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# A Constitutional Right To Discovery? Creating and Reinforcing Due Process Norms Through the Procedural Laboratory of Arbitration

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## I. INTRODUCTION

A constitutional right to pre-trial discovery? Absolutely not, so decrees the Supreme Court of the United States. The Supreme Court has held, in a criminal case, that there is no general constitutional right to broad discovery.[1] Of course, in the civil context, modern procedural systems such as the Federal Rules of Civil Procedure often grant broad procedural rights to engage in discovery through a variety of tools such as depositions, requests for production of documents, interrogatories, and requests for

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1. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . .").

admissions.[2] However, are such discovery procedures in the civil context—which have become the norm in modern litigation—*constitutionally* required? Would Congress or states, for example, violate the due process clause by banning or severely restricting the broad use of discovery in civil cases? If no constitutional right to discovery exists in criminal cases, which can involve severe deprivations of life and liberty, then surely it should follow that no constitutional right to discovery exists in civil cases. Furthermore, broad discovery in courts did not exist when the due process clauses were adopted,[3] and under a strictly static view of due process, there should be no right to discovery.

This article makes a bold, novel claim: the underpinnings for a due process-like norm involving a right to discovery in the civil context have begun to take root.[4] Where can one observe such a right beginning to emerge? In the laboratory or petri dish of procedural experimentation: arbitration.

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2. *See, e.g.*, FED. R. CIV. P. 26–37.

3. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998) ("Prior to [the adoption of] the Federal Rules of Civil Procedure ("Federal Rules") [in 1938], discovery in civil cases in federal court was severely limited. The Federal Rules discovery provisions dramatically increased the potential for discovery.").

4. This article is not claiming there is a well-defined constitutional due process right to extensive pre-trial discovery in all types of civil cases, such as the broad procedural rights to discovery created by the Federal Rules of Civil Procedure. Instead, this article claims there is evidence for a budding due process-like norm involving a right to *limited* pre-hearing discovery in certain types of civil cases. Perhaps this limited right to discovery in a civil case can be loosely analogized to the limited disclosures that are constitutionally required for a fair trial in the criminal context as a result of the Supreme Court's landmark ruling in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). *See also* U.S. v. Clark, No. 05-80810, 2006 WL 2008511 (E.D. Mich. July 12, 2006) (recognizing that although there is no constitutional right to broad discovery in a criminal case, limited disclosures are required in criminal cases as a result of *Brady*).

Arbitration is a contractual form of dispute resolution where two parties agree to submit their dispute to a neutral third party who will make a binding decision.[5] The foundation of arbitration is the agreement of the parties to submit their dispute to an arbitrator. In theory, and subject to some limits, parties have the freedom of contract to create whatever procedures they desire to be used in arbitration.[6] As a result of this broad contractual freedom, arbitral procedures can vary.[7] However, in practice, arbitration can often involve limited procedural rights compared to the broader procedural rights available in court litigation, such as broad rights to discovery, extensive motion practice, and rights to appeal.[8]

Arbitration and formal court litigation can be polar extremes, and scholars have lamented that, in the legal academy, there is a large divide between arbitration on the one hand, and litigation and formal procedures

5. *See* MARTIN DOMKE ET AL., 1 DOMKE ON COM. ARB. § 1:1 (2014).

6. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682-83 (2010).

7. *See infra* Section I.

8. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("[By agreeing to arbitrate, a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."); Pour Le Bebe, Inc. v. Guess? Inc., 5 Cal. Rptr. 3d 442, 458 (Cal. Ct. App. 2003) ("[P]arties to an arbitration are not afforded the full panoply of procedural rights available to civil litigants."). In contrast to private arbitration, court litigation is generally a more formal, public proceeding, and litigating in court typically involves extensive procedural rights granted by court rules, such as procedures permitting broad discovery and extensive motion practice. *See generally* FED. R. CIV. P.; Hodges v. Reasonover, 103 So. 3d 1069, 1075 (La. 2012) (explaining that compared to litigation, arbitration typically involves "streamlined discovery" and "little to no motion practice"). Litigation in court also generally involves broader rights to appeal an adverse decision in comparison to the extremely limited rights of appeal in connection with an arbitrator's decision. Hough v. Osswald, 556 N.E.2d 765, 766 (Ill. App. Ct. 1990) ("The object of arbitration is to avoid the formalities, delay and expenses of litigation in court. Judicial review of an arbitrator's award is more limited that an appellate review of a trial court's decision."); Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 123 (1st Cir. 2008) ("A federal court's review of an arbitrator's decision, however, is extremely narrow and exceedingly deferential. Indeed, it is among the narrowest known in the law.") (citations omitted) (internal quotation marks omitted).

governing the civil court system on the other.[9] However, the history and development of arbitration laws in America demonstrate that there are strong relationships between arbitration and the more formal court system.[10] For example, the push for modern arbitration laws developed, in part, in response to a broken, overwhelmed court system of the early 1900s, as arbitration could help serve as a safety valve for an overburdened judiciary.[11]

This article explores an overlooked dynamic between arbitration and the more formal court system. As developed in more detail below, this article's thesis is that arbitration can help define and reinforce due process norms applicable in court, and a due process-like norm regarding discovery is beginning to develop. Courts often review arbitration agreements for fairness, and through this judicial review, courts have developed a body of law discussing and defining whether certain procedures (or the lack thereof) violate fairness norms in connection with the resolution of a particular dispute. Through this body of law exploring procedural fairness, one can identify emerging procedural norms, such as a right to discovery in certain situations. Through the procedural creativity and experimentation that occurs in arbitration, and through the judicial review of such arbitral procedures, arbitration creates countless opportunities to explore and define what constitutes the minimum bundle of procedures required for a fair hearing.

Part II of this article provides a general overview of arbitration and arbitration procedures. Part III of this article then explores the legal framework supporting arbitration, including how courts review arbitration procedures for fundamental fairness. Part IV concludes with a discussion of

9. Jean R. Sternlight & Judith Resnik, Forward, *Competing and Complementary Rule Systems: Civil Procedure and ADR*, 80 NOTRE DAME L. REV. 481, 487 (2005); *see also* Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 681-89 (2005).

10. *See generally* IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 9-10 (2013).

11. *Id.*

how this judicial review of arbitration procedures helps define and reinforce due process norms applicable in courts, particularly with respect to an emerging due process right to discovery.[12]

## II. ARBITRATION: A PROCEDURAL LABORATORY

Parties have used arbitration to resolve disputes since the founding of the United States. During the 1800s and early 1900s, arbitration particularly thrived among members of trade associations and business groups like the New York Chamber of Commerce, which first established arbitration facilities to resolve commercial disputes in 1768.[13] Today, arbitration is used throughout American society to resolve almost every type of dispute in a wide variety of contexts, like: employment disputes; disputes between consumers and businesses; construction disputes; disputes in the securities industry; and disputes involving wills and trusts, to name a few.[14]

The foundation for arbitration is the agreement between the parties to submit their dispute to an arbitrator, and both the power of the arbitrator and the legitimacy of the arbitration proceeding are based on this agreement.[15]

12. There are different due process norms that could be analyzed in connection with this article, such as norms regarding notice and the neutrality of the decision maker. This article, however, focuses particularly on due process norms regarding discovery. The impact of arbitration on developing due process norms is particularly noticeable with respect to discovery. As explained below, due process norms regarding discovery appear to have changed over time, and arbitration helps support these developing norms.

13. SZALAI, *supra* note 10, at 15-19. The history of arbitration goes back to ancient times. DEREK ROEBUCK & BRUNO DE FUMICHON, ROMAN ARBITRATION (2004); DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001).

14. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987); Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013).

15. Bowater N. Am. Corp. v. Murray Mach., Inc., 604 F. Supp. 821, 822-23 (E.D. Tenn. 1984) ("As a matter of black letter law arbitration is a matter of contract, and the contours of the arbitrator's authority in a given case are determined by reference to the arbitral agreement.").

Because of this contractual foundation for arbitration, the procedures used in arbitration proceedings can vary, and arbitration institutions, trade associations, and industry groups have developed different sets of arbitration rules that parties can adopt through their contracts. For example, the American Arbitration Association has developed several different sets of procedural rules for a variety of disputes, such as employment disputes, small consumer disputes, complex commercial disputes, construction disputes, securities disputes, and wills and trust disputes.[16] Furthermore, these rules can cover an assortment of issues, such as the number of arbitrators, how the arbitrator or arbitrators may be selected, how a party may commence an arbitration proceeding, whether parties can amend or change their claims, whether motions can be filed, whether and to what extent parties will engage in discovery and exchange of information prior to a hearing, whether and when a hearing or hearings will occur, deadlines, how fees and expenses will be allocated, and numerous other issues.[17]

In addition to adopting rules developed by an arbitration association or trade group,[18] parties have the contractual freedom and flexibility to design and control the dispute resolution process by creating their own ad hoc rules. As Judge Posner once colorfully wrote:

16. *E.g.*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/aaa/faces/rules (last visited June 16, 2014); JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC. (JAMS), http://www.jamsadr.com/rules-clauses (last visited June 16, 2014). For examples of rules developed by trade associations or industry organizations, see the Arbitration Rules of the National Grain and Feed Association, http://www.ngfa.org/wp-content/uploads/2014_Arb_Rules.pdf (last visited June 16, 2014); Arbitration Rules of the Producers Guild of America, http://www.producersguild.org/?page=coc_rga (last visited June 16, 2014); and the Arbitration Rules of the American Cotton Shippers Association, http://www.acsa-cotton.org/rules-and-policies/acsa-arbitration-rules-2 (last visited June 16, 2014).

17. AMERICAN ARBITRATION ASSOCIATION, *supra* note 16.

18. A party can agree to adopt rules of a trade group even if the party is not a member of the trade group. *See, e.g.*, Hodge Brothers, Inc. v. DeLong Co., 942 F. Supp. 412, 419 (W.D. Wis. 1996) (compelling arbitration where agreement incorporated by reference rules of a trade association, even though the plaintiffs were not members of the trade association).

> Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[19]

Parties have the freedom to design "tailor-made" arbitration agreements.[20] For example, in one case involving two sophisticated corporate entities, the parties created their own arbitral procedures, and a court noted that "every provision of this arbitration agreement reveal[ed] that this is a complex matter, both technically and legally."[21] The parties devised a unique arbitration agreement providing for "extensive discovery[,] contain[ing] unusual provisions for waivers, statute of limitations, res judicata and recorded proceedings[,] and mandat[ing] detailed findings by the panel [ . . . due to] potential claims by and against vendors, consultants[,] and other interested third parties."[22]

Procedural creativity can flourish more powerfully, easily, and quickly in the arbitral setting as opposed to the courts. Of course, procedural rules in court can, and do, change over time through legislative action or through extensive, multi-stage, rulemaking proceedings.[23] However, such changes of court procedural rules can be a relatively slow, glacial political process when compared to the creation of rules in the arbitral setting. Because of the contractual freedom available to parties to construct their own arbitration

19. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

20. Oakland-Macomb Interceptor Drain Drainage Dist. v. Ric-Man Constr., Inc., 850 N.W.2d 498 (Mich. Ct. App. 2014).

21. *Id.* at 500.

22. *Id.* at 500-01.

23. *See, e.g.*, CHARLES ALAN WRIGHT ET AL., § 1001 POWER TO REGULATE PROCEDURE AS LEGISLATIVE OR JUDICIAL, 4 Fed. Prac. & Proc. Civ. § 1001 (3d ed. 2014) (recognizing Congressional power to control procedures in federal courts). For a helpful description of how procedural rules are developed for the federal courts, see Judge John D. Bates, *How the Rulemaking Process Works, Overview for the Bench, Bar, and Public*, http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx#summary-procedures (last visited June 18, 2014).

procedures, arbitration can function as a procedural laboratory for experimentation, where new procedures can instantaneously spring to life through the signing of a contract.

## III. THE LEGAL FRAMEWORK SUPPORTING ARBITRATION

### *A. The Enactment of the Federal Arbitration Act*

As mentioned above, parties have used arbitration in the United States since pre-Revolutionary War days, and parties have probably used arbitration since the beginning of time.[24] However, whether a legal system supports the use of arbitration is a completely distinct issue from the use of arbitration.

Even though arbitration was in use in American society since the earliest days of the United States, the legal system in the United States did not provide broad support for arbitration until the 1920s when modern arbitration laws were enacted.[25] Prior to the 1920s, courts in the United States generally refused to enforce arbitration agreements because of a judicial mistrust or hostility towards arbitration.[26] Before modern arbitration laws were adopted, parties to an arbitration agreement could back out at any time prior to the issuance of an arbitration award because courts typically refused to compel specific performance of an agreement to arbitrate a dispute.[27] Although the law at the time did not give broad support for arbitration, merchants in pre-1920s America may have voluntarily agreed to comply with agreements to arbitrate because of their own self-interest in maintaining a good reputation within a small business community, or

24. *See supra* note 13 and accompanying text.

25. *See generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992).

26. *Id.* at 19-20 (noting that although laws were supportive of arbitration, there was a "relative lack of enforceability of such agreements before an award was made").

27. *Id.*

perhaps because of the threat of expulsion from a trade organization if they refused to arbitrate.[28]

As the economy in America became more nationalized and such informal pressures from within a smaller community became less significant, business interests began to lobby in the early 1900s for laws that would make arbitration agreements binding.[29] Also, reforming arbitration laws became attractive to merchants because merchants were frustrated with overly complex, confusing, and time-consuming court procedures of the time.[30] Business interests desired strong arbitration laws so that arbitration could spread beyond small communities or trade associations, and so that they could have an effective, efficient, and binding alternative for resolving disputes with distant merchants outside of the court system, which was heavily criticized as broken and overwhelmed at the time.[31] With pressure from the New York State Bar Association, the New York Chamber of Commerce, and numerous other New York business interests, the state of New York enacted the country's first modern arbitration law in 1920.[32] This New York law, which was the first modern arbitration statute in America, made pre-dispute arbitration agreements binding and enforceable, and

28. Samuel Williams Cooper, *The Law's Delay*, 19 THE AMERICAN, 499, 394 (1890) ("The rules of the various trade associations throughout the country contain provisions that differences between members shall be settled by arbitration before an appropriate committee, and the fact that any member appeals to the court for his rights made the ground for his expulsion from the society."); Farmer v. Bd. of Trade of Kans. City, 78 Mo. App. 557, 566-67 (1899) ("It is well known that parties can not by agreement to arbitrate future differences, oust the courts of jurisdiction. But that principle of law does not affect our statement that the association may have a rule requiring all differences between members to be settled by arbitration and to impose expulsion as a penalty for disobedience of such rule."); DON ANTONIO DE ALCEDO, NEW YORK, III THE GEOGRAPHICAL AND HISTORICAL DICTIONARY OF AMERICA AND THE WEST INDIES 408 (stating that refusal of a member of a New York trade organization to submit a dispute to arbitration would result in the member's expulsion from the organization) (G.A. Thompson trans., 1812).

29. *See generally* SZALAI, *supra* note 10.

30. *See generally id.*

31. *See generally id.*

32. *Id.* at 83-88.

allowed parties to escape New York's broken, complex court system of the time.[33]

Similarly, in 1925, with strong lobbying from business groups and the American Bar Association, Congress enacted the Federal Arbitration Act ("FAA"), which was directly patterned after the New York arbitration law and which became the main federal law regulating arbitration agreements.[34] Like the ground-breaking New York arbitration statute of 1920, the core language of the FAA declares that arbitration agreements involving interstate commerce are generally "*valid, irrevocable, and enforceable*."[35]

It cannot be overstressed that the enactment of modern arbitration laws during the 1920s—at both the state and federal levels—was a response to overburdened, broken, and hypertechnical court systems.[36] In other words, a driving force behind the enactment of modern arbitration laws was a desire to allow parties to engage in procedural experimentation outside of the courts. If parties disliked existing court procedures, the FAA bestowed power on parties to design their own individualized, private court systems through arbitration agreements enforceable by the courts.

### *B. Judicial Review of Agreements to Arbitrate*

The formal court system and the arbitration system supported by the FAA are not entirely separate. These two systems are integrated to a certain degree, in both visible and less visible ways. Through the FAA, Congress expressly delegated to the courts the power to enforce arbitration agreements, and through this judicial process, to regulate and to supervise such agreements.

33. *Id.*; Act of Apr. 19, 1920, ch. 275, § 2, 1920 N.Y. Laws 803, 804.
34. *Id.*
35. 9 U.S.C. § 2 (2012) (emphasis added).
36. *See generally* SZALAI, *supra* note 10.

The heart of the FAA, section 2, declares that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[37] The remaining provisions of FAA help carry out this directive from section 2 by generally providing for judicial support of arbitration agreements in different ways,[38] although parties may not invoke judicial support in every situation. To illustrate, suppose two parties enter into an agreement to arbitrate certain disputes that may arise between them in the future. If such a dispute does materialize, the parties may willingly comply with their preexisting agreement to arbitrate, commence an arbitration proceeding, and abide by whatever decision the arbitrator renders. If the parties fully comply with their agreement in such a manner, a court may never become involved with their dispute resolution.

However, if one of the parties fails to comply with the arbitration agreement by refusing to participate in an arbitration proceeding, the FAA allows the other party to petition a court to enforce the agreement and compel the resistant party to honor the arbitration agreement.[39] In such a proceeding, a court typically examines two main issues: 1) whether a valid agreement to arbitrate exists; and 2) if such an agreement exists, whether the dispute at hand is within the scope of the arbitration agreement.[40] If there is

37. 9 U.S.C. § 2 (2012).

38. *See*, *e.g.*, 9 U.S.C. § 3 (2012) (providing for a stay of litigation if an issue in the litigation is referable to arbitration pursuant to an agreement to arbitrate); 9 U.S.C. § 4 (2012) (providing for a court order compelling a recalcitrant party to honor an agreement to arbitrate); 9 U.S.C. § 5 (2012) (providing for the court appointment of an arbitrator if a party fails to name an arbitrator pursuant to an agreement to arbitrate); 9 U.S.C. § 7 (2012) (providing for a court order compelling a witness to attend an arbitration proceeding if the witness refuses to obey a summons issued by an arbitrator).

39. 9 U.S.C. § 4 (2012).

40. Webb v. Investacorp, Inc., 89 F.3d 252, 258 (5th Cir. 1996) (When deciding whether to compel arbitration, a court decides "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.") (citations omitted); Fazio v. Lehman Bros., Inc., 340 F.3d 386, 392 (6th Cir. 2003); Kulig v. Midland Funding, LLC, 13 CIV. 4715 PKC, 2013 WL 6017444 (S.D.N.Y. Nov. 13, 2013) ("[C]ourts apply a conjunctive two-part test to determine arbitrability of claims, asking: (1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue

a valid agreement and the dispute falls within its coverage, the FAA *requires* the court to enforce the agreement by issuing an order compelling arbitration.[41]

During this process of determining whether a valid agreement exists, a court may review the fairness of the procedures to be used in arbitration.[42] If the procedures are one-sided, a court may refuse to enforce an arbitration agreement and deny a petition to compel arbitration.[43] For example, sometimes a stronger party, such as a corporation or employer, may draft a one-sided arbitration agreement with unfair procedures to be imposed on the weaker party, in an attempt to create an unlevel playing field for dispute resolution.

A well-known case in point of a court refusing to enforce a one-sided arbitration agreement involves a Hooters restaurant that required its employees to sign an arbitration agreement with egregiously unfair arbitration procedures.[44] These procedures required the employee to set forth details of his or her allegations along with a list of witnesses at the time of filing a claim, but the company was not required to reciprocate with its own responsive pleading, defenses, or list of witnesses.[45] Also, Hooters prepared the list of arbitrators a plaintiff employee had to choose from, and such a list raised concerns about the impartiality of the arbitrators.[46] Furthermore, Hooters could move for summary dismissal of an employee's claims, but employees had no corresponding right under the arbitration

comes within the scope of the arbitration agreement.") (citations omitted) (internal quotation marks omitted).

41. Amegy Bank Nat. Ass'n v. Monarch Flight II, LLC, 870 F. Supp. 2d 441, 447 (S.D. Tex. 2012) ("The FAA 'leaves no place' for the court to exercise discretion. The court must direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.") (citations omitted).

42. *See, e.g.*, Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 938-39.

rules.[47] The agreement also granted Hooters, but not employees, the right to cancel or modify the arbitration agreement.[48] Among the other problematic clauses in Hooters' arbitration agreement, the agreement imposed severe discovery limitations on employees attempting to bring a claim in arbitration.[49] The United States Court of Appeals for the Fourth Circuit refused to enforce Hooters' arbitration agreement, finding that the procedures set forth in the agreement "when taken as a whole . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding."[50]

To conclude this section, courts have refused to compel arbitration when an arbitration agreement contains one-sided, unfair procedures. In other words, courts serve a limited—but critical—role in policing arbitration agreements for procedural fairness. As part of this judicial monitoring or review of arbitration agreements pursuant to the FAA, courts have struck down a host of unfair arbitration procedures or rules, including: prohibitive arbitration fees; restrictions on an arbitrator's ability to award relief; discovery limitations; shortened time periods to file claims in arbitration; restrictions on joinder of parties; and arbitrator selection procedures raising concerns about arbitrator bias.[51]

47. *Id.* at 939.

48. *Id.*

49. Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582, 614-15 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999).

50. Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

51. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) (prohibition of class action joinder); Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005) (arbitration selection procedures); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (prohibitive fees); Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244 (9th Cir. 1995) (restrictions on relief and shortened statute of limitations); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa. 2006) (discovery limits).

## IV. JUDICIAL REVIEW OF ARBITRATION PROCEDURES HELPS DEFINE AND REINFORCE DUE PROCESS NORMS APPLICABLE IN COURTS

As discussed in the prior sections, through the FAA, courts play a role in policing the procedural laboratory of arbitration. This role is significant because through this judicial review, courts are continuously producing opinions assessing the fairness of a variety of procedures in connection with a broad range of underlying disputes. Because of the contractual freedom to design an arbitration proceeding, there can be a multitude of different types of proceedings, each with its own unique bundle of procedures. In effect, each arbitration agreement establishes a different procedural system—or bundle of rights—to resolve a particular dispute, and judicial review of arbitration agreements produces a body of precedent evaluating the fairness of these different systems vis-à-vis a broad array of disputes. With the widespread use of consumer, employment, and commercial arbitration, there are likely millions of arbitration agreements in the United States. Each time a distinct dispute arises between two parties to an arbitration agreement and a court is asked to enforce the arbitration agreement under the FAA, a court may in effect produce a snapshot of what procedural fairness means for a particular set of facts for the parties involved. Through these judicial snapshots or court opinions, one can discover the development of due process-like norms.

To help illustrate how arbitration can assist with defining due process-like norms, this section of the article focuses on judicial review of arbitral procedures regarding discovery.[52] First, this section examines several cases in which courts evaluate the procedural fairness of discovery limits in arbitration. Second, this section discusses how these judicial fairness cases relate to due process concerns. Finally, this section concludes by exploring

52. Through judicial review of arbitration, one can also see cases examining other due process norms, such as norms regarding notice of proceedings. *See, e.g.*, Amalgamated Cotton Garmen & Allied Indus. Fund v. J.B.C. Co. of Madera, 608 F. Supp. 158 (W.D. Pa. 1984) (discussing a right to receive notice). However, this article focuses on discovery.

how arbitration can be used to define and reinforce due process rights, particularly with respect to discovery. As explained below, this case law evaluating procedural fairness in arbitration suggests there is a developing due process-like norm involving a right to pre-trial discovery in certain circumstances.

### *A. Judicial Review of Discovery Limits in Arbitration*

The Supreme Court of the United States has reviewed discovery limits in an arbitration agreement when assessing the enforceability of the agreement. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court addressed whether a claim under the federal Age Discrimination in Employment Act could be subject to arbitration.[53] Ultimately, the Supreme Court held that federal civil rights claims, like many other statutory claims, can be subject to arbitration, and in doing so, the court assessed the fairness of various arbitration procedures, including the limited discovery procedures available under the arbitration agreement at issue.[54]

In trying to resist the enforcement of an arbitration agreement, the plaintiff employee in *Gilmer* challenged "the adequacy of arbitration procedures" set forth in the agreement, including limited discovery procedures.[55] The Court ultimately rejected the plaintiff's arguments about the inadequacy of the arbitration procedures in this case.[56] However, the Court recognized that in other situations, limits on discovery may be problematic:

> Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims.

53. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
54. *Id.*
55. *Id.* at 30.
56. *Id.* at 30-32.

> *Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims*.[57]

The particular limits on discovery and other procedural concerns raised by the plaintiff employee were not problematic for the arbitration agreement at issue in *Gilmer*.[58] However, the Supreme Court in *Gilmer* left open the possibility that parties may be able to demonstrate "procedural inadequacies . . . in specific cases" in the future.[59]

Several federal and state courts have found arbitration agreements to be unenforceable due to limited discovery procedures allowed for in arbitration. For example, in *Fitz v. NCR Corp.*, an employee filed a wrongful termination lawsuit against her employer, and the employer asked the court to compel arbitration.[60] The arbitration agreement in *Fitz* limited discovery "to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing."[61] In addition to these depositions, the arbitration procedures required the parties to exchange exhibits and a list of witnesses to be used during arbitration at least two weeks prior to the hearing, and the agreement generally prohibited other discovery unless the arbitrator determined there was a compelling need.[62] Noting that "adequate discovery is indispensable" for a fair proceeding, the *Fitz* court found that the "arbitration clause does not permit discovery necessary to make a fair hearing possible," and the deposition limits unfairly "place[d the plaintiff employee] at a disadvantage in proving her claims."[63] The court reasoned that, in the employment setting, the defendant employer

57. *Id.* at 31 (emphasis added) (citations omitted).
58. *Id.* at 30-32.
59. *Id.* at 33.
60. Fitz v. NCR Corp, 13 Cal. Rptr. 3d 88 (Cal. Ct. App. 2004).
61. *Id.* at 97.
62. *Id.*
63. *Id.* at 97-98.

was likely to have control over many of the documents or witnesses relevant to the employee's claims, and a two deposition limit imposed on the employee was procedurally inadequate when considering the "complexity of employment disputes, the outcomes of which are often determined by the testimony of percipient witnesses, as well as written information about the disputed employment practice."[64] The court also found that the burden imposed by these limits on discovery outweighed any potential benefit the employee could derive from these limits.[65] In sum, the *Fitz* court found that the discovery procedures under the arbitration agreement fell short of "a minimum standard of fairness" because the arbitration agreement "fail[ed] to ensure that [the plaintiff employee] is entitled to discovery sufficient to adequately arbitrate her claims."[66]

Similarly, in another employment arbitration case called *Ontiveros v. DHL Exp.*, a court refused to enforce an arbitration agreement whose discovery procedures limited the parties to a request for production of documents and the deposition of one individual and any expert witness.[67] The court found that the limited arbitral discovery was procedurally inadequate and would frustrate the plaintiff employee's ability to prove harassment and discrimination claims because the alleged wrongdoing occurred on two different job sites and involved numerous employees over a four-year period.[68]

When evaluating whether to enforce an arbitration agreement, state and federal courts have found the following discovery limits in arbitration agreements to be procedurally unfair:

64. *Id.*
65. *Id.*
66. *Id.* at 99-100.
67. Ontiveros v. DHL Exp, 79 Cal. Rptr. 3d 471 (Cal. Ct. App. 2008).
68. *Id.* at 487-88.

- In connection with civil rights claims for age and disability discrimination in the employment context, the arbitration agreement contained procedures allowing for only three depositions and requests for relevant documents, and the procedures forbid the use of interrogatories and requests for admissions unless the employer consented to such written forms of discovery;[69]

- In connection with a retaliatory discharge employment dispute, the arbitration agreement failed to contain any "express provision for discovery rights";[70]

- In connection with fraudulent inducement claims involving a cooperative marketing agreement in the agricultural setting, the arbitration agreement provided that discovery would be permitted at the sole discretion of the arbitration panel, but the agreement provided virtually no time for discovery to occur (as the arbitration panel had to issue its report within thirty days of receiving claims);[71]

- In connection with claims for retaliation, age discrimination, and disability discrimination in the employment context, the arbitration agreement contained procedures for one request for production of

69. Hulett v. Capitol Auto Grp., Inc., No. 07-6151-AA, 2007 WL 3232283 (D. Or. Oct. 29, 2007).

70. Sparks v. Vista Del Mar Child & Family Servs., 145 Cal. Rptr. 3d 318, 327 (Cal. Ct. App. 2012).

71. *See* Brief of Appellees, Venture Cotton Cooperative v. Freeman, No. 11-11-00093-CV, 2011 WL 7452136 (Tex. App. Dec. 21, 2011) (arguing discovery limitations in arbitration clause were unconscionable); Venture Cotton Cooperative v. Freeman, 395 S.W.3d 272 (Tex. App. 2013) (affirming trial court's order finding arbitration agreement to be substantively unconscionable), *rev'd on other grounds by* Venture Cotton Cooperative v. Freeman, No. 13-0122, 2014 WL 2619535 (Tex. June 13, 2013).

documents involving twenty-five questions, two days of depositions, and one day of deposition of experts;[72]

- In connection with civil rights claims for age and ethnicity discrimination in the employment context, arbitration agreement limited discovery to one request for production of documents and two depositions absent relief from the arbitrator on a finding of good cause;[73]
- In connection with a personal injury action alleging negligence in an assisted living facility, the arbitration agreement permitted all discovery allowed under court rules, but under a shortened timeline, and depositions were limited to expert witnesses;[74]

- In connection with a wrongful discharge employment dispute, an arbitration agreement included discovery rules permitting document requests, but prohibiting interrogatories and limiting depositions to one individual and any expert witness unless the arbitrator finds a substantial need;[75]

- In connection with a sexual harassment employment dispute, the arbitration agreement limited depositions to one person unless arbitrator finds a substantial need;[76]

72. Reid v. Optumhealth Care Solutions, Inc., No. 3:12-cv-00747-ST, 2012 WL 6738542 (D. Or. Oct. 11, 2012).

73. Jara v. JPMorgan Chase Bank, N.A., No. B234089, 2012 WL 3065307 (Cal. Ct. App. July 30, 2012).

74. Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 541 (E.D. Pa. 2006).

75. *See* Brief of Appellant, Domingo v. Ameriquest Mortgage Co., No. 02-15232, 2002 WL 32145133 (9th Cir. June 7, 2002) (describing discovery provisions in arbitration agreement); Domingo v. Ameriquest Mortgage Co., 70 Fed. App'x 919, 920 (9th Cir. 2003).

76. Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582, 601 (D.S.C. 1998).

- In connection with a wrongful termination employment dispute, the arbitration agreement provided that "[n]either party shall be entitled to written or deposition discovery from the other, except with respect to damages";[77]

- In connection with alleged violations of the Fair Labor Standards Act, the arbitration agreement provided for one deposition, unless the arbitrators found exceptional circumstances;[78]

- In connection with retaliatory discharge and age discrimination claims, the arbitration agreement limited discovery to depositions of two individuals and any expert witnesses, unless arbitrator found compelling circumstances;[79]

- In connection with sexual discrimination and retaliation claims, the arbitration agreement limited discovery to one deposition, unless the arbitrator found good cause;[80]

- In connection with age discrimination claims, the arbitration agreement limited depositions to only one person, unless arbitrator approves request for additional discovery;[81] and

- In connection with sexual harassment, retaliation, and hostile work environment claims, the arbitration agreement contained discovery procedures providing for three depositions and a deposition of a

77. Openshaw v. FedEx Ground Package System, Inc., 731 F. Supp. 2d 987, 995 (C.D. Cal. 2010).
78. Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 387 (6th Cir. 2005).
79. Doubt v. NCR Corp., No C 09-05917, 2010 WL 3619854 (N.D. Cal. Sept. 13, 2010).
80. Hamrick v. Aqua Glass, Inc., No. 07-3089-CL, 2008 WL 2853992 (D. Or. Feb. 20, 2008).
81. Sherwood v. Blue Cross, No. CIV S-07-633, 2007 WL 2705262 (E.D. Cal. Sept. 14, 2007).

> corporate representative limited to no more than four designated subjects.[82]

One general observation about the above cases is that most, but not all, of the reported cases discussing inappropriately severe discovery limits involve the employment setting, and more particularly, civil rights disputes. However, not all of these cases involve employment disputes. For example, the *Ostroff* case involved a personal injury dispute arising out of an accident in a nursing home,[83] and the *Venture Cotton* case involved a contractual dispute between farmers and a cotton cooperative marketing association.[84]

Another general observation regarding the above cases is that a court's invalidation of a severe discovery limit as being fundamentally unfair tends to involve a fact-specific analysis. In other words, the mere fact that an employment claim is at issue will not likely result in the invalidation of a severe discovery limit, and a two deposition limit in arbitration may not always be inappropriate. Instead, courts tend to examine a plaintiff's *particular factual allegations* in light of the discovery provisions in order to assess whether the limited discovery provisions are procedurally unfair. For example, in *Reid v. Optumhealth Care Solutions, Inc.*, the federal court found that the two-day deposition limit in the arbitration agreement would be procedurally unfair for the plaintiff employee because her allegations of wrongdoing involved a team of other employees and supervisors spread across five states, along with other witnesses located in a sixth state.[85] The court observed that "[e]mployment discrimination claims are notoriously fact intensive," and in light of the plaintiff's specific allegations, involving important witnesses spread across six states, the two-day discovery limit at issue would hinder the plaintiff's ability to present her discrimination

82. Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 781 (9th Cir. 2002).

83. Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 541 (E.D. Pa. 2006).

84. Venture Cotton Co-op. v. Freeman, 435 S.W. 3d 222, 225 (Tex. 2014).

85. Reid v. Optumhealth Care Solutions, Inc., No. 3:12-CV-00747-ST, 2012 WL 6738542, at *8 (D. Or. Oct. 11, 2012).

claims.[86] Similarly, in *Ostroff v. Alterra Healthcare Corp.*, which involved negligence claims against an assisted-living facility, the court examined several of the plaintiff's specific allegations of wrongdoing from the complaint, and the court recognized that in order to prove these particular allegations, the plaintiff would need to depose several of the defendant's employees and other residents.[87] In light of these specific allegations, the arbitral discovery rules limiting depositions solely to the other party's experts would deny the plaintiff "a fair opportunity to present her claims."[88]

In sum, there is a body of case law recognizing a general principle that limits on discovery in arbitration cannot fall below a minimum threshold and deprive a party of a fair opportunity to present its claims in arbitration. Although most reported cases are employment related and involve statutory claims, this general principle is not limited to the employment context or statutory claims. Thus, according to these opinions, a minimum acceptable level of discovery or a minimum bundle of discovery rights is necessary for an arbitration agreement to be enforceable—at least in certain contexts, and the arbitral discovery in the cases discussed above failed to meet this threshold.

### *B. Due Process and Arbitration*

Do constitutional due process rights apply in arbitration? In order for such rights to apply, it is fundamental that state action must exist, and whether arbitration under the FAA involves state action is a matter of debate. Professor Sarah Rudolph Cole has written an outstanding article analyzing the state action doctrine and different types of arbitration, and she ultimately concludes that "there is no state action in contractual arbitration"

86. *Id.*
87. *Ostroff*, 433 F. Supp. 2d at 541.
88. *Id.* at 546 (citation omitted).

under the FAA.[89] She reasons that contractual arbitration does not trigger state action "because arbitration involves private parties using privately created dispute resolution mechanisms."[90] Moreover, even if a party invokes the court system to enforce an arbitration agreement or award, she concludes there is no state action.[91] She reasons that merely obtaining such a remedy from a court would not transform an out-of-court, private arbitration proceeding into state action because compelling arbitration or enforcing an award does not involve a state official jointly, overtly, and significantly participating with the private parties in the arbitration process.[92]

Several courts have explicitly held that arbitration does not involve state action. For example, the United States Court of Appeals for the Seventh Circuit has rejected the argument that court support of arbitration through the FAA transforms arbitration into state action.[93] The court analogized arbitration agreements to other private contracts, and the court reasoned that court enforcement of contracts does not convert private contractual obligations into state action:

> Arbitration is a private self-help remedy. The American Arbitration Association is a private organization selling a private service to private parties who are under no legal obligation to agree to arbitrate their disputes or, if they decide to use arbitration to resolve disputes, to use the services of the Association, which is not the only provider of such services. When arbitrators issue awards, they do so pursuant to the disputants' contract—in fact the award is a supplemental contract obligating the losing party to pay the winner. The fact that the courts enforce these contracts, just as they enforce other contracts, does not convert the contracts into state or federal action . . . .[94]

89. Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L. REV. 1, 49 (2005).
90. *Id.* at 46.
91. *Id.*
92. *Id.*
93. Smith v. Am. Arbitration Ass'n, Inc., 233 F.3d 502 (7th Cir. 2000).
94. *Id.* at 507 (citations omitted).

Similarly, the United States Court of Appeals for the Eleventh Circuit, along with numerous other courts, has held that "the state action element of a due process claim is absent in private arbitration cases."[95]

However, there are conflicting views. Some scholars have found state action to exist in connection with contractual arbitration, and it appears that some courts have applied due process norms when analyzing arbitration. Professor Richard C. Reuben has written a thorough, exceptional article concluding that state action exists in contractual arbitration because of the "statutory schemes that establish an intimate involvement between arbitrators and the public courts," and because of the privileges the government grants to arbitrators, including immunity from civil liability and powers to sanction and administer discovery.[96] He also reasons that the binding resolution of disputes is a "traditionally exclusive public function," and when the government delegates this public function to arbitrators through the FAA, such a delegation transforms the arbitrators into public actors operating under the color of state law.[97]

Professor Jean R. Sternlight has also written an outstanding article concluding that "the creation of an elaborate state enforcement mechanism,

95. Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995); *see also* Fed. Deposit Ins. Corp. v. Air Florida Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987) ("The FDIC argues also that it had a due process right to an oral hearing. The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."); Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986) ("Private arbitration, however, really is private; and since constitutional rights are in general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint."); Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) ("[C]ourts have consistently held that private arbitration lacks any element of state action.").

96. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1005-06, 1016-17 (2000).

97. *Id.* at 997-98, 1016-17.

deliberately designed to allow enforcement of private agreements, does constitute state action."[98] Moreover, Professor Sternlight compellingly argues that courts may not be acting in a neutral manner when enforcing the intentions of parties in connection with arbitration.[99] Courts have adopted strong preferences for arbitration when interpreting the FAA, and as a result, courts frequently impose arbitration on weaker parties who have not knowingly or voluntarily agreed to arbitrate.[100] In effect, courts are *forcing* private parties to resolve disputes in arbitration when a genuine agreement to arbitrate is lacking, and in such circumstances of a state imposing arbitration on unwilling parties, state action exists.[101]

Even though some courts have stated that arbitration does not involve state action, and hence, the due process clause does not apply, other courts have applied due process norms when analyzing arbitration. As explained by an appellate court:

> Although arbitration proceedings are not held to the same strict rules as are the courts, nonetheless, an arbitrator must be vigilant in affording basic due process requirements. The first and foremost requirement is the opportunity to present evidence and to be heard.[102]

The United States Court of Appeals for the Ninth Circuit recently applied due process norms to contractual arbitration. In the case of *In re Wal-Mark Wage and Hour Employment Practices Litigation*, the Ninth Circuit recognized that when parties are drafting arbitration agreements, parties cannot contractually undermine "a minimum level of due process for

98. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 43 (1997).

99. *Id.* at 44-47.

100. *Id.*

101. *Id.*

102. Pennington v. Cuna Brokerage Sec., Inc., 5 So. 3d 172, 176 (La. Ct. App. 2008) (citations omitted).

parties to an arbitration."[103] The Ninth Circuit noted that when courts consider vacating an arbitrator's award, courts are in effect reviewing whether "due process" and "elementary procedural fairness" exist in connection with the arbitration proceeding.[104]

In the Fourth Circuit's *Hooters* case discussed above,[105] where the court invalidated the arbitration clause due to severe discovery limits and other unfair procedures, the Fourth Circuit found that the arbitral procedures were "so one-sided" that as a result, such procedures "undermine[d] the neutrality of the proceeding."[106] In finding that the arbitration agreement was unenforceable, the court relied on expert testimony that the procedures significantly "deviated from minimum due process standards," "violated fundamental concepts of fairness," and were "inconsistent" with a "fair and impartial" hearing.[107]

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court analyzed class action arbitrations administered by the American Arbitration Association (AAA).[108] In discussing whether such arbitration is appropriate, the Supreme Court relied on its landmark decision in *Phillips Petroleum Co. v. Shutts*, which helped define due process rights in the context of judicial class actions.[109] The *Concepcion* Court explained that judicial class actions required several procedural protections in order for the class action to be binding on the parties.[110] The Court then borrowed this due process analysis for judicial class actions, applied the analysis to arbitral class actions, and concluded that "[a]t least this amount of process would presumably be

103. *In re* Wal-Mart Wage, 737 F.3d 1262, 1268 (9th Cir. 2013).
104. *Id.*
105. Hooters of America, Inc. v. Phillips, 173 F.3d 933, 933 (4th Cir. 1999); *see supra* notes 44-50 and accompanying text.
106. Hooters of America, Inc. v. Phillips, 173 F.3d at 939.
107. *Id.*
108. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011).
109. *Id.* (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).
110. *Id.*

required for absent parties to be bound by the results of [a class action] arbitration."[111] The Court suggested that the AAA's special class procedures for arbitration comported with these due process requirements.[112] Even though the Court's discussion of the AAA's rules was dicta and the case involved the unique setting of class procedures, the Court nevertheless analyzed the AAA's rules using the lens of due process.[113]

In sum, there are conflicting views from courts as well as scholars regarding whether arbitration under the FAA involves state action, and thus, triggers due process concerns. Personally, I favor the view that state action and due process apply to arbitration under the FAA for all the reasons persuasively argued by Professor Reuben and Professor Sternlight.

Furthermore, when one examines the FAA on a more macro and historical level, there are additional arguments supporting Professor Reuben's and Professor Sternlight's conclusion that arbitration under the FAA should involve state action. In private practice, I was accustomed to viewing the FAA solely in terms of how the FAA could shape dispute resolution between two parties. However, in my research regarding the history and development of modern arbitration laws, I began to view the FAA on a broader, macro scale as a safety valve for an overburdened judiciary.[114] When enacting the FAA, Congress delegated binding decision-making authority to arbitrators in an attempt to relieve an overburdened,

111. *Id.*

112. *Id.*

113. *See also* Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013) (acknowledging "due-process concerns" with complex procedures used in arbitration); Allstate Ins. Co. v. Fioravanti, 299 A.2d 585, 588 (Pa. 1973) (analyzing arbitration proceeding and concluding that the arbitral "hearing had the necessary essentials of due process, i.e., notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause"); Donegal Ins. Co. v. Longo, 610 A.2d 466, 468 (Pa. Super. Ct. 1992) (holding that arbitration proceeding was "not fair and did not comport with procedural due process").

114. *See generally* SZALAI, *supra* note 10.

broken court system of the early 1900s.[115] When Congress created the FAA, Congress established an interconnected relationship between the formal court system and this binding system of arbitration supported by the FAA in order to serve a critical public function and alleviate overburdened courts. This historical context stresses the delegation of authority that occurred in connection with the FAA's enactment, and this delegation context helps support Professor Reuben's arguments that contractual arbitration involves a public function.[116]

To illustrate the public role served by this system of arbitration established by the FAA, consider the case of *Quick & Reilly, Inc. v. Jacobson*, which arose out of the infamous Black Monday stock market collapse of October 1987.[117] In the immediate wake of this crash, a brokerage firm liquidated an investor's sizeable portfolio.[118] The investor subsequently demanded the reinstatement of his account because he believed the brokerage firm had no contractual right to liquidate his portfolio. The investor eventually commenced an arbitration, which resulted in a $1.8 million award in his favor against the brokerage firm.[119] When the brokerage firm filed a court action to vacate the arbitrator's award, the federal district court in Manhattan refused to vacate the award, explaining that the award of the expert arbitrators was final as it did not trigger the extremely narrow justifications for vacating an award under the FAA.[120]

This Manhattan federal court noted that the brokerage firm was merely arguing that the arbitrators' decision was erroneous, but such arguments do not justify the vacating of an arbitrator's award under the FAA.[121] The court

115. *Id.*

116. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 994-96, 997-99 (2000).

117. Quick & Reilly, Inc. v. Jacobson, 126 F.R.D. 24 (S.D.N.Y. 1989).

118. *Id.*

119. *Id.* at 24-25.

120. *Id.* at 25-26.

121. *Id*.

stressed that if such arguments regarding the arbitrators' errors could invalidate an arbitration award, "then the entire force of New York Stock Exchange and similar arbitration proceedings is undermined significantly."[122]

Consider the broader context of this arbitration award and the court's decision to leave the award intact. This Manhattan federal court—which is the oldest, busiest, and largest federal court in the country[123]—was probably concerned with a flood of disputes associated with the Black Monday stock market crash. At the end of the opinion, the court sanctioned the lawyers for the brokerage firm because the lawyers improperly filed a frivolous motion to vacate the arbitrator's award.[124] Sanctioning under these circumstances helps signal to other parties the court's reluctance to overturn the strong finality of arbitrators' awards. In issuing sanctions, the Manhattan federal court was trying to protect the critical public role of arbitration as an "expeditious, efficient, and definitive" safety valve for an overburdened judiciary,[125] particularly under these circumstances, where many disputes could be expected to arise out of the Black Monday stock market crash. This interdependent relationship between the formal judicial system and the binding system of arbitration, as illustrated by the *Quick & Reilly* case, helps support the views and conclusions of Professor Reuben regarding state action.[126]

Another aspect regarding the FAA's history is further helpful in supporting Professor Sternlight's arguments that arbitration involves state action because courts are not acting in a neutral manner when enforcing

122. *Id.* at 25.

123. Report and Recommendations of the Southern District of New York Civil Justice Reform Act Advisory Group, 1991 WL 525131 (Nov. 1, 1991); Phil Schatz, *Hon. Loretta A. Preska Chief U.S. District Judge, Southern District of New York*, 60 FED. LAWYER 22 (Dec. 2013).

124. Quick & Reilly, Inc. v. Jacobson, 126 F.R.D. at 26-28.

125. *Id.* at 26 (citation omitted).

126. Reuben, *supra* note 116, at 994-96, 997-99.

arbitration agreements.[127] The history of the FAA's enactment demonstrates that the FAA was originally intended to cover contract disputes between merchants.[128] The FAA was intended to apply solely in federal court,[129] and the FAA was never intended to cover employment disputes or consumer disputes.[130] Today, however, through unfortunate, erroneous decisions of the Supreme Court, the FAA applies broadly to employment disputes, consumer disputes, statutory claims, and state courts are forced to apply the FAA.[131] Back in the 1920s, Congress enacted the FAA to create a more limited system of arbitration covering routine contract disputes between merchants, which could be resolved efficiently by other merchants serving as arbitrators.[132] Today, however, courts have misinterpreted the FAA as expansively covering all types of disputes involving almost every facet of modern life, and courts critically rely on this vital system on a daily basis to alleviate their dockets of all types of civil claims. Through the Supreme Court's broad misreadings of the FAA, the Supreme Court has in effect created a third-and-a-half branch of the government: an expansive, extra layer of arbitration tribunals with binding judicial power, where parties are often sent without knowing or voluntary consent, and where the decisions—on all types of disputes—are for all practical purposes final and unreviewable, even more final than the decisions of traditional courts.[133]

Today, arbitration through the FAA can often function just like a compulsory, binding court system. This expansive delegation of broad,

127. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 44-47 (1997).

128. *See generally* SZALAI, *supra* note 10.

129. *See generally* MACNEIL, *supra* note 25.

130. *See generally* SZALAI, *supra* note 10.

131. *Id.*; *see generally* MACNEIL, *supra* note 25.

132. *See generally* SZALAI, *supra* note 10.

133. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) ("[S]tandard of review of arbitral awards is among the narrowest known to the law.") (citations omitted) (internal quotation marks omitted).

binding, and virtually all-powerful authority to resolve disputes serves a vital public role on a macro level. Because the Supreme Court has created another branch of the judiciary to aid the traditional judiciary and alleviate the judiciary's burden with respect to virtually every type of non-criminal case, if such an expansive final system continues to exist, due process protections should apply to help ensure the legitimacy of such decisions which touch almost every aspect of American society.

To conclude this section, there are conflicting views regarding whether due process applies in arbitration. However, because of the vital public role arbitration serves by alleviating the burdensome caseloads of courts and because of the expansive use of arbitration today to resolve all kinds of disputes in a binding manner even when parties did not knowingly or voluntarily consent, due process norms should be applied to arbitration to help protect the rights of vulnerable parties forced into this system.

### *C. Implications of Judicial Invalidation of Severe Discovery Limits in Arbitration*

There is a body of case law, discussed above, analyzing whether discovery provisions in arbitration provide parties with a fair opportunity to present claims (the "arbitration discovery cases").[134] What are the implications of these arbitration discovery cases? These cases suggest there is a developing norm of procedural fairness involving the right to pre-hearing discovery, at least in certain limited contexts.

As explained above, it is not clear whether due process should apply in arbitration, and courts and scholars have taken conflicting positions.[135] If constitutional due process does apply to arbitration, then the analysis of the arbitration discovery cases can be construed as constitutional due process findings. However, even if constitutional due process does not apply in

134. *See supra* notes 60-82 and accompanying text.
135. *See supra* Section III.B.

arbitration because of a lack of state action, the arbitration discovery cases nevertheless still set forth an analysis of procedural fairness in the arbitral setting. In other words, the findings of procedural unfairness involving severe discovery limits are either due process findings, or, if due process is inapplicable to arbitration, then at a minimum, these findings constitute due process-***like*** norms assessing procedural fairness. If due process technically does not apply to arbitration, then these arbitration discovery cases are still helpful as analogous, persuasive findings regarding what procedures are due for a fair proceeding.

The Supreme Court has observed that the "touchstone of due process" is protecting individuals from a "denial of fundamental procedural fairness."[136] Courts have also recognized that constitutional due process is a flexible, fact-specific concept:

> Due process is malleable, calling for such procedural protections as the particular situation demands. A court may hand-tailor procedures to account for the nature of the affected interests and the circumstances of the threatened deprivation. As the rubric itself implies, procedural due process is simply a guarantee of fair procedure. Hence, we review cases involving adversarial hearings to determine whether, under the specific facts and circumstances of a given situation, the affected individual has had a fundamentally fair chance to present his or her side of the story.[137]

Looking at these descriptions of due process, and then turning to the arbitration discovery cases mentioned above, courts in practice seem to be looking at arbitration procedures with a due process or due process-like lens. In the arbitration discovery cases analyzed above, the heart of the judicial analysis focused on a fact-specific, flexible inquiry to determine whether the arbitral discovery procedures provided each plaintiff "a fair opportunity to

136. County of Sacramento v. Lewis, 523 U.S. 833 (1998).

137. *In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 611 (1st Cir. 1992) (citations omitted) (internal quotation marks omitted).

present her claims."[138] Constitutional due process norms similarly focus on this exact concept of a fundamentally fair chance to present one's claims.[139]

To summarize, the arbitration discovery cases reveal a developing norm of procedural fairness involving the right to pre-hearing discovery, at least in certain contexts. Through these cases, one has the building blocks to argue there is a developing due process or due process-like norm regarding a right to discovery.

What are the implications of a due process right to discovery? It should be recalled that discovery as we know it today in civil litigation is a modern creation arising from the adoption of the Federal Rules of Civil Procedure in 1938.[140] With a strictly static view of due process as it existed when the due process clauses were adopted in 1787 and 1868, it seems that courts could severely restrict discovery rights since broad discovery rights did not exist during these times. However, the arbitration discovery cases show a developing, contemporary notion that discovery is required for procedural fairness. Through the arbitration discovery cases, one can argue that our

138. Ostroff v. Alterra Healthcare Corp, 433 F. Supp. 2d 538, 546 (E.D. Pa. 2006) (citation omitted).

139. Yu Yun Yang v. Holder, 368 F. App'x 214, 215 (2d Cir. 2010) (stating that due process analysis examines whether the procedures at issue denied a party "a full opportunity to present her claims, deprived her of fundamental fairness"); Wander v. United Ben. Life Ins. Co., 905 F.2d 1541 (9th Cir. 1990) (stating that due process examines whether a party had "a full and fair opportunity to develop and present facts and legal arguments in support of its position") (citation omitted); Andela v. Univ. of Miami, 692 F. Supp. 2d 1356, 1373 (S.D. Fla. 2010) (stating that due to discovery and other procedural protections, a plaintiff's "due process right was not violated because he had a full and fair opportunity to litigate his claims in the administrative proceeding"); Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm'n, 319 S.E.2d 695, 699 (S.C. 1984) (analyzing whether permitted discovery violated due process by "impair[ing] [the party's] ability to prepare and present its evidence").

140. Professor Stephen N. Subrin wrote a brilliant article exploring the history of the development of discovery procedures. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998) ("Prior to the Federal Rules of Civil Procedure ("Federal Rules"), discovery in civil cases in federal court was severely limited. The Federal Rules discovery provisions dramatically increased the potential for discovery.").

legal system's treatment of discovery has radically changed over time: as discovery has become more the norm over the last several decades since the 1938 adoption of the Federal Rules, discovery has grown to become a critical component of what is expected today for a fair proceeding.

Could the federal or state court systems today suddenly and severely restrict discovery? For example, under the supremacy clause of the United States Constitution, states are supposed to apply and be bound by federal civil rights laws.[141] Imagine if a hypothetical state concluded that the costs of discovery for civil rights cases has become so significant that the state adopts a new procedural rule severely limiting discovery in its courts to one deposition per side. Using the arbitration discovery cases as precedential or persuasive building blocks, one can argue that such a new state rule would be inconsistent with due process norms. The procedural laboratory of arbitration, therefore, helps reinforce, define, and protect due process rights available in court.

Cutting back on discovery is not a far-fetched hypothetical. Discovery costs have become a significant litigation expense, particularly with the explosion of digital information, and how and whether to limit discovery is often a central part of current debates to reform America's legal system.[142] In June 2014, the state of New York established new court procedures for large, complex commercial cases.[143] Under the new rules, cases are supposed to be ready for trial in nine months.[144] In order to meet this tight deadline, a key feature of the new procedural rules are discovery limits,

141. U.S. Const. art. VI.

142. *See, e.g.*, LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GROUP, & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES (2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf; 2011 CONGRESSIONAL HEARING, COSTS AND BURDEN OF CIVIL DISCOVERY.

143. *See* ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS, http://www.nycourts.gov/rules/comments/orders/AO-77-14.pdf.

144. *Id.*

including seven interrogatories, five requests to admit, seven depositions at seven hours each, and document requests limited to "those relevant to a claim or defense in the action" and "restricted in terms of time frame, subject matter and persons or entities to which the requests pertain."[145] New York's new procedural rules regarding discovery do not appear to be overly harsh in light of the arbitration discovery cases involving one or two deposition limits.[146] However, if a court system severely restricts discovery procedures, one can rely on the arbitration discovery cases to argue that a certain minimal level of discovery is required for procedural fairness.

Interestingly, New York's new procedural rules reveal another important dynamic between litigation and arbitration: the growth of arbitration helped spur the development of New York's new procedural rules. The Honorable James M. Catterson, former Justice of New York's Appellate Division, First Department, has explained that the new accelerated court rules were designed "to provide the parties with an alternative to arbitration while still guarantying important procedural protection, such as the right to appeal the final judgment."[147] The development of the new rules serves as evidence that the two systems of arbitration and litigation influence one another. Not only does the procedural laboratory of arbitration help support and define due process rights, but also the flexibility of arbitration can spur innovation in procedures used in the courts.

Arbitration can have its drawbacks and be abused, but arbitration also provides a procedural laboratory or petri dish, with different procedural systems springing to life almost instantaneously through the signing of an arbitration agreement. As demonstrated by the New York court system's recent rule changes, courts can adopt desirable procedural rules that have been tested in the procedural laboratory of arbitration. Moreover, the

145. *Id.*

146. *See supra* notes 60-82 and accompanying text.

147. New Rule on Accelerated Adjudication Procedures in New York State Courts, http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/861/New-Rule-onAccelerated-Adjudication-Procedures-in-New-York-State-Courts.aspx.

potential for a variety of systems in arbitration provides continuing opportunities to assess or define the meaning of procedural fairness in connection with different claims and fact patterns. These assessments help support procedural fairness in the formal court system, and such opportunities for assessment would diminish in the absence of flexible, party-created procedures through arbitration.

In the federal judicial system, controversy has erupted over the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[148] and *Ashcroft v. Iqbal*.[149] In these cases, the Supreme Court transformed the liberal notice pleading standards set forth in Rule 8 of the Federal Rules of Civil Procedure into a more heightened "plausibility" standard.[150] Under this new standard, a plaintiff's complaint needs to have enough detailed facts to make the claim "plausible."[151] This heightened pleading standard has raised concerns in employment civil rights cases, where the evidence of wrongdoing is likely in the hands of the defendant, and without access to discovery, it would be challenging for a plaintiff's complaint to contain sufficiently detailed facts to satisfy the plausibility standard.[152] Concerns about discovery costs likely informed the rulings in both *Twombly* and *Iqbal*, since both opinions discuss the potential for expensive, disruptive discovery.[153] It has also been argued that a motion granting a dismissal of a complaint pursuant to *Twombly* and *Iqbal*'s plausibility standard can be

148. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

149. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

150. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

151. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

152. *See, e.g.*, Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215.

153. *Twombly*, 550 U.S. at 558 (justifying heightened plausibility pleading because "proceeding to antitrust discovery can be expensive"); *id.* at 559 (the defendants likely have "many thousands of employees generating reams and gigabytes of business records"); *Iqbal*, 556 U.S. at 686 (recognizing the need to avoid "disruptive discovery") (citation omitted).

understood as similar to a motion denying access to discovery.[154] This analogy may help explain why so many in the legal community are troubled by these decisions.[155] These Supreme Court decisions have in effect restricted discovery, and as demonstrated by the arbitration discovery cases, there is a developing sense that a right to pre-trial discovery has become an expected norm, or requirement, for procedural fairness.[156]

These arbitration discovery cases reveal a broader, seismic shift that has been occurring over several decades in our legal system, and these changes reflect broader changes in society. Our American society has shifted from smaller, isolated island communities, where everyone in the small community likely had access to the underlying facts,[157] to a more global, complex, expansive community of today, where the relevant facts regarding one's harms could be hidden across the world or in electronic data packets. If one looks at cases describing the elements of due process, the hallowed, exclusive pantheon of procedural due process traditionally included notice, an opportunity to be heard, and an impartial tribunal.[158] This traditional list

154. Andrew Blair-Stanek, *Twombly Is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 36 (2010) (Dismissal under plausibility standard is "effectively just the denial of discovery, followed by summary judgment based solely on the facts alleged in the complaint").

155. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) ("By inventing a new and foggy test for the threshold stage of every lawsuit, [*Twombly* and *Iqbal*] have destabilized the entire system of civil litigation.").

156. *See supra* notes 60-82 and accompanying text; *cf.* Suzette Malveaux, *Front Loading and Heavy Lifting; How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (arguing that courts should allow limited discovery in civil rights cases at the pleading stage in order to maintain the viability of civil rights claims).

157. Subrin, *supra* note 140, at 695 (noting that broad discovery did not make sense in an earlier time period when "the jurors themselves were people in the community who had knowledge of the facts").

158. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'") (citation omitted); St.

developed at a time when trial was more common in the American legal system, and thus, this traditional list focuses on the hearing or trial itself, as well as receiving advance notice of this all-important hearing. However, our legal system has significantly changed. With a noticeable shift away from trial and a greater emphasis on *pre-trial* litigation as dominating the legal process today, the old pantheon of procedural due process seems outdated. So much time, effort, and money in modern litigation is spent with discovery; discovery is arguably the most significant component of modern litigation. Thus, it should come as no surprise that a developing due process norm regarding a right to discovery has begun to take root. Discovery has begun to rise up into the pantheon of due process.

## V. CONCLUSION

To be clear, this article is not claiming there is a clear-cut, fundamental right to broad, extensive discovery in all situations. Instead, on a narrower plane, there is some support that limited discovery is required for a fair proceeding in certain contexts. In cases that involve a significant right, such as the right to be free from discriminatory conduct under the civil rights laws, and where the relevant facts are complex and not reasonably accessible to the plaintiff, the discovery arbitration cases explored above[159] suggest a minimum bundle of discovery rights must exist in order to allow a party a

Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73 (1936) (stating that due process requires "that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed"); Iowa Cent. Ry. Co. v. State of Iowa, 160 U.S. 389, 393 (1896) ("But it is clear that the fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided.").

159. *See supra* notes 60-82 and accompanying text.

fair opportunity to present his or her claim. Although arbitration can be abused, the procedural laboratory of arbitration under the FAA is a valuable institution that can be used to study, define, reinforce, and protect due process rights applicable in court.