constitutional democracy,¹⁶ but hopefully is broad enough to begin to inform the experiences of other democracies.¹⁷

that can be waived), *with* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling *Wilko*), and Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (compelling arbitration of a federal age discrimination claim).

14. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (arguing that adjudication is in the public good and arguing against private settlements); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2693 (1995) (describing the potential for settlement to increase "access to justice" and be "participatory, democratic, empowering, educative, and transformative for the parties"); see also Ackerman, *supra* note 6, at 53-82 (considering the degree to which litigation, arbitration, and mediation foster the social capital of community); Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000) (discussing personal autonomy in the context of judicial review of arbitration awards); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (proposing a detailed negotiating process that would increase participation in, and provide legitimacy to, the regulatory process); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001) (arguing that mediation can provide greater procedural justice than adjudication).

15. Even the "rule of law" scholarship focuses less on the relationship between the rule of law and dispute resolution as a structural or institutional component of democratic governance and more on philosophical questions, such as whether a rule of law actually exists, its meaning if it does exist, and, to the extent that it exists, whether it should include substantive values. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 782-810 (1989). Compare LON L. FULLER, *THE MORALITY OF LAW* 33-94 (2d ed. 1969) (advocating a narrow, instrumental approach to the rule of law), with JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971) (arguing that the concept includes substantive values).

16. This emphasis is purely the result of my own familiarity with U.S. constitutional democracy, rather than any claim that system might have to superiority.

17. Such generalized understandings must always be considered in light of the unique laws, customs, traditions, practices, and contexts of those other nations. See generally Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons From General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319 (urging caution in the export of U.S. dispute-resolution technology).

Part II establishes an operative understanding of what democracy is, explores the role of dispute resolution in a democracy, and identifies certain core substantive values of democratic governance that may be used to assess the democratic character of a dispute-resolution method, process, or system, namely: personal autonomy, participation, accountability, transparency, rationality, equality, due process, and the promotion of a strong civil society. Part II suggests that public adjudication represents a high embodiment these values and that, under U.S. democracy, it constitutes democracy's endowment for dispute resolution.

Part III applies this lens of democratic theory to arbitration and concludes that arbitration has a contingent democratic character: As a dispute-resolution process, arbitration is generally undemocratic, but it acquires democratic legitimacy when parties actually agree to arbitrate their disputes because it furthers the unifying democratic value of personal autonomy. When involuntary, however, arbitration only frustrates the larger goals of democratic governance. Part IV discusses the potentially significant systemic costs of institutionalized, mandatory, and binding arbitration: the possible diminishment of public trust in the rule of law as an institution, and a concomitant erosion of the social capital that is necessary for effective democracy. Finally, the Article concludes by raising some theoretical, empirical, and practical questions for further research, including how a recognition of arbitration's contingent democratic character might be integrated into U.S. law.

II

THE FRAMEWORK FOR A DEMOCRATIC ANALYSIS OF ARBITRATION

This Part draws on the vast literature on democracy to contextualize this narrow inquiry into why it is appropriate to consider arbitration (and, indeed, dispute resolution more generally) from a democratic perspective. It then articulates specific factors that can be used in assessing the democratic character of a method of dispute resolution. Finally, this Part applies that analysis briefly to public adjudication and concludes that this public system is the endowment for dispute resolution that U.S. democracy provides.

A. Defining Democracy: The Great Debate over Substantive Values

The task of defining democracy is necessary,¹⁸ but is complicated by a number of factors, including the many different philosophical strands that have informed the development of democracy over time,¹⁹ and the many different

18. See M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 5 (1984) (noting a variety of definitions of democracy in the United States); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 165 (1988) ("Any particular conception of democracy . . . must be defended.").

19. See generally Robert Goldberg, *Ancient Theory*, in POLITICAL PHILOSOPHY: THEORIES, THINKERS, AND CONCEPTS 179 (Seymour Martin Lipset ed., 2001); Steven B. Smith, *Twentieth Century European Theory*, in POLITICAL PHILOSOPHY, *supra*, at 209; *infra* notes 38-41 and accompanying text.

forms that democracy takes and has taken.²⁰ Most definitions will fall along a spectrum of breadth, or “thickness,” as it is sometimes called.²¹ Political scientists, whose discipline undertakes to give democracy its most comprehensive study, commonly define democracy broadly in terms of a system with many different and mutually reinforcing components.²² Many U.S. legal scholars and judges, however, have tended toward a much narrower, or thinner, definition of democracy for much of the last century, one emphasizing procedure and largely disclaiming substance. In particular, U.S. constitutional scholarship has largely defined democracy in terms of majoritarianism—as a system of government in which the majority rules.²³ This narrower approach is in large part attributable to concerns over the so-called “counter-majoritarian difficulty,” the problem of unelected judges potentially trumping the “will of the people,” as expressed through the legislatures, with their own values and ideologies.²⁴

In recent years, however, this narrow approach to the definition of democracy has come under increased criticism as a new generation of scholars has come of age and has pushed for a more expansive understanding of democ-

20. See, e.g., Geraint Parry, *Types of Democracy*, in POLITICAL PHILOSOPHY, *supra* note 19, at 364 (comparing, for example, direct versus representative democracy). Political scientists have identified more than 500 subcategories of democracy, underscoring the difficulty in making general categorizations. See David Collier & Steven Levitsky, *Democracy With Adjectives: Conceptual Innovation in Comparative Research*, 49 WORLD POL. 430, 430-51 (1997).

21. See, e.g., Richard H. Fallon Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 105 (1997) (noting the way in which the “minimalist conception of democracy implicitly rejects thicker, more substantive rivals”); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435, 453 (2002) (lamenting the way in which some democracies will use state-action doctrine to implement a “thin” view of “social rights” afforded constitutional protection); Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1472-74 (2002) (distinguishing between “thicker” democracies that include broad rights of citizenship and “thinner” conceptions of democracy that emphasize property rights).

22. A generally acceptable and representative definition of democracy for political scientists might be this: “a system of governance in which rulers are held accountable for their actions in a public realm by citizens, acting independently through the competition and cooperation of their elected representatives.” Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, in THE GLOBAL RESURGENCE OF DEMOCRACY 49, 49-50 (Larry Diamond & Marc F. Plattner eds., 1993).

23. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1883). Peremptory challenges to civil and criminal juries have provided an important extra-majoritarian context in which democratic values have been recognized by courts. *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (prohibiting defendants from using race as a basis for exercising peremptory challenges in jury selection); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (holding that civil litigants may not strike jurors on account of race).

24. See BICKEL, *supra* note 23, at 18 (stating that judicial review may be seen as a “deviant institution in the American democracy”). A generation of constitutional scholars has wrestled with the “counter-majoritarian difficulty.” Many answers have been proposed, but the most respected have been those that have preserved, albeit with notable exceptions, the procedural understanding of democracy. For example, in his “representation-reinforcing theory,” John Hart Ely forcefully argued that judicial review is appropriate when necessary to make the democratic processes work effectively. See ELY, *supra* note 11. Jesse Choper has also contended that review is appropriate when necessary to vindicate certain individual rights. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 4-6 (1980).

racy.²⁵ For these scholars, the question is not whether the definition of democracy should include a substantive component, but rather what the source and content of that substantive component should be, including such reference points as constitutional text,²⁶ structure,²⁷ and context.²⁸

This later, arguably more contemporary view seems more persuasive, not simply because a more substantive understanding of democracy paints a more complete and ultimately more accurate portrait of democracy, but because a purely majoritarian understanding fails to meaningfully account for the place of governmental dispute resolution within a system of democratic governance.²⁹ As a practical matter, the judicial determinations of statutory validity that lie at the core of the counter-majoritarian problem constitute only a relatively small part of the actual work of the courts.³⁰ The governmental resolution of private (and public) disputes according to the law of the sovereign is far more common.

25. For an exhaustive and persuasive critique of the counter-majoritarian difficulty, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (synthesizing and extending prior work); see also CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 18-20 (2001) (criticizing the failure to distinguish majoritarianism and democracy); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1-7 (2002) (generally arguing against "grand" or "unified" theories of constitutional interpretation); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 163 (1993); Erwin Chemerinsky, 1988 Term: Foreword, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 64-72 (1989) (criticizing the Supreme Court for its adherence to a majoritarian paradigm).

26. See, e.g., Chemerinsky, *supra* note 25, at 74-76 (arguing that the text of the Constitution, especially the Bill of Rights, is a source of substantive, democratic values that U.S. courts should enforce).

27. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (arguing that the promotion of public dialogue is a substantive value of individual freedom that arises from the democratic foundations of the Constitution); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) (exploring the notion of "public reason" as a substantive mitigating force in the conflict of doctrines in a pluralistic democracy); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (outlining the origins and modern applications of the republican belief in deliberative democracy); see also MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

28. See, e.g., ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (promoting civil society as a substantive value because of its demonstrated importance in providing a foundation for the promotion of democratic rule).

29. This democratic function has traditionally been the province of courts. However, our understanding of the judicial role has broadened as a result of the massive dispute-resolution movement of the last quarter-century, as well as the extraordinary innovations in dispute resolution that have broadened the range of options available to parties. For a discussion, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (expressing concerns about judges engaging in settlement and other nonadjudicatory tasks). These innovations include court-related mediation programs, early neutral evaluation programs, and summary jury trials, among others. For a summary, see Reuben, *Constitutional Gravity*, *supra* note 6, at 962-71. For an assessment, see Brazil, *supra* note 10, *passim*; see also James J. Alfani, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 256-61 (1999). To be clear, in this Article, I am considering only courts acting in their traditional adjudicatory capacity, rather than as facilitators of settlement.

30. Thorough search has failed to uncover empirical data regarding the number of federal cases that actually present the counter-majoritarian difficulty—that is, a challenge to the validity of a legislative act. The standard empirical reference points for federal civil legislation, however, suggest that the number would be small, if not infinitesimal. See Marika F.X. Litras & Carol J. DeFrances, *Federal Tort Trials and Verdicts 1996-97*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (Feb. 1999).

This makes sense because conflict is inevitable in a democratic society,³¹ and the orderly adjudication of formal disputes is a crucial function of public courts, at least under U.S. democracy.³² This essential function—the orderly and enforceable resolution of disputes—would seem as important to democratic governance as the legislative and executive functions. Indeed, it helps define civilized society, preventing routine disputes from escalating into violence and social chaos.³³ And, like the executive and legislative branches, the judiciary best serves democratic governance when it acts in a manner that is consistent with and reinforces the basic values of democracy.³⁴

B. Democracy's Substantive Values and the Centrality of Personal Autonomy and Dignity

Once one acknowledges dispute resolution as a necessary function of democratic governance, the question becomes how to understand, assess, and constructively cultivate the democratic character of a dispute-resolution method, process, or system. The democracy literature is helpful in this regard. While particular formulations and articulations may vary, most scholars who embrace a broader definition of democracy tend to agree upon its core values.³⁵ Those values are briefly discussed here to provide a common language and context. To move beyond the intellectual seductions of the counter-majoritarian - difficulty, it is helpful to cluster them into three categories: political values, legal values, and social capital values.³⁶ In brief, the political values are participation, accountability and transparency, and rationality. The legal values are due pro-

31. JEFFREY Z. RUBIN ET AL., *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 27-46 (2d ed. 1994).

32. Reuben, *State Action*, *supra* note 6, at 624-25. Significantly, democratic governance is primarily concerned with formal dispute resolution. It is less concerned with informal dispute resolution, such as settlements between neighbors, which are often decided without recourse to law, even though informal dispute resolution likely constitutes the majority of actual disputes. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631, 633 (1980-81); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 16-17 (1983).

33. Indeed, to the extent that most disputes are settled through some form of private negotiation, this private ordering often occurs in the shadow of the public law. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 951 (1979).

34. See ELY, *supra* note 11, at 181.

35. Compare Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *B.U. L. REV.* 885, 898-905 (1981) (arguing that the inclusion of equality, predictability, transparency, rationality, and participation in the judicial process promotes humanness and individualization), with EISGRUBER, *supra* note 25, at 87 (suggesting four “desiderata—impartiality, effective choice, participation and public deliberation—[as] criteria by which to assess how judicial review affects democratic flourishing”), and SUNSTEIN, *supra* note 25, at 141 (stating that “[t]he commitments of liberal republicanism—to deliberation, citizenship, agreement as a regulative ideal, and political equality—embody the principles of deliberative democracy”). See generally ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989); HERBERT MCCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY* (1984).

36. While this tripartite clustering is somewhat arbitrary and contrived, it does help to contextualize the political elements that are dominant under thin majoritarianism.

cess and equality. And the social capital values are public trust, social connection and cooperation, and reciprocity.

Before describing these values in more detail, two observations are appropriate. First, these values will be treated separately below for purposes of theoretical analysis, but should be understood as much more integrated in practice, often overlapping and mutually reinforcing, and sometimes barely distinguishable. Second, and more substantively, they should be understood as operating to fulfill democracy's ultimate aspiration of enhancing the capacity and competence of personal autonomy and dignity within a system of collective self-government and social responsibility.³⁷ This is a primary lesson from the birth of modern Western democracy and from the Enlightenment's repudiation of a divinely ordained socio-political hierarchy,³⁸ its embrace of individual worth and self-actualization,³⁹ and its deliberate expression in the grand experiment of U.S. democracy.⁴⁰

The Founders viewed their new nation as a laboratory for the potential of human achievement and constructed a government through a written constitution that would limit the worst instincts of man in his state of nature,⁴¹ while at

37. In recognizing the need to temper individual autonomy with social responsibility, Professor Christina Wells has adroitly noted autonomy "is not about atomistic individuals but about social creatures entitled to respect for their dignity" and "members of society . . . responsible for respecting the dignity of others." See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 161-70 (1997) (drawing on Kantian theory for a social understanding of autonomy that informs free speech theory).

Democratic theory often accounts for this quality through the concept of civic virtue—actions by individuals that advance (or at least do not detract from) a collective good, and the structural capacity of democratic society to uplift the status of all of its members, and the use of law to promote this value. In U.S. constitutional law, the notion of civic virtue as an interpretive principle was most clearly seen in the Warren Court era, particularly in the jurisprudence of Justice William Brennan. See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE* 99-112 (1998) (discussing the impact of the Warren Court on democratic culture). Professor Mashaw has conceptualized the principle as dignitary theory because of its emphasis on human dignity as an interpretive value. See Mashaw, *supra* note 35, at 885-87. For examples of Justice Brennan's invocation of civic virtue, see his opinions in *Goldberg v. Kelly*, 397 U.S. 254, 264-65, and *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 301-30 (Brennan, J., dissenting). For a general discussion of Brennan's vision of constitutional law and its relationship to democracy, see FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999).

38. For a classic treatment, see *THE AGE OF ENLIGHTENMENT* (Lester G. Crocker ed., 1969). The roots of Enlightenment-era democracy actually extend back to ancient Greece and Rome. For a discussion, see Goldberg, *supra* note 19, at 179-88.

39. "[T]he rejection of Christianity and the substitution of a secular philosophy were at the core of the new outlook." Lester G. Crocker, *Introduction to THE AGE OF ENLIGHTENMENT*, *supra* note 38, at 3. This new understanding touched virtually all aspects of social, economic, and political life—from science, letters, and the arts, to religion, philosophy, and political organization. For a general discussion, see *id.* at 1-30.

40. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 3-10 (1969) (observing that the American revolution was unique among revolutions because "Americans were not an oppressed people; they had no crushing imperial shackles to throw off"); see also TUSHNET, *supra* note 27, at 91-118.

41. Enlightenment-era political philosophers such as Hobbes, Locke, Rousseau, and Kant generally viewed all men as being of free and equal rights in their "state of nature," while, at the same time, being in constant collective struggle as they pursued their unbridled self-interests. To provide order and security, and to satisfy collective interests, these free and equal people cede authority to, and agree

the same time maximizing the potential for personal autonomy and self-actualization.⁴² They accomplished this by a structure that promoted individual and collective choice through elected legislative and executive branches, and through the rights to vote,⁴³ to hold office, and to engage in political expression. They hoped to create a government and, equally important, a society burgeoning with the vibrancy and creativity that ambition and choice could inspire in political, economic, and social structuring.⁴⁴ For these reasons, personal autonomy should be seen as a unifying and synthesizing value that can have a dominating or trumping effect when other supporting democratic values are in tension.⁴⁵

1. Political Values

The first, and largest, set of core democratic values may be understood as those primarily intended to foster collective self-governance by enhancing the capacity of individuals to participate in that governance effectively. These include participation, accountability, transparency, and rationality.

a. Participation. Democracy's essential theory is the consent of the governed, a concept that is implemented through the democratic value of participation. Under this social contract theory, the exercise of coercive government power is seen as legitimate because laws are enacted with the consent of those who will be bound by them.⁴⁶ In most democracies, this consent is achieved through representation rather than direct participation.⁴⁷

This individual citizen participation in governance is one of the principle factors distinguishing democratic from authoritarian or totalitarian forms of government,⁴⁸ under which the exercise of coercive force is justified through the

to be bound by, a sovereign. This is the essence of social contract theory. *See generally* Richard Vernon, *Contractarianism*, in *POLITICAL PHILOSOPHY*, *supra* note 19, at 54-57. John Rawls was perhaps the greatest modern champion of social contract theory. *See* RAWLS, *supra* note 15, *passim* (generally contending that rational and impartial people will develop mutually beneficial principles of justice for regulating power, wealth, rights, and duties).

42. *See* WOOD, *supra* note 40, at 4.

43. *See infra* note 52.

44. To be sure, others have argued that the Founders' vision was far less altruistic, since one of the Constitution's immediate effects was the securing of the power, property, and other vested interests of colonial elites, and since women and minorities were excluded from the sweep of the Constitution's egalitarianism. For highlights of the vast critical literature on these issues, see, for example, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (2d ed. 2001); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* (7th ed. 1994); JUDITH SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 64 (1991).

45. *See infra* notes 155-71.

46. *See generally* Vernon, *supra* note 41, *passim* (discussing social contract theory).

47. *See* ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971); Parry, *supra* note 20, at 364-67. Even representative democracies can have direct elements, particularly at state and local levels, such as initiatives on particular issues (such as tax increases). For a democratic analysis and critique, see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503 (1990).

48. *See* Juan Linz, *Authoritarianism*, in *POLITICAL PHILOSOPHY*, *supra* note 19, at 3.

authority of familial descent,⁴⁹ military might,⁵⁰ or the raw power of an individual.⁵¹ In the United States, participation in democratic governance is secured through the Constitution's electoral structure for the legislative and executive branches, the decentralization of government through state and local governments, and the rights to vote,⁵² to hold office, and to engage in political expression, even if critical of the government or otherwise unpopular.⁵³

Majoritarian theorists would generally limit the notion of public participation to the electoral process and the exercise of the franchise.⁵⁴ However, a broader understanding of democracy recognizes, fosters, and integrates other aspects of public participation in democratic governance.⁵⁵ Jury service is perhaps the most common example of public participation,⁵⁶ accepted even by majoritarians,⁵⁷ but participation values are also promoted in other areas of the law, such as the notice-and-comment processes in administrative rulemakings.⁵⁸ Deliberative democratists and communitarians would likely go further, considering the public debate on political issues that takes place between and among people, and between and among institutions, as democratic participation.

b. Accountability and transparency. The accountability of elected officials to the general public interrelates with participation, in that government accountability makes individual and public participation meaningful. In this sense, accountability refers to the degree to which the government can be held responsible to the citizenry for its policies, words, and actions. In U.S. democracy, accountability is constitutionally assured in part through the vesting of the legislative and executive powers in elective offices, thus conditioning the exer-

49. Monarchies and other patrimonial regimes are examples. *Id.* at 5.

50. Communist China is an example. *Id.* at 4.

51. Fascism is an example. *Id.* at 6.

52. *Baker v. Carr*, 369 U.S. 186, 242 (1962). The right to vote is particularly noteworthy because it is not expressly provided for in the U.S. Constitution. Nonetheless, it has been recognized by courts as inherent to the character of democracy itself, and as implied from the explicit provisions of the Guarantee Clause and the Fourteenth and Fifteenth Amendments. See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (recognizing the right to vote as an incident to equal protection).

53. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Brennan, J.) ("We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.").

54. See, e.g., *CHOPER*, *supra* note 24, at 4-9; *ELY*, *supra* note 11.

55. Participation can operate at many different levels. See Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216-17 (1969) (describing eight "rungs" of participation, ranging from "nonparticipation" to "citizen control").

56. The democratic character of the jury has been widely recognized. See *supra* note 23. In the criminal context, see, for example, HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). In the civil context, see, for example, Stephen Landsman, *The History and Objectives of the Civil Jury System*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 22, 29-39 (Robert E. Litan ed., 1993).

57. See *supra* note 23 and accompanying text.

58. See 5 U.S.C. §§ 553(c), 554(d) (2000).

cise of these powers on voter approval.⁵⁹ Significantly, accountability is also fostered constitutionally through the First Amendment rights of speech,⁶⁰ press,⁶¹ and petition,⁶² and the availability of legal actions to vindicate these rights in the courts.⁶³

Accountability is also furthered by a closely related democratic value: transparency. This generally refers to the openness of government decisionmaking, and in the United States is frequently associated with press freedoms secured by the First Amendment,⁶⁴ as well as federal and state open records and open meetings laws.⁶⁵ Transparency is closely aligned with accountability as a democratic value because it is transparency that makes accountability possible by permitting witness to government actions.

c. Rationality. Rationality, in the democratic sense, refers to the consistency of governmental decisions with the law, social norms, or public expectations.⁶⁶ It correlates with notions of equal protection and due process, and in the United States is secured by the Bill of Rights and the Fourteenth Amendment, as well as by statutory protections against arbitrary and capricious deci-

59. Although they have lifetime tenure, federal judges are still subject to a democratic process through the advice-and-consent requirement of Article III. Moreover, judicial decisions on matters other than constitutional law may be legislatively reversed. Even constitutional decisions of the Supreme Court are subject to constitutional amendment. For a discussion of the “democratic pedigree” of federal judges, see EISGRUBER, *supra* note 25, at 64-108.

60. Protection of political speech is at the heart of the First Amendment. *See, e.g.,* Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377 (2000) (Breyer, J., concurring) (“The Court’s opinion does not question the constitutional importance of political speech or that its protection is at the heart of the First Amendment.”); Mills v. Alabama, 384 U.S. 214, 218 (1966); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 28 (1954); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971); Cass Sunstein, *Free Speech Now*, in THE BILL OF RIGHTS IN THE MODERN STATE 255, 304-07 (Geoffery R. Stone et al. eds., 1992).

61. *See, e.g.,* N.Y. Times v. United States, 403 U.S. 713 (1971) (permitting publication of a classified government study on Vietnam War decisionmaking under the First Amendment); N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that the First and Fourteenth Amendments “[prohibit] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

62. *See, e.g.,* Thomas v. Collins, 323 U.S. 516 (1945) (expanding the right of petition to any field of human endeavor, including economic activity); DeJonge v. Oregon, 299 U.S. 353 (1937) (holding that the right to petition is a defense to criminal actions for violation of assembly laws); Downes v. Bidwell, 182 U.S. 244, 282-83 (1901) (grouping the right of free access to courts with the freedoms of speech, press, and worship and other natural rights subject to constitutional protection).

63. The Fourteenth Amendment is particularly important in this regard, as it extends many of the other federal constitutional protections to the states.

64. *See, e.g.,* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (holding that criminal trials must be open to the public absent an overriding interest articulated in formal findings); *In re Oliver*, 333 U.S. 257, 270 (1948) (stating that open trials are one of the essential “checks and balances” of the U.S. system because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power).

65. *See* Government in the Sunshine Act, 5 U.S.C. § 552b (2000). For a listing of related state laws, see the state-by-state compilation posted at the website of the Freedom of Information Center at the University of Missouri School of Journalism, at <http://foi.missouri.edu/citelist.html> (last updated May 1, 2004).

66. *See* Mashaw, *supra* note 35, at 901-02.

sionmaking by government agencies.⁶⁷ Rationality also interrelates with transparency and accountability: To the extent that eligible voters view legislative, executive, or judicial decisions as inconsistent with their expectations, values, or other nonbinding social norms, their votes provide a vehicle through which officials may be held accountable.⁶⁸

2. Legal Values

The foregoing political values are complemented by at least two values that pertain to the application of substantive law: equality and due process.⁶⁹ Significantly, these legal values also further the central value of personal autonomy by recognizing and protecting the inherent worth and dignity of the individual through fair and equal treatment under the law.

Democracies generally at least aspire to provide equal treatment under the law.⁷⁰ This equality, or neutrality,⁷¹ speaks to the notion of the same law being applied in the same manner to all persons, without regard to governmental position,⁷² wealth,⁷³ or social status.⁷⁴ Equality in democracy serves to check the influence and power of elites (both governmental and nongovernmental), which in turn helps to assure the stability of the political, social, and economic orders.

67. See 5 U.S.C. § 706 (1)(A) (2000) (providing for the reversal of agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring a “rational connection between the facts found and the choice made” for administrative action to survive arbitrary-and-capricious review) (quoting *Burlington Trucks, Inc. v. United States*, 371 U.S. 156, 158 (1962)).

68. In the federal system, of course, judges are not directly accountable to the voting public, although their appointing presidents are.

69. Legal values would also include those human rights values typically embraced by liberal democracy. I emphasize equality and due process because they are most salient to the issues addressed in this Article.

70. The Freedom House, an influential monitor of international democracy, specifically includes equal treatment as a factor in its assessment. See <http://www.freedomhouse.org/research/freeworld/2002/methodology3.htm> (last modified Aug. 7, 2002); accord Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF. Mar./Apr. 1998, at 95-96 (defining rule of law in terms of equality of treatment under the law). I say “aspire” to recognize the force of claims often made by critical legal scholars about the degree to which these ideals are realized. See, e.g., Derrick Bell, *Who’s Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893.

71. See SUNSTEIN, *supra* note 25, at 17-39.

72. See *Clinton v. Jones*, 520 U.S. 681 (1997) (holding it an abuse of discretion to defer the civil suit against President Clinton until after he was to leave office).

73. Consider the deterrent effect of the high-profile insider-trading prosecutions in the 1980s and 1990s against deal-makers such as Ivan Boesky, Michael Milken, and Dennis Levine. See Frederick W. Addison, III & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 SW. L.J. 1427, 1440 (1991). For an argument that corporate crime is under-prosecuted, see Editorial, *Corporate Crime and Punishment*, 20 MULTIN’L MONITOR (July/Aug. 1999), available at <http://www.essential.org/monitor/mm1999/99july-aug/editorial.html>.

74. Common examples today are celebrity prosecutions, such as those of O.J. Simpson, and, more recently, Martha Stewart. This is not to suggest there are constraints on the capacity of elites to press for the enactment or interpretation of laws that are favorable to them. Rather, once enacted, the law will generally be applied without specific regard to status.

In the United States, equality is most prominently enshrined in the Equal Protection Clause of the Fourteenth Amendment.⁷⁵ It is also, however, assured through the neutrality and independence of the judiciary, through such means as due process and professional proscriptions against judges receiving compensation from parties.⁷⁶ Such protections provide a hedge against factions and capture⁷⁷ and rent-seeking in the administration of the rule of law.⁷⁸ Due process is closely aligned with equal protection in its operation as a constraint upon arbitrary government action, and is essentially the promise of fair treatment at the hands of the government. While there is considerable debate over the meaning of the term,⁷⁹ there seems little question that at least some kind of due process value is embedded deeply in democratic governance.⁸⁰ Due process is enshrined in the Fifth and Fourteenth Amendments to the Constitution.⁸¹ In interpreting those provisions, the Supreme Court has come to distinguish two types of due process: procedural due process (focusing on the procedures required before the government may take one's life, liberty, or property), and the more controversial substantive due process (focusing on the substantive fairness of legislation).⁸² Language may vary, but the concepts in these separate strands represent internationally recognized standards.⁸³

3. Social Capital Values

The final category of core democratic values relates to social capital, in particular the promotion of civil society, a concept that embraces public trust,

75. U.S. CONST. amend. XIV, § 1.

76. *E.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that being convicted by a mayor who stood to receive a portion of the fine collected denied the defendant's right to due process); see MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1990) (disqualification). For a general discussion in the arbitration context, see Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 514-21 (1997).

77. *See, e.g.*, ROGER G. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 40-43, 46 (1971) (discussing and critiquing standard theories of agency capture); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON & MGMT. SCI. 3 (1971) (developing a thesis that "regulation is acquired by industry and is designed and operated primarily for its benefit").

78. For academic discussions, see, for example, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1216 (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 488-99 (1989).

79. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 416, 453-626 (13th ed. 1997).

80. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-63 (1951) (Jackson, J. concurring). The principle of due process is widely traced to chapter 39 of the Magna Carta, which was signed at Runnymede in June, 1215. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WISC. L. REV. 941, 948-58 (citing chapter 39); *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (addressing the need for due process in administrative procedures).

81. U.S. CONST. amends. V, XIV, § 1.

82. *See* GUNTHER & SULLIVAN, *supra* note 79, at 415-16.

83. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 71-75, 6 U.S.T. 3516, at 46-51 (providing procedural due process protections).

social connection and cooperation, and reciprocity.⁸⁴ While social capital values are familiar to political scientists and organizational behaviorists, their discussion expands democratic theory beyond its traditional governmental moorings in the constitutional law literature.⁸⁵

Civil society is generally recognized as the conceptual space between purely governmental and purely private affairs, where much of our collective societal interaction takes place—"including churches, schools, places of employment, clubs, and other group affiliations."⁸⁶ Researchers, led by Harvard political scientist Robert Putnam,⁸⁷ have come to recognize that this civil society, spawned by and supporting the structure of democratic governance, is just as important to the consolidation of a healthy democracy as properly functioning political institutions.⁸⁸

In his seminal work, Putnam compared the effectiveness of democracy in the autonomous regions of Italy and found that, measured in terms of institutional efficiency and citizen responsiveness, democracy in some regions was more effective than in others.⁸⁹ Putnam found that effective democracies were marked by a civil society that broadly encouraged cooperation, reciprocation, and a sense of common good among citizens at all levels of national life, from social, to political, to economic, and beyond.⁹⁰ Such cooperation led to an ever-deepening sense of social trust and order, both horizontally among the citizenry

84. See PUTNAM, *supra* note 28, at 163-87 (1993) (describing social capital and its relationship to a democracy's institutional success).

85. One exception is the literature about the benefits of operating corporations according to democratic principles. See, e.g., MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 18-29 (1976) (discussing the principle of shareholder democracy in the formulation of a normative model of corporate decisionmaking); Richard M. Buxbaum, *The Internal Division of Powers in Corporate Governance*, 73 CAL. L. REV. 1671, 1672 (1985) ("[E]xisting corporation law is based on shareholder participation."); David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 460-61 (1983) (describing the worker-cooperative corporate form as an application of normative principles of democracy to the economic sphere).

86. Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 625 (1999). As Larry Diamond discusses,

Civil society is distinct from "society" in general in that *it involves citizens acting collectively in a public sphere* to express their interests, passions, and ideas, to exchange information, to achieve mutual goals, to make demands on the state, and to hold state officials accountable. Civil society is an intermediary phenomenon, standing between the private sphere and the State. Thus, it excludes individual and family life, inward-looking group activity (recreation, entertainment, religious worship, or spirituality) and . . . the profit-making enterprise of individual business firms, and political efforts to take control of the State.

LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 227-28 (1999). The complexity of the term is discussed in ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992). The American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution are examples of spheres of civil society in the dispute-resolution context.

87. See generally PUTNAM, *supra* note 28 (comparing effective and ineffective regional democratic governments in Italy since the devolution of power to regional governments in 1970). For a criticism, see Edward S. Adams & Richard Saliterman, *The Trusteeship of Legal Rulemaking*, 30 HOFSTRA L. REV. 483 (2001).

88. See *infra* notes 225-30.

89. PUTNAM, *supra* note 28, at 7-9.

90. *Id.* at 165-85.

and vertically between the citizenry and its regional and national governmental institutions.⁹¹ In contrast, the less effective democracies were marked by civic traditions of distrust and competition, and a sense of isolation and detachment between and among citizens and their governmental institutions.⁹²

The work of Putnam and other social capital theorists strongly suggests that it takes far more than governmental institutions operating according to the substantive political and legal values identified above for a democracy to reach its maximum potential;⁹³ it also requires the support of a strong civil society, steeped in public trust of governmental institutions, with a sense of social connection and cooperation among citizens and between citizens and their national institutions, as well as a spirit of goodwill, reciprocity, and civic virtue that reinforces this sense of trust and connection. Indeed, it is these seeming intangibles that constitute the foundation upon which a democracy must rest if it is to be sustained, consolidated, and effective.

C. Democracy's Endowment for Dispute Resolution in the United States

The core democratic values identified above provide criteria for assessing the democratic character of a method of dispute resolution. When applied to public adjudication in the United States, one sees a very high capacity for democratic dispute resolution.⁹⁴ Indeed, public adjudication can be considered a functional baseline endowment for dispute resolution⁹⁵ that shapes obligations and expectations regarding the democratic character of other dispute-resolution technologies, such as arbitration.⁹⁶

Courts promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, as well as by allowing, or requiring, the citizenry to administer the law through jury service.⁹⁷ As noted by Justice Anthony Kennedy, jury service is particularly

91. *Id.*

92. *Id.*

93. See, e.g., DAVID LISMAN, TOWARD A CIVIL SOCIETY: CIVIC LITERACY AND SERVICE LEARNING (1998) (analyzing the relationship between education, civic virtue, and civil society); MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY (Diane Ravitch & Joseph P. Viteritti eds., 2001); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001); THE VOLUNTARY CITY: CHOICE, COMMUNITY AND CIVIL SOCIETY (David Beito et al. eds., 2002) (exploring the relationship between civil society and economic health).

94. This is not to suggest that public adjudication always achieves this potential. Indeed, the questions of whether, under what conditions, and to what effect this capacity is actually achieved are all important questions for further research—once dispute resolution is recognized as having a democratic character at all. See *infra* notes 234-42 and accompanying text.

95. It is particularly appropriate to use public adjudication as a baseline because a judiciary is expressly provided for in the U.S. Constitution. U.S. CONST. art. III, § 1. This contributes to my characterization of the access right as an endowment for domestic purposes. See *infra* notes 167-70. Endowment effects—that is, the effects of the initial allocation of a commodity or entitlement on preferences—can be extraordinarily powerful. See, e.g., SUNSTEIN, *supra* note 25, at 166-68.

96. For a consistent analysis demonstrating the communitarian characteristics of public adjudication, see Ackerman, *supra* note 6, at 53-66.

97. See *Powers v. Ohio*, 499 U.S. 400, 406-08 (1991) (discussing how jury service promotes respect for and acceptance of the law).

important because “with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”⁹⁸ This participation fosters social and political stability by permitting individuals to turn to the law for the resolution of disputes rather than resorting to violence or other such means of destructive self-help, as well as by inspiring trust in the rule of law itself.⁹⁹

Similarly, courts promote equality, due process, and rationality by operating according to specific rules of procedure, evidence, and substantive law that have been enacted pursuant to statutory or administrative prescription, or which have evolved over time at common law.¹⁰⁰ Regardless of whether a trial is held before a judge or jury, public adjudication requires legal standards to be used as the basis and process for decisions, with the principle of *stare decisis* providing an important constraining mechanism on judicial rulings. In this way, judicial proceedings operate at the highest level of formality, with the greatest level of procedural due process protection available at law. This is particularly significant because empirical research repeatedly confirms that participant perceptions of procedural fairness are crucial to the participant’s acceptance of the decisional outcome as substantively fair.¹⁰¹

There is also significant accountability and transparency in trial-court decisionmaking. The availability of appellate review helps to assure that legal rules are accurately applied¹⁰² and permits the evolution of legal standards as legal principles are tested in new situations. Similarly, while it is rare, jury decisions that stray too far from legal standards may be set aside by a trial-court judge or reversed on appeal.¹⁰³ Both judicial and jury trials are open and accountable to the public (a right often exercised through the proxy of the press),¹⁰⁴ as well as to

98. *Id.* at 407.

99. Richard Delgado et. al, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-88 (discussing the relationship between the formality of trial processes and the fairness of procedures).

100. *See, e.g.*, *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (R. Arnold, J.) (discussing the Anglo-American history of precedent in finding a federal circuit rule prohibiting the use of unpublished opinions unconstitutional under Article III).

101. The so-called “procedural justice” literature is vast. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 228 (1988) (stating that procedural justice was the most consistent predictor of decision acceptance, rule following, turnover intention, and grievance filing); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 985 (1990) (concluding that parties who have their day in court are more likely to feel as though they were treated fairly by the justice system and be satisfied with the process and outcome. For a different perspective, see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977) (“In Heaven there will be no law . . . In Hell there will be nothing but law, and due process will be meticulously observed”).

102. This assurance lies at the heart of the fact-law distinction for appellate review in civil cases, under which questions of law are reviewed de novo to assure proper application below, while questions of fact are reviewable only on a clearly erroneous basis. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2585, 2588 at 729, 749-50 (1977).

103. FED. R. CIV. P. 50 (permitting the judge to direct verdict when the jury’s decision does not rest on a “legally sufficient evidentiary basis”).

104. Federal court judges are accountable through public scrutiny and impeachment, as well as conflict-of-interest and disclosure rules. State court judges are generally subject to retention elections. *See*

the other branches of government, most notably the legislature, which has the capacity to reverse most judicial decisions through legislation.¹⁰⁵

Finally, as instruments of the rule of law, courts help generate a rich reserve of social capital that generally revolves around common compliance with law. Public adjudication constrains the arbitrary exercise of power by elites, the powerful, and other governmental or nongovernmental factions, which in turn promotes a sense of fairness and equality that inspires reciprocal mutual compliance with the law—the belief that we should follow the law because we know that the same rules will apply to all people and because we expect others to follow the law as well. From Nixon to Enron, the court of law is the great equalizer in a democracy. This also promotes both public and private stability—private stability by providing public standards by which citizens can order their private affairs, and public stability by assuring the peaceful use and transition of political power.¹⁰⁶ Finally, courts and the law provide for the legitimacy of the political, economic, and social order by assuring legal constraints, compliance, and stability. This social capital is substantial, but is still capable of diminishment, as we see later in Part IV.

III

ANALYZING ARBITRATION THROUGH THE LENS OF DEMOCRACY

When we apply the democracy analysis in Part II to the arbitration process, we see that the democratic character of arbitration is complex and ultimately contingent. As a process, arbitration tends to be undemocratic, especially when it is compelled. When institutionalized in the form of mandatory and binding arbitration, it may diminish the social capital of a democracy by eroding public trust in the courts and the law. Arbitration does, however, have many desirable characteristics, and when actually chosen by the parties, promotes democracy by expanding the range of dispute-resolution choices that are available to resolve formal legal disputes.

generally NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 11-19 (2001) (finding that, nationally, eighty-seven percent of state judges face an election), available at http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf.

105. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in various sections of 42 U.S.C.), overruled several U.S. Supreme Court cases seen by Congress as hostile to employment discrimination claims. For a listing of the cases, see Carlos E. Gonzalez, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 507 (2001). For a discussion, see Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993). The legislatures, of course, may not reverse constitutional decisions.

106. The 2000 U.S. presidential election is a good recent test of this principle. Clearly, many U.S. citizens disagreed with the final outcome. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001). But at least that disagreement was nonviolent.

A. The Arbitration Process

Like public trial, arbitration is an adjudicatory process in which a third-party neutral simply decides the dispute.¹⁰⁷ It differs substantially, however, in that the proceeding is informal rather than formal, and is not bound by traditional rules of evidence or procedure.¹⁰⁸ As decisionmakers, arbitrators wield considerably more unchecked power than their public judicial counterparts. They act alone and blend the functions of triers of fact and law into a single adjudicatory power for resolving disputes that is supported by broad statutory and common law authority and discretion.¹⁰⁹ Moreover, arbitrators generally are free from the constraints of substantive law in either the procedures by which they conduct their hearings, or in the standards they use to resolve disputes.¹¹⁰ In fact, arbitrators need not and often do not have legal training.¹¹¹ Finally, their decisions, called “awards,” generally are final, binding, and enforceable by courts, and generally may not be reversed on substantive grounds.¹¹²

Arbitration is a part of the vast domain of the private ordering of disputes that depends largely on personal choices, such as whether to respond to a conflict, the tactics to be used, and the means by which a given dispute may be resolved.¹¹³ It is in this sphere that the U.S. alternative dispute-resolution movement of the late twentieth century dramatically expanded the democratic notion of personal choice in dispute resolution by identifying and improving methods of dispute resolution other than trial—arbitration, mediation, early-neutral evaluation, and so on—that would lead to settlements or awards that would be enforceable by the courts, and would sometimes even be operated by the courts themselves.

With respect to the contractual arbitrations that are the central concern of this Article, Congress specifically, and necessarily, authorized the specific

107. See, e.g., STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 233-37 (3d ed. 1999).

While the following discussion applies to arbitration generally, my focus for purposes of the rest of the Article remains on mandatory and binding arbitration under the FAA. For example, while the essential character of arbitration would still be inherently undemocratic for the reasons described herein, the analysis of its application in the collective bargaining context would be different.

108. 1 GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 1.01 (rev. ed. 1997).

109. Three-member arbitration panels, or tripartite arbitrations, are also common, especially in the international commercial arbitration context, but these can be controversial as well. See Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749 (1995).

110. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 486-96 (Alan Miles Rubin ed., 2003).

111. *Id.* at 138-45; see also *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) (suggesting that many labor law arbiters, while having superior knowledge of “the law of the shop,” lack sufficient knowledge of “the law of the land”) (quoting *Alexander v. Gardner-Denver Co.* 415 U.S. 36, 57 (1974)).

112. See 9 U.S.C. § 10 (2000). See generally WILNER, *supra* note 108, §§ 33:00-33:11, 34:00-34:02. In court programs, arbitration tends to be nonbinding because of constitutional concerns. See GOLDBERG ET AL., *supra* note 107, at 373.

113. See RUBIN ET AL., *supra* note 31, at 27-46.

enforcement of agreements to arbitrate under the Federal Arbitration Act of 1925 (FAA).¹¹⁴ Significantly, this authorization was consistent with principles of democratic choice, as the legislative history seems to many to fairly clearly indicate that Congress in 1925 intended the Act to apply only to commercial cases in which the parties voluntarily agreed to arbitrate.¹¹⁵ Under the FAA, an agreement to arbitrate is specifically enforceable if it is valid as a matter of state contract law.¹¹⁶

There is a considerable and eloquent literature extolling the virtues of arbitration as a means of expanding the capacity of parties to tailor dispute resolution according to their needs, what Tom Stipanowich has called “the multi-door contract.”¹¹⁷ These include the capacity to provide for greater expertise and flexibility in decisionmaking, to facilitate finality of judgment, to control economic efficiencies in time and cost, and to foster the preservation of business and personal relationships.¹¹⁸ These are all good reasons to choose to arbitrate a particular matter, and are consistent with democratic theory.

Moreover, arbitration has the capacity to enhance democratic governance in several important ways. For one, it is possible for arbitration to achieve efficiency gains for the public justice system, as logic suggests that having formalized disputes resolved by arbitration will reduce the number left for resolution by public courts.¹¹⁹ Furthermore, voluntary arbitration enhances personal autonomy by providing a means of governmentally enforceable dispute resolution to complement public adjudication. As noted above, democratic govern-

114. 9 U.S.C. §§ 1-16 (2000). Historically, Anglo-American courts had refused to enforce agreements to arbitrate under the so-called “ouster doctrine.” The express purpose of the FAA was to overturn this doctrine. For a concise history, see Reuben, *State Action*, *supra* note 6, at 598-609. For a comprehensive treatment, see MACNEIL, *supra* note 3, at 92-133.

115. See, e.g., David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 16-27 (Winter/Spring 2004); S. REP. NO. 569, at 3 (1924) (“The record made under the supervision of this society shows not only the great value in voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into.”).

116. See, e.g., *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stan. Jr. Univ.*, 489 U.S. 468 (1989). See generally 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* §§ 10.8-10.9 (1994); STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* § 2.14 (2001).

117. See Stipanowich, *supra* note 5; see also GOLDBERG ET AL., *supra* note 107, at 234 (listing some of the theoretical advantages of arbitration over court adjudication); Ackerman, *supra* note 6, at 67-69 (describing the communitarian aspects and benefits of arbitration when it is a conscious choice and provides a desired alternative to the courts).

118. Reuben, *Constitutional Gravity*, *supra* note 6, at 965-67.

119. Claims that alternative dispute resolution increases efficiency are commonly made but difficult to prove. See, e.g., JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* 48-53 (finding arbitration, mediation, and early neutral evaluation produced no “statistically significant” effects on time to disposition, the costs of adjudication, perceptions of fairness, or client satisfaction). Still, there are suggestions that the number of cases being tried in both state and federal courts is declining. See, e.g., Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (Dec. 12, 2003), at <http://www.abanet.org/litigation/vanishingtrial>; Hope Vinor Samborn, *The Vanishing Trial: More and More Cases are Settled, Mediated, or Arbitrated Without a Public Resolution. Will the Trend Harm the Justice System?* 88 A.B.A. J. 25 (2002). More empirical research on this issue would be helpful.

ance requires dispute resolution,¹²⁰ and effective democracy should recognize that it may be achieved through many different methods that allow disputants to “fit the forum to the fuss.”¹²¹ Indeed, there is ample reason to believe that autonomy and flexibility in dispute resolution was the original understanding of the Founders in the U.S. experiment in democracy. Clearly, the Founders recognized the importance of a legitimate rule of law as a component of effective democracy by incorporating an independent judiciary into the governmental structure through Article III. Yet Article III carves out an important role for personal choice by creating only a limited system of public dispute resolution,¹²² implicitly authorizing substantial private ordering. Indeed, historical treatments of the pre-Revolutionary period suggest that what we now call “alternative dispute resolution,” was the norm rather than the exception in the colonies.¹²³

The public system of law remains primarily a user-option system. Courts may not reach out to bring cases before them for decision, and parties are not required to adjudicate their disputes before them. Indeed, the research has long been clear that most legal disputes are actually settled by the parties (sometimes with the assistance of a mediator) rather than decided by the courts.¹²⁴ Further, the research is also clear that the number of formalized legal disputes is a mere fraction of all of the perceived injurious events that could be claimed at law.¹²⁵ Requiring all of these claims to be brought to trial would, of course, crush the system under the weight of often trivial cases, and to the extent that parties may want to have their cases decided by third-party neutrals according to nonlegal norms, arbitration presents a highly desirable alternative to public adjudication. Democratic governance thus has a strong interest in supporting arbitration as a choice among dispute-resolution options.

B. Arbitration As a Process Tends To Be Undemocratic

If public adjudication provides a baseline against which the democratic character of other U.S. dispute-resolution processes can be measured, arbitration as an adjudicatory process tends to fall short of the mark in many important respects. For purposes of analytical congruity, the supporting democratic

120. See *supra* notes 29-33 and accompanying text.

121. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

122. The civil jurisdiction of Article III courts is limited to cases arising under federal law and cases brought under diversity jurisdiction. See 28 U.S.C. §§ 1331-32 (2000).

123. For forceful arguments that arbitration has been a spoke in the wheel of the larger formal legal system since colonial times, see JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 136 (1983); Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, *ARB. J.*, June 1993, at 15; Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 468-81 (1984). See generally LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 32-33, 94 (1973).

124. See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1351-88 (1994) (summarizing the research).

125. See *supra* note 32.

values will be addressed before turning to the more complex assessment of personal autonomy and dignity in arbitration.

1. Participation

Participation in the process is the area in which arbitration is least problematic from a democratic theory perspective. Parties do have the opportunity to participate in the arbitration decisional process, even when it is unilaterally imposed. Arguably, the participation value of arbitration exceeds that of public adjudication because the relaxed rules of evidence and procedure make it easier for parties to tell their story in their own way, both personally and through witness testimony.¹²⁶ For example, parties may offer hearsay evidence in arbitration but may not do so in public trial unless an appropriate exception applies.¹²⁷ Similarly, subjective factors such as informal understandings and industry or cultural customs and practices may play a greater role in the arbitral decisional process than in the trial process.

There are two notable ways in which participation values are not promoted in arbitration, however. The first is the lack of a place for public participation. Arbitral justice is the most private of law, with no publicly evolved legal standards to guide decisionmaking and no juries to provide a sense of community conscience.¹²⁸ Indeed, the diminishment of the public realm in dispute resolution has been argued as a basis for rejecting alternative means of dispute resolution altogether.¹²⁹ Some have suggested that a primary motivating factor in the embrace of arbitration by some larger institutional repeat players is the ability to avoid the sense of community conscience that juries bring to the resolution of disputes, especially in the form of punitive damages.¹³⁰

The arbitration selection process, which permits parties to exclude entire classes of arbitrators on the basis of bias or other preferences, also diminishes participation.¹³¹ While parties are generally stuck with the assigned judge in the public adjudication system,¹³² parties in arbitration may screen out potential arbitrators on any grounds, including factors that would be inappropriate in

126. See, e.g., William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 384-87 (1985) (supporting ADR as means of expanding access to justice for those unable to afford traditional litigation).

127. See FED. R. EVID. 802-07.

128. While one could argue that tripartite arbitration has the characteristics of a jury trial, arbitrators are generally party-chosen, rather than randomly drawn from the community, and juries are obligated to apply law to the facts they find, while arbitrators are not. These significant differences render the comparison inapposite.

129. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-90 (1983).

130. See Carrington & Haagen, *supra* note 2.

131. I thank Jonathan Cohen for raising this issue.

132. There are situations, of course, in which parties may move to recuse a judge on the basis of perceived bias. See, e.g., CAL. CIV. PROC. CODE § 170.3(c)(1) (permitting parties to move for recusal if the judge does not disqualify herself); MODEL CODE OF JUDICIAL CONDUCT canon 3(E) (1990).

public adjudication, such as race¹³³ or gender.¹³⁴ Still, participation is arguably the democratic value most favorably vindicated in arbitration.

2. Accountability

In contrast, unlike the highly accountable process of public adjudication, there is relatively little accountability in arbitration.¹³⁵ Arbitration awards are generally not subject to the kind of substantive review for accuracy that is available for court decisions.¹³⁶ Rather, review is limited to misconduct on the part of the arbitrator¹³⁷ and to procedural defects.¹³⁸

One might argue, and with some force, that accountability in arbitration is provided by the private marketplace. The theory is that if arbitration is not a desirable process, or a particular arbitrator is undesirable, parties will not choose these services. The arbitration process is thus accountable to the public because people will vote with their pocketbooks.

Clearly, one may quibble with this argument. For example, it assumes that consumers have access to equal and adequate information about all arbitrators, but the scant empirical research suggests just the opposite: Repeat players tend to have more information about arbitrators than nonrepeat players, who have very little, because of disparities in capacity and incentive.¹³⁹ This suggests potential market failure, not market success.¹⁴⁰ Indeed, the most significant regulatory activity in recent years has focused on the need, documented in pub-

133. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that race is not a valid basis for peremptory challenges).

134. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1991) (extending *Batson* to gender).

135. This is normatively desirable because it permits arbitrators to make decisions based on standards other than legal standards—a strong reason to choose binding arbitration over trial for some disputes. For this reason, the current push towards the incorporation of substantive law standards of judicial review into arbitration is lamentable, a step in precisely the wrong direction. See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (1997) (permitting parties to contract for standards of judicial review more stringent than under the FAA), *rev'd*, 341 F.3d 987 (2003) (en banc). For a discussion of cases supporting and opposing contractual expansion of judicial review, see Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 194-79 (2003); see also Cole, *supra* note 14.

136. While courts have frequently cited their inherent authority to overturn arbitration decisions that show “manifest disregard” of the law, it is rare for a court to take such a step. For an unusual situation in which a court permitted further proceedings on “manifest disregard” grounds, see *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (1997). For a general discussion, see Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117.

137. 9 U.S.C. § 10(a) (2000); U.A.A. § 23(a) (2000).

138. 9 U.S.C. § 11 (2000); U.A.A. § 24 (2000).

139. Serious questions have been raised about arbitrator impartiality in light of the so-called “repeat player” problem. See, e.g., Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 889-902 (2002) (documenting a repeat-player effect but noting that there could be many explanations for the phenomenon).

140. Cf. STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 1-35 (1982) (detailing examples of market defects justifying government regulation); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 4-9 (4th ed. 1979) (discussing market failure as a justification for governmental regulation).

lished reports,¹⁴¹ for arbitrators to provide greater disclosure of conflicts of interests.¹⁴²

Moreover, the market argument is completely dependent upon the voluntariness of arbitration. If arbitration is mandatory, then it simply is not subject to market forces—other than, perhaps, the selection of a particular arbitrator for a particular dispute or initial transaction. Still, to the extent that arbitration is voluntary, a market theory of accountability has greater force, despite its imperfections.

3. Transparency

Transparency is generally not an animating value of arbitration. Arbitrators are generally not required to articulate reasons for their decisions in the form of written opinions.¹⁴³ Although major providers have recently moved toward an industry standard that would permit such opinions upon party request,¹⁴⁴ more commonly the arbitral award consists only of the award itself, with no formally reasoned opinion. Moreover, as noted above, arbitration proceedings are often conducted on a confidential basis.¹⁴⁵ Under current law, these proceedings are not likely to be subject to public oversight under constitutional standards and statutory sunshine laws for media access because such proceedings likely would not be considered state action for purposes of such protection.¹⁴⁶

141. See, e.g., Reynolds Holding, *Private Justice: Can the Public Count on Fair Arbitration? Financial Ties to Corporations Are Conflict of Interest, Critics Say*, S.F. CHRON., Oct. 8, 2001, at A15 (documenting specific examples of undisclosed financial relationships between arbitration firms and their corporate clients); Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18-20.

142. See California Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. R. OF CT., Div. IV. (2002). For a discussion, see Jay Folberg, *Arbitration Ethics: Winds of Reform Blowing From the West?*, DISP. RESOL. MAG., Fall 2002, at 5; see also Mayo v. Dean Witter Reynolds, Inc., 285 F. Supp. 2d 1097 (N.D. Cal. 2003) (holding that the Judicial Council of California's ethics standards for California arbitrators are preempted by federal law); U.A.A. § 12 (2000).

143. See 3 MACNEIL ET AL., *supra* note 116, § 37:10. For a more detailed analysis, see Reuben, *Constitutional Gravity*, *supra* note 6, at 1082-91.

144. See, e.g., AM. ARBITRATION ASS'N, COMMERCIAL DISPUTE RESOLUTION PROCEDURES, COMMERCIAL ARBITRATION RULES, R. 44(b) (amended 2003) (“[The] arbitrator need not render a reasoned award unless the parties request such an award . . . or unless the arbitrator determines that a reasoned award is appropriate.”); JAMS, COMPREHENSIVE ARBITRATION RULES AND PROCEDURES, R. 24(g) (revised Aug. 2002) (“[U]nless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.”).

145. The rules of arbitration-provider organizations vary, both as to whether the arbitration proceedings are confidential and as to whether the awards are confidential. Compare, e.g., NAT'L ASS'N OF SECURITIES DEALERS, NASD CODE OF ARBITRATION (1999) (failing to discuss issue), with AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES, Rs. 1-56, 25 (amended Jan. 1, 1999) (requiring the arbitrator to “maintain the privacy of the hearings unless the law provides to the contrary”), and AM. ARBITRATION ASS'N & AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI(B) (2003), and NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 11-19 (2002), available at http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf (requiring the arbitrator to “keep confidential all matters relating to the arbitration proceedings and decision” unless otherwise agreed by the parties or required by law). See generally Derek Lisk, *Confidentiality of Arbitrations*, 63 TEX. B. J. 234 (2000). Some arbitration awards are reported by private publishers.

146. For an argument that arbitrations conducted under the FAA are conducted pursuant to state action, see Reuben, *State Action*, *supra* note 6, at 609-41. But see Duffield v. Robertson Stephens &

4. Rationality

Arbitration is not what democratic theory would consider to be a rational decisional process.¹⁴⁷ This is, emphatically, not to suggest that arbitrators routinely issue decisions that are irrational; to the contrary, most arbitration awards may be presumed to be quite sensible. What it does mean is that arbitrators have substantial discretion to decide matters on grounds other than those that may be required by a rule of law, grounds that may appear arbitrary or capricious to parties or observers who are unfamiliar with the customs or practices within a particular relationship, entity, or industry.¹⁴⁸ For this reason, in the collective bargaining context, arbitration is sometimes said to be governed by the "law of the shop."¹⁴⁹ This lack of democratic rationality is a strength of the arbitration process, not a weakness, because it permits disputes to be resolved according to the unique facts and circumstances that may be most relevant to the parties, rather than according to a more remote general rule of law.

5. Equality and Due Process

Because of the enormous discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment, at least in the sense of substantive rule application. Quite to the contrary, regardless of whether it is mandatory or consensual, arbitration provides a highly individualized form of justice that is narrowly tailored to the specific circumstances presented to the arbitrator, and a decision is made according to whatever substantive standard the arbitrator determines is appropriate under the circumstances. The submissions of the parties can include specific standards to apply,¹⁵⁰ but this is relatively uncommon. The essence of arbitration is individualized and contextualized judgment, not rule application.

On the other hand, arbitration does provide for equal treatment in the sense of procedural due process. Arbitration submissions routinely include specific rules by which an arbitration is to be conducted, such as the Commercial Arbitration Rules of the American Arbitration Association.¹⁵¹ Such procedural rules prescribe by contract the procedures that will be applied to both parties and

Co., 144 F.3d 1182, 1201-02 (9th Cir. 1998) (holding that no state action was involved in a mandatory waiver of the judicial forum when a securities broker was compelled to arbitrate claims against his employer), *overruled on other grounds by* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).

147. Indeed, "arbitration" and "arbitrary" are derived from the Latin "*arbitrat*," meaning "to examine, give judgment." OXFORD ENGLISH DICTIONARY 426 (2d ed. 1989).

148. Some contracting parties have begun to authorize judicial review in their arbitration agreements. Federal courts are split on the issue of whether to enforce such agreements. *See supra* note 135.

149. *E.g.*, McDonald v. City of W. Branch, 466 U.S. 284, 290 (1984); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

150. LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 884 (1997), *rev'd on other grounds*, 341 F.3d 987 (2003) (en banc).

151. *See* AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES) (amend. July 1, 2003), *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload/LIVESITE/Rules_Procedures/National_International\...\focusArea\commercial\AAA235current.htm.

generally treat both parties equally with respect to the presentation of evidence; to the extent they do not, such rules are routinely struck down as unconscionable—contract law’s mechanism for ensuring due process.¹⁵² Similarly, arbitration awards that are beyond the scope of the arbitrator’s delegated authority, or that were reached through a process other than that which is provided in the arbitration agreement, may be vacated on grounds of arbitral misconduct.¹⁵³

6. Personal Autonomy

Arbitration’s greatest departure from democratic norms, as well as its greatest potential for democratic legitimacy, is in the area of personal autonomy.¹⁵⁴ The issue is complex but fundamental. Just as the political, legal, and social capital values of democracy largely serve to support individual autonomy with respect to self-government through an informed elective process, so too these values inform autonomy with regard to dispute-resolution choices in a democracy, thus justifying a heavier emphasis on autonomy over other values.

a. Competing autonomy claims. On the surface, it would seem axiomatic that voluntary arbitration promotes personal autonomy and that mandatory arbitration frustrates it. A person compelled into arbitration over her opposition cannot be said to have chosen to submit to the process. The problem is more complex, however, because it presents a deceptive but fundamental theoretical dilemma: the reality that any act of law curtails the liberty of someone or some thing.¹⁵⁵ By its very nature, regulation benefits one by constraining the freedom of another,¹⁵⁶ thus entitling both to choice-based claims.

152. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (rejecting as unconscionable an arbitration provision that limited discovery and available remedies, and bound only the employee, among other abuses); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) (holding substantially unconscionable an arbitration provision requiring only the employee to arbitrate and even then not affording full statutory remedies); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981) (rejecting a music industry arbitration provision requiring nonunion members to arbitrate before a union arbitration panel). For a discussion with extensive case citations, see F. PAUL BLAND, JR. ET AL., NAT’L CONSUMER L. CTR., *CONSUMER ARBITRATION AGREEMENTS* §§ 4.1-4.4 (2001).

153. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968) (White, J., concurring). See generally 2 MACNEIL ET AL., *supra* note 116, § 28.2.1; Reuben, *Constitutional Gravity*, *supra* note 6, at 1059-63.

154. See Ackerman, *supra* note 6, at 67-71.

155. See ROBERT LEE HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 385-500 (1952).

156. For a characterization of this understanding as part of a broader baselines approach to constitutional law, see Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1376-83 (2002); see also JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 71 (2000) (“Property rights themselves are forms of regulation, for they grant to individuals the right to call on the power of the state to exclude others from ‘finite and critical goods’ that others need. Thus property regulates nonowners as well as other owners.”). For an earlier statement, see Robert Lee Hale, *Economic Theory and the Statesman*, in *THE TREND OF ECONOMICS* 191, 215 (1924) (“The fact is that in ‘protecting property,’ the law is intervening to restrict what would otherwise be the liberty of the non-owner [to use the owner’s property]; [the law] also restricts the owner’s liberty in respect of other property owned by the non-owners of this property.”).

For this reason, both proponents and opponents of mandatory arbitration are able to claim the rhetorical high ground of choice by pitching compliance with the autonomy value at different levels of abstraction. Those favoring mandatory arbitration can plausibly argue that there is always choice with respect to mandatory arbitration—specifically, the higher level choice of whether to enter into the contract containing such a provision in the first place.¹⁵⁷ Thus, if one is opposed to arbitration, she does not have to be an investor or broker in the stock markets. One can find another doctor, or buy a different computer. Under this view, the choice of dispute-resolution forum is derivative of the higher choice of whether to enter into the transaction in the first place. On the other hand, those opposing mandatory arbitration can just as plausibly argue that compliance with the personal autonomy value should be pitched at the more specific level of concern—that is, the choice of dispute forum. Under this view, the choice of forum is independent of the transactional choice rather than derivative of it. One is thus left with a thorny theoretical problem: Whose claim of choice carries the greatest democratic legitimacy?

b. Individual, institutional competencies. Like most dilemmas, this problem admits of no easy resolution, in part because it calls for drawing a line between legitimate coercion of free choice and the kind of coercion that might be compared to duress¹⁵⁸ or undue influence,¹⁵⁹ in which free choice is effectively overcome. In assessing this problem, the insights of one of the pioneers of modern law and economics, Robert Lee Hale, are particularly helpful.¹⁶⁰ Hale believed that government regulation is most appropriate when it corrects a power imbalance between negotiating parties. Scorning the *laissez-faire* theory of the day, Hale argued that economic and legal outcomes are a function of choice, and that these choices are affected by a broad array of public and private coercive pressures that calibrate the interrelated conditions of freedom and coercion.¹⁶¹ Regulation is of course a central vehicle of governmental coercion and is justified as a constraint on individual liberty when it advances larger social goals. For Hale, one of these goals is the maximization of individual

157. I thank my colleague Pat Fry for raising this persistently over the course of several conversations about arbitration and consent.

158. See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (stating that duress by threat makes a contract voidable when a “party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative”).

159. *Id.* at § 177 (stating that undue influence makes a contract voidable when a party is under the “domination” of another person “exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare”).

160. The definitive treatment of Hale’s work is BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998). For a concise discussion, see Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 143-146 (2002); see also Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 280-81 (1973).

161. The coercion of one expands freedom for another. See HALE, *supra* note 155.

freedom, a concept Barbara Fried calls “aggregate positive freedom.”¹⁶² Legal intervention correcting a power imbalance contributes to aggregate positive freedom by equalizing the bargaining power between the parties, thus enabling the bargainers to make actual choices based on other aspects of the contracting environment that are responsive to more normatively desirable pressures, such as price, quality, or timing.¹⁶³

The implications of Hale’s analysis can be felt supporting larger democratic principles at both the individual and institutional levels. Take, for example, the common situation in which a consumer contract for the purchase of a computer includes a standard, broad arbitration provision. The consumer purchases the computer, and when the hard drive crashes for the last time a year later, and she sues the manufacturer for breach of warranty, she is met with a responsive motion to compel arbitration pursuant to an arbitration provision in shrink-wrapped materials that came with the computer but have never been opened.¹⁶⁴ Whose claim to choice should democratic theory favor—the consumer’s claim to access the courts if she so chooses, or the manufacturer’s claim to set the terms of the business relationship? Should a democracy permit such a scheme, and if so, under what conditions?

At the individual level, both democratic theory and aggregate positive freedom analysis would initially assess how the manufacturer and consumer manifested their respective powers of autonomy, and how they did not. Plainly, they both exercised their autonomy by agreeing to the sale and purchase of a specific quantity of computers, at a specific price, from a mutually agreeable retailer. The exercise of autonomy was bilateral, thus promoting aggregate positive freedom. With respect to the arbitration provision, however, only one party exercised autonomy: the manufacturer. Accordingly, aggregate positive freedom is diminished by the reduction of the buyer’s autonomy with respect to the dispute-resolution forum. The question then becomes whether this unilaterally imposed arbitration obligation is legitimate from the perspective of democratic theory.¹⁶⁵

The better policy view is that the answer is “no” because of the uniquely democratic character of the arbitration term at issue. Clearly, effective democracy would not require an affirmative exercise of autonomy on each contractual term.¹⁶⁶ Many standard-form terms, such as automatic adjustments to financing

162. See FRIED, *supra* note 160, at 68-70.

163. *Id.*

164. This hypothetical is loosely drawn from *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), in which the court, in an opinion by Judge Frank Easterbrook, upheld the arbitration provision against claims of unconscionability and other defenses.

165. Under these basic facts, some courts have held that this manner of contracting for arbitration is not unconscionable because contract law assumes that the parties have read all terms of their contracts. See *id.* at 1151; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (App. Div. 1998).

166. Such a view would undermine the viability of standard-form contracts, which are an essential component of modern commerce. See E. ALLAN FARNSWORTH, *CONTRACTS* §§ 4.26-4.28 (1982). I thank William Henning for pressing this point. But see Todd D. Rakoff, *Contracts of Adhesion: An*

interest rates or shipping charges for repairs, are of a more ministerial character and do not implicate democratic concerns, even though they may be important to the parties and the transaction. The arbitration provision is different, however, because its very purpose is to waive the parties' democratic endowment for dispute resolution.¹⁶⁷ U.S. democracy may not endow one with the right to own a computer, have it financed at a certain rate, or have it shipped for free, but, as discussed above, it does endow one with specific rights with respect to dispute resolution when a legal dispute arises over that computer: the right to have that dispute decided in a public court according to rules of law.¹⁶⁸ Whether one chooses to engage or disavow those endowment rights is a quintessential act of autonomy and self-determination that a vibrant democracy should support.¹⁶⁹ Conversely, the unilateral denial of the opportunity to exercise self-determination suppresses autonomy and diminishes aggregate positive freedom.

For this reason, democratic theory, as described, suggests that autonomy with respect to the choice of a dispute-resolution forum is an independent, rather than derivative, choice.¹⁷⁰ In the context of an adhesion contract, then, either the drafter or the adhering party could make the independent choice that she wants to make a binding commitment to arbitration, but binding the other party would require an independent exercise of autonomy by that party in waiving her democratic endowment for dispute resolution. Hale's model for choosing between choice preferences supports such an understanding because requiring actual assent to the waiver of democracy-related rights promotes aggregate positive freedom.

Institutionally, the dilemma between the competing autonomy claims of the computer manufacturer and the consumer leads to a policy choice about the legitimacy of mandatory arbitration.¹⁷¹ The decision to authorize the use of mandatory arbitration represents the policy choice that the institutional efficiency gains realized by mandatory arbitration, through the reduction of obliga-

Essay in Reconstruction, 96 HARV. L. REV. 1173 (1983) (arguing for a presumption of unenforceability of contracts of adhesion).

167. In *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273 (Ct. App. 1998), the California Court of Appeals struck down arbitration provisions included in bill-stuffers, under an analogous rationale tied to contract law doctrine. For further discussion, see *infra* notes 238-39 and accompanying text.

168. I am not claiming this endowment right is necessarily of a constitutional character. Rather, it is a right that may also be vindicated through other legal means. See *infra* notes 231-32 and accompanying text.

169. Waiver is commonly defined as the "intentional relinquishment or abandonment of a known right or privilege." See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 479 (1981) (noting the lack of a general theory of waiver and providing an overview of popular definitions of different types of waiver).

170. For purposes of U.S. law, I do not mean to suggest a return to the *Wilko* notion that the judicial forum is unwaivable. See *Wilko v. Swan*, 346 U.S. 427, 434 (1953), *overruled by* *Rodriguez de Quijos v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). The later decision in the *Shearson* cases that the judicial-forum right is important but waivable is perfectly consistent with the expectations of democratic theory.

171. See Steven Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 RUTGERS L. REV. 369 (1999) (discussing the allocation of responsibilities between courts and arbitrators).

tions of the judiciary, outweigh the rights of individuals to access the law and the courts—that is, that efficiency trumps autonomy.

In the United States, this policy choice is presently made by the judiciary, which has at least tacitly endorsed mandatory arbitration in a number of cases.¹⁷² Yet as a matter of democratic theory, again supported by Hale's economic analysis, this seems to be precisely the type of question that should be decided by the legislature, if it is to be decided by an instrument of democratic governance at all.¹⁷³ It is a fundamental question of what the law should be on an issue of significant public policy that affects broad and diverse interests and is "heavily laden . . . with value judgments and policy assessments."¹⁷⁴ Legislative determination allows for democratic participation in the policymaking process, and for the various arguments for and against mandatory arbitration to be tested against the mettle of counterargument as competing interests deliberate toward a consensus.¹⁷⁵ Further, legislators responsible for making the choice are subject to ongoing and proximate accountability.¹⁷⁶

The courts, by contrast, have no special competence to bring to the policy question whether statutory and other nonconstitutional claims should be arbitrated rather than decided by courts.¹⁷⁷ To the contrary, one of the central democracy-enhancing competencies of the courts—neutrality—is actually compromised in this context because of the courts' institutional stake in the

172. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that an age discrimination claim is subject to compulsory arbitration under an arbitration clause within a securities registration application required by an employer); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that securities fraud claims under the 1933 Securities and Exchange Act and under RICO may be compelled to arbitration under an arbitration clause in a brokerage agreement); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (holding that questions of the validity of a contract with an arbitration provision are to be decided by arbitrators, not courts).

173. See HALE, *supra* note 155, at 541-49 ("Popularly elected legislative bodies would thus seem to be the organs best suited to make the final choices which government at times has to make between conflicting liberties.").

174. See *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting); *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825) (arguing that Congress may not delegate certain "important subjects").

175. This is not to suggest that all outcomes of a democratic legislative processes are necessarily democratic, as the rise of Nazi Germany so clearly attests. See Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199 (1997). But see ELY, *supra* note 11, at 181 (responding to this critique).

176. As a matter of U.S. constitutional law, such a choice would appear to be well within Congress's Article I powers. Few would argue that Congress lacks the power to create a statutory right that can only be vindicated through an arbitral forum. It is less clear whether Congress could delegate this adjudicatory authority wholly to private arbitrators. See, e.g., *CFTC v. Schor*, 478 U.S. 833 (1986) (holding that judicial review by Article III courts preserves the constitutionality of arbitration procedures in the Federal Insecticide, Fungicide, and Rodenticide Act).

177. This is a determination of policy—of what the law should be—rather than an articulation and application of the law. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 123-50 (1994); Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 730 (1998) (arguing that courts lack "a yardstick for measuring appropriate political competition, either between party and nonparty political actors or among nonparty actors").

outcome.¹⁷⁸ Courts have a vested interest in managing the size of their dockets, and individual judges may have ideological preferences that would cause them to steer certain cases or classes of cases to arbitration rather than permitting them to proceed before judges or juries.¹⁷⁹ In the end, judicial resolution of this issue gives rise to precisely the kind of judicial value imposition—or judicial activism—that even traditional majoritarians should deplore.¹⁸⁰

Democratic theory suggests that the proper role for the U.S. judiciary in interpreting the Federal Arbitration Act is not to create a rule validating mandatory and binding arbitration. Rather, the courts should implement the will of the legislature by policing agreements to arbitrate. This would mean following the language and intent of the Act's central operating provision, section 2, which provides that arbitration agreements are enforceable to the extent, and only to the extent, they are otherwise contractually enforceable.¹⁸¹ The Act leaves these determinations for courts to decide under state contract law.¹⁸² Thus, the proper role for the courts is to determine whether in fact parties have agreed to arbitrate a particular dispute as a matter of state contract law, thus waiving the parties' presumptive right to the democratic endowment.

C. Democratic Concerns About Arbitration Should Elevate the Standard for Waiver

How the courts implement this institutional obligation is crucial, as one of the principle consequences of recognizing the contingent democratic nature of arbitration is to underscore the importance of the autonomy value in arbitration. Autonomous assent legitimizes what is otherwise a less-than-democratic process, while coerced arbitration only exacerbates a democratic problem.¹⁸³

178. One of the bedrock principles of due process is the right to have one's legal claims decided by an impartial tribunal. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Tumey v. Ohio*, 273 U.S. 510, 522-31 (1927) (holding that being convicted by a mayor who stood to receive a portion of the fine collected denied the defendant's right to due process). *See generally* KOMESAR, *supra* note 177, at 141-42; Reuben, *Constitutional Gravity*, *supra* note 6, at 1055-70.

179. *See* MACNEIL, *supra* note 3, at 172-73 (arguing that the Supreme Court's arbitration jurisprudence is based on its vested interest in "docket-clearing pure and simple"); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 S. CT. ECON. REV. 1, 2 (1993) ("[J]udges have a vested interest in reducing the workload of the courts, and they may attempt to advance that agenda without sensitivity to the impact on the system as a whole, particularly the impact on the attorney-client relationship.").

180. *See supra* note 23 and accompanying text.

181. 9 U.S.C. § 2 (2000); *see also* U.A.A. § 15 (2000). One might plausibly argue that Congress has already made the decision to endorse mandatory arbitration by enacting the FAA. However, the language and the legislative history strongly indicate that the FAA was intended to apply only to voluntary arbitrations, not ones that are imposed, and that the decision to extend the FAA to enforcement of adhesive arbitration provisions was a policy decision by the Supreme Court. *See* MACNEIL, *supra* note 3, at 134-47; Carrington & Haagen, *supra* note 2; Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 844 n.143 (2003) (citing sources); Sternlight, *supra* note 3.

182. *See supra* note 116 and accompanying text.

183. Significantly, democratic concerns about mandatory arbitration are diminished when it is non-binding—that is, when the results of the arbitration are not binding on the parties or enforceable in the

Under U.S. law, the question of the standard by which courts should make this determination is complex and controversial, and it is beyond the scope of this Article. Let it suffice to recognize here that there is a spectrum of approaches that courts can take, ranging from a more restrictive standard that requires greater proof of consent to arbitrate,¹⁸⁴ to one that is more permissive, requiring less proof of consent.¹⁸⁵ The foregoing discussion suggests that arbitration is more democratic when questions of waiver are decided under an elevated standard. Requiring greater proof of assent to the waiver of U.S. democracy's endowment for dispute resolution would help to assure that autonomy has actually been exercised by all parties in the selection of arbitration as the forum for dispute resolution, thus promoting aggregate positive freedom.¹⁸⁶

IV

THE ANTI-DEMOCRATIC CONSEQUENCES OF MANDATORY ARBITRATION

Part III's democratic analysis of mandatory and binding arbitration did not address the social capital values underlying democracy, and this set of values may be the most compromised over time by an institutionalized policy favoring mandatory arbitration. The law's failure to account for the undemocratic character of arbitration risks serious long-term consequences for democracy over time, beginning with the frustration of people's expectation of their day in court. Emerging theory on trust in interpersonal and institutional relationships suggests that the frustration of expectations regarding access to the law and courts can lead to loss of trust in the courts and the rule of law, contributing to the erosion of the social capital necessary for a vibrant and effective democracy. Again, the following discussion emphasizes U.S. democracy, but its principles may resonate more broadly.

courts. In such situations, an arbitration award essentially functions as an advisory opinion, with decisional power still vested in the parties (thus reaffirming democratic autonomy).

184. See, e.g., Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (arguing that constitutional standards should be applied to arbitration when the right to jury trial is at stake).

185. See, e.g., Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, *passim* (Winter/Spring 2004) (arguing that civil contract standards should be applied to arbitration provisions purporting to waive court-access rights). Professor Ware's radical approach turns the law of waiver on its head by assessing waiver based on the vehicle through which it is accomplished rather than the nature of the right being waived. See Rubin, *supra* note 169, at 478-80. This approach would seem to eviscerate the familiar constitutional standard for waiver altogether because all waivers come in the form of a contract—that is, through written or verbal agreements to relinquish rights otherwise assured by law. For example, the paradigmatic waiver of constitutional rights—the plea bargain—is clearly a contractual exchange, albeit one of intense judicial regulation because of the constitutional rights at stake.

186. Such an understanding is consistent with what appears to be the Supreme Court's trajectory on the issue. In its most recent cases, the Court has looked to the more restrictive standard, requiring evidence of assent to arbitration to be "clear and unmistakable." *First Options of Chi. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing *AT&T Tech. v. Communications Workers*, 475 U.S. 643, 649 (1986)). For further discussion, see Reuben, *supra* note 181, at 851-72.

A. The Baseline Expectation of One's "Day in Court"

Legal scholars have long recognized the importance to U.S. citizens of having their day in court as a fundamental tenet of the U.S. justice system¹⁸⁷—an expectation no doubt influenced by massive exposure to judicial dispute resolution through television, movies, and other forms of mass media.¹⁸⁸ The "right" to one's "day in court" is a socially learned expectation and a powerful cultural norm in U.S. democracy that is embodied in the law in a variety of doctrines,¹⁸⁹ such as those of unconscionability and reasonable expectations.¹⁹⁰

This perception may be seen as a manifestation of the democratic endowment for dispute resolution. U.S. citizens may expect to have a court decide the merits of their disputes according to rules of law unless they agree otherwise, regardless of whether that expectation is reasonable as a matter of formal law.¹⁹¹ Anecdotal evidence suggests that many are shocked and dismayed when they learn that they no longer have that right because of an arbitration clause buried in the fine print.¹⁹² Their expectation of their day in court is unmet.

187. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1167 (2001) (citing, *inter alia*, RONALD DWORKIN, A MATTER OF PRINCIPLE 72, 73 (1985); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1177 ("However articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions.")).

188. For a discussion of the media's impact on public perceptions of law and lawyers, see Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5 (2003). For a general criticism of media influence on society, see Newton N. Minow, *How Vast the Wasteland Now*, MEDIA STUD. J., Fall 1991, at 67 (reflecting on Minow's famous speech and discussing the changes in the field during the past thirty years).

189. Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 99 (observing that the "most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story'"); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 63 (1985) (observing that a plaintiff "may want to complete the process of litigation in order to feel that she has had her day in court," even when a "settlement would be more favorable than the outcome at trial").

190. The doctrine of reasonable expectations has its roots in the context of standard-form insurance contracts, and generally holds that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *C&J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975) (quoting *Rodman v. State Farm Mut. Ins. Co.* 208 N.W.2d 903, 906 (Iowa 1973)). See generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970) (coining the phrase); Paul D. Carrington, *The Dark Side of Contract Law*, 36 TRIAL 73 (2000) (warning against the trend of courts upholding standard-form contracts that deny individual rights); Bailey H. Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863 (2001).

191. See Kuklin, *supra* note 190, at 899-902. Also, the behavioral science literature persuasively suggests that humans operate with understandings distorted by a broad array of cognitive, social, and other biases, rather than under principles of rationality that economically oriented scholars tend to assume. See generally SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993).

192. See Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53 (citing examples of abuses in ADR); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (critiquing the use of arbitration provisions in consumer and employment contracts of adhesion).

B. A Breach of Trust

Emerging theory on human trust in general, and in democratic institutions in particular,¹⁹³ suggests that such an experience could diminish an individual's trust in the institution she perceives as creating this dissonance—the courts and the rule of law.¹⁹⁴

Trust is commonly defined in terms of the degree to which a person or entity complies with one's confident, positive expectations in situations of uncertainty and ambiguity.¹⁹⁵ Compliance with such expectations generates trust, while departures or defections lead to distrust.¹⁹⁶ Positive or constructive consequences—such as reciprocal cooperation, a greater capacity to trust, civic virtue, and a reservoir of goodwill that is capable of absorbing failed expectations without a total loss of trust—generally flow from the fulfillment of trust.¹⁹⁷ Conversely, negative or destructive consequences, such as alienation, attribution error, and self-serving behavior, flow from the breach of trust and the rise of distrust.¹⁹⁸

These basic principles of trust theory apply to the relationship between people and institutions, including the courts and the rule of law, as well as to interpersonal interactions and group or social relations.¹⁹⁹ With respect to the rule of law, the trust scholarship over the last two decades has focused on the degree to which trust in courts and the law affects the citizen's willingness to voluntarily comply with the law.²⁰⁰ This willingness to comply with law is particularly important in a pluralistic democracy, in which individual preferences may frequently depart from democratically derived policy choices, norms, or

193. For collected works, see *DEMOCRACY AND TRUST* (Mark E. Warren, ed., 1999); *DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES* (Susan J. Pharr & Robert D. Putnam eds., 2000); *TRUST AND GOVERNANCE* (Valerie Braithwaite & Margaret Levi eds., 1998).

194. The concept of trust has been analyzed from a variety of scholarly perspectives. For an attempt to categorize the streams of trust research flowing from psychology, sociology, political science, anthropology, history, and sociobiology, see Philip Worchel, *Trust and Distrust*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 174-87 (William G. Austin & Stephen Worchel eds., 1979).

195. See, e.g., Susan D. Boon & John G. Holmes, *The Dynamics of Interpersonal Trust: Resolving Uncertainty in the Face of Risk*, in *COOPERATION AND PROSOCIAL BEHAVIOR* 190-211 (Robert A. Hinde & Jo Groebel eds., 1991); Roy J. Lewicki & Barbara Benedict Bunker, *Trust in Relationships: A Model of Development and Decline*, in *CONFLICT, COOPERATION AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH* 135-39 (Barbara Benedict Bunker et al. eds., 1995); J.B. Rotter, *A New Scale for the Measurement of Interpersonal Trust*, 35 *J. PERSONALITY* 651-55 (1967).

196. Lewicki & Bunker, *supra* note 195, at 161.

197. See DOUGLAS R. HOFSTADTER, *The Prisoner's Dilemma and Other Tournament Games*, in *METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF THE MIND* (1985) (describing characteristics of "tit for tat" game-theory strategy).

198. See generally Morton Deutsch, *Cooperation and Competition*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 21-41 (Morton Deutsch & Peter T. Coleman eds., 2000). For analysis of the vicious cycle of distrust, see Toshio Yamagishi, *Trust as a Form of Social Intelligence*, in *TRUST IN SOCIETY* 121, 124-27 (Karen S. Cook ed., 2001).

199. See M. Kent Jennings, *Political Trust and the Roots of Devolution*, in *TRUST AND GOVERNANCE*, *supra* note 193, at 218-45.

200. As Tom Tyler writes, "[a] judge's ruling means little if the parties to the dispute feel they can ignore it. Similarly, passing a law prohibiting some behavior is not useful if it does not affect how often the behavior occurs." TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19 (1990).

governmental actions.²⁰¹ Moreover, compliance needs to be voluntary, as the actual power of the courts, legislators, and other institutions to enforce the law is, in fact, quite limited,²⁰² and the costs of individualized deterrence is prohibitively high.²⁰³ As a result, one may personally posit that the rule of law in a democracy derives its greatest force from citizen's willingness to voluntarily comply.

Remarkably, the empirical research of New York University social psychologist Tom R. Tyler has consistently shown that trust in legal institutions far exceeds other factors—including agreement in the substantive correctness of the law—as the primary determinant of compliance with the law.²⁰⁴ More specifically, it suggests that people are most willing to comply with the law when it is perceived to be legitimate, in the sense that it is entitled to or deserving of compliance,²⁰⁵ and the primary determinants of this legitimacy are perceived procedural fairness and trust in the motives of legal authorities.²⁰⁶ In other words, people are willing to go along with a rule, even a rule they do not like, if they generally trust the process that created it and believe that the authorities are acting in society's best collective interests.

The latter point is particularly significant, as the dynamics of motive attribution underscore the importance of judicial preservation of citizens' reasonable expectations about how the courts and the law will protect them, and the correlation between this judicial preservation and the essential values of democ-

201. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (suggesting it is "impossible" for any process to "even hope to 'reflect' any such thing as the will of the majority"); see also Daniel Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890, 901-06 (1987) (discussing the implications of the Impossibility Theorem for legislative behavior).

202. Appreciation of this limitation harks back to the days of Andrew Jackson, who responded to John Marshall's decision protecting Cherokee Indians by famously stating: "Well, John Marshall has made his decision; now let him enforce it!" DAVID LOTH, *CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC* 365 (1948); see also TONY FREYER, *THE LITTLE ROCK CRISIS* 117-163 (1984) (discussing *Cooper v. Aaron*, 358 U.S. 1 (1958), and the difficulty of implementing desegregation); MARGARET LEVI, *OF RULE AND REVENUE* 52-54 (1988) (discussing the quasi-voluntary nature of taxpayer compliance and the importance of belief in the fairness of the system for voluntary compliance).

203. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207-09 (1968) (arguing that a rational actor will only be deterred from committing a profitable wrong if the actor concludes in advance that the expected gain from the wrong is smaller than the amount of the potential sanction, multiplied by the probability that the sanction will be imposed); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 424-25 (1998) (same); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887-88 (1998) (presenting different levels of suggested damages necessary for deterrence).

204. In studies undertaken across time and modes of authority, Tom Tyler repeatedly found that trust in government is more influential in terms of achieving voluntary compliance with the law than are threats or other deterrent measures. See Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856-58 (1998).

205. Both the morality and the legitimacy of the law strongly outweigh more instrumental factors affecting compliance, such as the probability of getting caught. *Id.* at 859-60.

206. *Id.* at 866. The most significant research in this regard—Tyler's studies in Chicago and California—focused on citizen contact with police and courts as a proxy for what is described here as the "rule of law."

racy.²⁰⁷ Across studies, Tyler's empirical research suggests that people generally operate with what he calls an "illusion of benevolence" with respect to the motives of legal authorities—that is, an assumption or expectation that the law and the courts are "trying to do what is best for them" and will "treat them fairly."²⁰⁸ In other words, people come into contact with the legal system with a positive attribution: a predisposition of trust toward legal authority.²⁰⁹

This trust, however, and the illusion of benevolence, are tested in the real world through personal experiences with legal authorities. Here, the research is striking, showing that it is the integrity of the process by which the rule of law is administered—the processes and behaviors of legal authorities—and not substantive agreement with the law, that determines whether these initially trusting expectations are met or defeated.²¹⁰ Equally striking, the reference points that have been found to be most salient in people's determination of procedural integrity are generally consistent with the very factors identified in Part II of this Article as being central to democratic legitimacy: whether the authorities allow people to influence the outcome (participation), allow people to speak and present evidence (participation), behave neutrally (equality and due process), treat people with dignity and respect (due process), explain judgments (rationality), and provide desired outcomes (rationality).²¹¹ More research is needed, but the implication seems intuitive enough: The more the behaviors of courts and other legal institutions are consistent with people's expectations along these dimensions, the more legitimacy these institutions will command, and the more likely people will be to comply voluntarily with the commands of those institutions. Conversely, the less the behaviors of courts and the law accord with people's expectations, the less legitimacy these institutions will command, and the less likely people will be to comply voluntarily with their commands.

207. The literature on motive attribution is vast. For important contributions, see, for example, LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 87-89, 140-41 (1991); KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY AND BLAMEWORTHINESS* (1985); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 129 (Daniel Kahneman et al. eds., 1982).

208. See Tyler, *supra* note 204, at 868-69. A thorough review revealed no empirical studies on point, but one may reasonably doubt whether the public has a similarly benevolent view of the motives of arbitrators. Anecdotal evidence suggests the public might be more likely to view arbitrators as profit-motivated service providers than as expositors of justice engaged in public service. Unlike those of the federal and state judges, arbitrator salaries (via arbitration fees) can be quite extraordinary. See, e.g., Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 307 (1999) (observing that, at the time, arbitrators' fees averaged \$700 per day).

209. This predisposition toward trust was reflected in an empirical study of the public confidence in state courts, in which seventy-five percent of respondents reporting either a "great deal" or "some" confidence in "courts in your community." NAT'L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS* 12-14 (1999). However, the study also noted systematic variations across several key variables, including race, education, and income. *Id.*

210. This result is consistent with the wealth of research on procedural justice that has arisen out of the larger dispute-resolution movement. See *supra* notes 96, 198.

211. See Tyler, *supra* note 204, at 869-73.

To the extent that the judicial enforcement of mandatory arbitration provisions frustrates people's deeply held expectations of their right to their day in court, trust theory logically suggests that this may diminish people's general willingness to trust courts and the law, and to be willing to respect and voluntarily comply with the law in other contexts.²¹² Individual and isolated cases are hardly cause for alarm. An individual not otherwise predisposed seems unlikely to join an anti-government terrorist organization simply because of the enforcement of a mandatory and binding arbitration provision included in the boilerplate of papers accompanying the purchase of a new computer. But the institutionalization of the practice of mandatory arbitration is the cause of greater concern to a vibrant and effective democracy. Already, entire industries, such as the securities and financial services industries, are virtually dominated by systems of mandatory and binding arbitration.²¹³ As more industries follow this trend, the gap between public expectations regarding citizens' rights to their day in court and the judicially enforced reality of compelled arbitration will widen.

C. The Significance of Breach of Trust for Civil Society and Social Capital

If trust in the courts and the rule of law is a cornerstone of democracy, this possibility presents a very troubling scenario. Indeed, the trust, political science, and behavioral economics literatures cumulatively suggest that the systemic effects of such a trend are potentially significant over time.

Clearly, legitimate questions may be raised about whether the distrust generated by a court's enforcement of a mandatory arbitration provision would be directed at the particular judge enforcing the award, the court in general, the drafter of the adhesive arbitration provision, or elsewhere. In this regard, much may depend upon the specific factual context, including party sophistication and legal representation.²¹⁴ One might reasonably assume that the distrust and attribution of malevolent motive will not be isolated upon a single participant, but rather will be spread, perhaps unevenly, to all potential targets, including "the system."²¹⁵

212. Similar concerns could be raised by proponents of mandatory and binding arbitration, who could plausibly argue that a court's refusal to enforce an arbitration provision under the FAA would frustrate their expectation that disputes covered by the provision would be arbitrated rather than tried in court. However, the proponents of mandatory arbitration are likely to be sophisticated parties who are aware of the provisions and their significance. For this reason, contractual terms, especially in contracts of adhesion, are generally read against the drafting party. See JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS 425 (3d ed. 1990).

213. See ARBITRATION POLICY TASK FORCE, SECURITIES ARBITRATION REFORM 6-7 (1996); Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered by a Consumer Lender*, SF81 ALI-ABA 215 (2001). But see Jean R. Sternlight, *Protecting Franchisees from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45 (2000).

214. See *infra* Part V. This is an area in which further empirical research would be appropriate and insightful.

215. This would accord with the social-structure theory of conflict. See JAMES A. SCHELLENBERG, CONFLICT RESOLUTION: THEORY, RESEARCH, AND PRACTICE 79-102 (1996).

However, for purposes of this analysis, the focus remains on the courts, where the primary concern is that an individual who experiences a perceived breach of trust through the enforcement of a mandatory arbitration provision will develop distrust towards the courts more generally, as well as towards the larger rule of law. The empirical research suggests that individual experiences with legal authority are often generalized to the broader system of law, for better or for worse.²¹⁶ To the extent that these experiences are trust-confirming because they accord with expected norms regarding procedural fairness and democratic virtues, this phenomenon is normatively desirable because it promotes trust and confidence in the rule of law by reinforcing public expectations and the illusion of benevolence. To the extent, instead, that individual experiences are trust-disconfirming, the distrust created would likely undermine and diminish trust and confidence in the rule of law.

Trust theory further suggests that this is the point at which the impact of mandatory and binding arbitration is most deeply felt. Scholars often distinguish between calculative and identity-based trust. Calculative trust is based on rational calculation of another person's (or institution's) likely behavior in situations of ambiguity or uncertainty, while identity-based trust stems from shared values, from moral senses of right and wrong, from how people positively perceive and identify themselves as social beings.²¹⁷ While breaches of calculative trust create a sense of hurt or dissonance, they are not nearly as deeply felt as violations of trust based on shared values and identity.²¹⁸ Breaches of calculative trust may lead to feelings of instrumental regret, but breaches of identity-based trust lead to feelings of alienation and shame, attribution error, and moral outrage,²¹⁹ as well as psychological distancing from the defector of trust.²²⁰

Breach of trust occasioned by court-enforced mandatory and binding arbitration may well be found to fall into the category of identity-based trust, rather than merely calculative-based trust, and behavioral law-and-economics scholarship into the so-called "endowment effect"²²¹ underscores the depth at which

216. See TYLER, *supra* note 200, at 200 (reporting results indicating that Chicago respondents ranked the general obligation to comply with the law as high); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 385-91 (2001) (reporting similar findings in a study of respondents drawn randomly from Los Angeles and San Francisco); see also Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553, 563 (1993) (concluding that the satisfaction of disputants in child-custody mediations and litigation was "consistently affected . . . by the fairness of the procedures used . . ."); E. Allan Lind et al., *Individual and Corporate Dispute Resolution*, 38 ADMIN. SCI. Q. 224, 237 (1993) ("Procedural justice judgments were strongly related to the decision to accept the [court-ordered] arbitration award [instead of opting to reject the award and go to trial]").

217. See, e.g., Lewicki & Bunker, *supra* note 195, at 161-67.

218. *Id.*

219. *Id.*

220. See RUBIN ET AL., *supra* note 31, at 82-90.

221. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1231-56 (2003) (summarizing and analyzing the social science research).

this betrayal might be felt. The endowment effect refers to the empirical finding that “people tend to value goods more when they own them than when they do not,” but the concept has been applied beyond chattels to more abstract rights, such as environmental quality.²²² In other words, people placed greater value on *preserving* the entitlement than they did on *gaining* the entitlement. While the proposition begs for empirical research, at least one inference regarding the set of rights and expectations associated with dispute resolution in a democracy seems plausible: One’s investment in the expectation of his right to a “day in court” is likely to be greater than if access were a mere hope, and the denial of that expectation would exact a heavier toll than if the expectation were lower.

The application of these principles to mandatory and binding arbitration illuminates its costly destructive potential. Identity theory suggests that to the extent that people draw positive senses of self from legal institutions and the rule of law and a sense of national identity,²²³ it is because they perceive these institutions as promoting and operating under democratic values they cherish: personal autonomy, participation, accountability, equality, due process, rationality, transparency, civic virtue, and the promotion of social capital. The trust research further indicates that the ability to choose arbitration as a dispute-resolution option would foster public trust and reciprocal cooperation, and deepen civil society and social capital by respecting personal autonomy in dispute resolution, thereby reinforcing widely held rule-of-law expectations. By contrast, the denial of one’s perceived endowment of her day in court, a forum that fully vindicates these democratic virtues, and the substitution, by the court, of a forum that generally denies many of these values, can lead to alienation, outrage, attribution error, and distancing from the rule of law itself.²²⁴ Institutionalized, this compulsion into arbitration threatens to weaken civil society and social capital by diminishing social trust in the rule of law by breaching the public’s expectations.

Putnam’s landmark research and the flood of scholarly work that has followed it continues to underscore the importance of trust in public institutions such as courts.²²⁵ Rather than being separate from effective democratic govern-

222. *Id.* at 1232 n.16 (citing Murray B. Rutherford et al., *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 HARV. ENVTL. L. REV. 51 (1998)); Robert D. Rowe et al., *An Experiment on the Economic Value of Visibility*, 7 J. ENVTL. ECON. & MGMT. 1 (1980). One study, for example, surveyed duck hunters about what they would pay to protect wetlands and found that they were willing to pay an average of \$247 per person, per season for the right to prevent development (thus preserving their capacity to hunt), while they were willing to demand, on average, \$1,044 to give up their entitlement to hunt in the wetlands. JUDD HAMMACK & GARDNER MALLARD BROWN, JR., *WATERFOWL AND WETLANDS: TOWARD BIOECONOMIC ANALYSIS* 26-27 (1974).

223. For a rich discussion of national identity, see VAMIK VOLKAN, *BLOODLINES: FROM ETHNIC PRIDE TO ETHNIC TERRORISM* 19-30 (1997).

224. See Reuben, *State Action*, *supra* note 6, at 605-09. Interestingly, the endowment research suggests that the endowment effect is more pronounced when there is no meaningful substitute than when the good is readily interchangeable. See Korobkin, *supra* note 221, at 1238-40.

225. See, e.g., *DISAFFECTED DEMOCRACIES*, *supra* note 193 (focusing on problems of loss of public trust in democracies); *supra* note 93.

ance, social capital theory suggests that social trust is a necessary precondition to effective democratic governance.²²⁶ By contrast, unsuccessful democracies are characterized by weak social capital, marked by civic cultures of distrust, lawlessness, and alienation.²²⁷

It is this civil society that lies at the heart of a democracy's social capital, providing a basis for mutual cooperation, reciprocity, and civic virtue. Putnam, drawing on modern game theory, suggests that such cooperation leads to an ever-deepening sense of trust and order, both horizontally among the citizenry and vertically between the citizenry and its regional and national governmental institutions.²²⁸ He concludes that social capital is more powerful and effective than either positive law or economics in ordering human affairs, and that it is the very engine that drives effective democracy.²²⁹ Stoke this social capital, and democracy will flourish; starve it, and democracy will hollow.²³⁰

When private dispute resolution is widely conducted through mandatory and binding arbitration,²³¹ Putnam's work clearly suggests that the distrust and alienation may diminish civil society's capacity to support democracy.²³² The capacity of a corporate or other economic entity to unilaterally revoke access to

226. PUTNAM, *supra* note 28, at 165-85.

[These] regions of Italy have many choral societies and soccer teams and bird-watching clubs and Rotary clubs. Most citizens in these regions read eagerly about community affairs in the daily press. They are engaged by public issues, but not by personalistic or patron-client politics. Inhabitants trust one another to act fairly and to obey the law. They believe in popular government, and they are predisposed to compromise with their political adversaries. Both citizens and leaders find equality congenial. Social and political networks are organized horizontally, not hierarchically. The community values solidarity, civic engagement, cooperation and honesty. Government works. Small wonder that people in these regions are content!

Id. at 115. For a discussion of the importance of cross-cutting cleavages in social structure for the success of democracy, see SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (1960); RUBIN ET AL., *supra* note 31, at 131-40.

227. See PUTNAM, *supra* note 28, at 165-85.

At the other pole are the uncivic regions Public life in these regions is organized hierarchically rather than horizontally. The very concept of "citizen" here is stunted. From the point of view of the individual inhabitant, public affairs is the business of somebody else—*i notabili*, "the bosses," "the politicians"—but not me. Few people aspire to partake in deliberations about the commonweal, and few such opportunities present themselves. Political participation is triggered by personal dependency or private greed, not by collective purpose. Engagement in social and cultural associations is meager. Private piety stands in for public purpose. Corruption is widely regarded as the norm, even by politicians themselves, and they are cynical about democratic principles. "Compromise" has only negative overtones. Laws (almost everyone agrees) are made to be broken, but fearing others' lawlessness, people demand sterner discipline. Trapped in these inter-locking vicious cycles, nearly everyone feels powerless, exploited, and unhappy. All things considered, it is hardly surprising that representative government here is less effective than in more civic communities.

Id. at 115.

228. *Id.* at 163-85.

229. *Id.*

230. For more on the relationship between trust and democracy, see generally DEMOCRACY AND TRUST, *supra* note 193; FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995); TRUST AND GOVERNANCE, *supra* note 193; TRUST IN SOCIETY, *supra* note 198.

231. See Demaine & Hensler, *supra* note 4 (questioning how common mandatory arbitration actually is).

232. See PUTNAM, *supra* note 28.

the courts—one of democracy’s most basic institutions—and, hence, to the rule of law, undermines the very kind of voluntary compliance and cooperation that Putnam found so important to the success of effective regional democracies in Italy.²³³ If the rule of law is as illusory as the surprise enforcement of mandatory arbitration provisions would suggest, why bother to rely on it?

V

CONCLUSION

The relationship between democracy and arbitration is subtle but important and only begins with a recognition of arbitration’s contingent capacity to promote or diminish democratic governance and the importance of a high standard of waiver for U.S. democracy’s essential endowment for dispute resolution. It also raises important theoretical, empirical, and practical questions that are appropriate for further study and analysis.

In the United States, one immediately pressing question is how to integrate this understanding of arbitration’s democratic character into U.S. law in a way that assures arbitration’s constructive, democracy-enhancing effects and discourages its more destructive, democracy-diminishing potential. Significantly, democracy and constitutionalism are not the same, and it is unlikely under current law that such assurance can be achieved through the application of federal constitutional norms because of the reliance of U.S. courts on the so-called “state action” doctrine, which generally limits the application of constitutional standards to governmental actors.²³⁴ However, the lack of state action does not diminish the undemocratic character of unilaterally imposed arbitration. It simply shifts the question to how the democratic use of arbitration might be assured through other, traditional means.

In this regard, several possibilities are worth exploring. For example, arbitration’s democracy-enhancing potential can be assured by amending the Federal Arbitration Act and related state laws²³⁵ to make it clear that legally enforceable arbitration must proceed on a voluntary basis—that is, by actual party consent to the use of arbitration to resolve the dispute.²³⁶ Similarly, courts

233. *Id.*

234. This doctrine generally provides that state action may be found when a private concern is performing a traditionally exclusive public function, or when its operation is so inextricably entangled with the government that the two are functionally inseparable.

235. My emphasis is on federal statutes because the U.S. Supreme Court has broadly and consistently held that state statutes evincing a hostility toward arbitration are preempted by the FAA. *See* *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempts a Montana statute conditioning enforceability of arbitration clauses on compliance with special notice requirements); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA applies in state courts). For scholarly treatments, compare Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L.REV. 101 (2002), with Schwartz, *supra* note 115.

236. Congress has shown its willingness to consider such amendments in recent years. *See, e.g.*, H.R. 5162, 107th Cong. (2002) (prohibiting predispute arbitration agreements in consumer transactions); S. 192, 107th Cong. (2001) (introduced by Russell Feingold, D-Wis.) (same); S. 2435, 107th Cong. (2002)

can look to the democratic character of arbitration when considering the application of contractual defenses to the enforcement of alleged arbitration agreements, such as when applying the doctrines of unconscionability²³⁷ and reasonable expectations²³⁸ and the duty of good faith and fair dealing.²³⁹ Finally, democracy-enhancing arbitration can be assured through private ordering—that is, by lawyers counseling clients to engraft actual arbitration choice into standard-form agreements through the use of check-offs or other similar opt-in mechanisms.²⁴⁰ If demonstrating proof of consent is practicable and appropriate to justify the purchase of a tank of gas when renting a car,²⁴¹ or determining

(introduced by Edward Kennedy, D-Mass.) (excluding all employment contracts from the coverage of the FAA); H.R. 2282, 107th Cong. (2001) (introduced by Dennis Kucinich, D-Ohio) (same).

One may readily suggest that congressional silence on mandatory arbitration may be construed as tacit support for the practice. However, it is logically fallacious to presume that congressional approval for any practice can be inferred from its failure to address that practice. Public choice theory would also reject the validity of any conclusion of congressional support for mandatory arbitration based on its inaction. Indeed, one may just as plausibly, and fallaciously, argue that Congress's failure to require mandatory arbitration in all statutory cases evinces its opposition to the practice. *See Johnson v. Trans. Agency, Santa Clara County*, 480 U.S. 616, 671-72 (1986) (Scalia, J., dissenting) ("I think we should admit that vindication by congressional inaction is a canard."). *Id.* at 672.

It is far more telling that in the two most significant congressional authorizations of arbitration since the FAA's enactment, Congress required actual voluntary consent to the process. *See Administrative Dispute Resolution Act of 1990*, 5 U.S.C. § 575(a)(1) (2000) ("Arbitration may be used as an alternative means of dispute resolution whenever all parties consent."); *Alternative Dispute Resolution Act of 1998*, 28 U.S.C. § 654 (b)(1) (2000) (making arbitration available when parties' "consent to arbitration is freely and knowingly obtained").

237. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.") Unconscionability has become a common way for courts to invalidate the most egregious arbitration clauses. *See supra* note 152 (citing cases).

238. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term . . ."). The doctrine has been used only sparingly by the courts. *See, e.g., Broemmer v. Abortion Servs. of Phoenix*, 840 P.2d 1013 (Ariz. 1992) (invalidating a mandatory arbitration provision in a health care contract); *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775 (Ct. App. 1976) (invalidating an arbitration provision in a hospital admissions form because the patient was not made aware of it at time of contracting).

239. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); *cf. Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 283-85 (Ct. App. 1998) (ruling that a change to the terms and conditions of the customer's deposit account signature card adding a mandatory arbitration provision was not consistent with the terms that the customer had initially agreed).

240. For an earlier version of this proposal, see Richard C. Reuben, *The Pendulum Swings Again: Badie, Wright Decisions Underscore Importance of Actual Assent in Arbitration*, 6 DISP. RESOL. MAG., Fall 1999, at 18. For another variation, see Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1245-60 (arguing for a system in which the employee chooses between trial or arbitration with just-cause protections).

241. Automobile rental companies often require customers to initial their rejection of prepaid fuel-refilling options. *See, e.g.,* Budget Rent-A-Car's policy at <http://www.budget.com/visitor/questions/general.html> (last visited Nov. 29, 2003); Hertz Rent-A-Car's policy at http://www.hertz.com/servlet/ByrServlet?MOVE_TO=3 (last visited Nov. 29, 2003).

whether to permit one's professional dues to be used for political purposes,²⁴² the waiver of judicial access rights that an arbitration provision represents should require no less.

Beyond arbitration lie the similar set of questions that can be asked of other dispute-resolution processes. What is the democratic character of mediation? How might other dispute-resolution methods, such as fact-finding and facilitation, serve democracy-enhancing functions? How might dispute-resolution contexts affect the meaning and application of the substantive democratic variables described in this Article? How might democracy theory inform other aspects of dispute resolution, such as systems of design and conflict management, and how might what we have learned about dispute resolution inform our understandings of democracy?

Significantly, similar inquiries can and should be directed at the public adjudication context. While it has the capacity to enhance democracy, what do we find as a descriptive matter when we examine judicial processes according to the degree that they promote or diminish democratic values? What changes might be appropriate based on those findings? How does an appreciation for dispute resolution's relationship with democracy affect such issues as jury reform, the development and funding of dispute-resolution programs, and public access to proceedings? How might deeper historical research on the Framers' understanding of dispute resolution affect our understanding of the meaning and application of Article III?

These inquiries also call for much empirical and comparative analysis. What might empirical research tell us about the degree to which we expect our day in court and perceive it as an endowment, about the degree to which mandatory or voluntary dispute-resolution processes comports with or defeats those quantified expectations, and about the degree and manner in which the disappointment of these expectations affects the confidence and trust in the courts and the rule of law? How should these understandings be integrated into our own system of law, and how can they be exported appropriately to other new and developing democracies in Eastern Europe, Africa, and elsewhere around the globe?

Such questions only scratch the surface of potentially helpful inquiry. As the mandatory arbitration problem suggests, the relationship between democracy and dispute resolution has been overlooked too long.

242. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that a state bar association may not use member dues for political purposes without member consent); *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986) (permitting deduction from union dues as a vehicle for individual members to decline participation in a union's political activities).