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# Contractual Arbitration, Mandatory Arbitration and State Constitutional Jury-Trial Rights

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# Contractual Arbitration, Mandatory Arbitration and State Constitutional Jury-Trial Rights

By STEPHEN J. WARE\*

PROFESSOR JEAN STERNLIGHT believes that courts should be more reluctant to enforce arbitration agreements than they are to enforce contracts generally.<sup>1</sup> In other words, she believes that contract law's standards of consent are not as high as the standards of consent that should be applied to arbitration agreements. This belief puts her at odds with the Federal Arbitration Act ("FAA"),<sup>2</sup> which requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract,"<sup>3</sup> and with the Supreme Court, which continues to recognize that the FAA places arbitration agreements "upon the same footing as other contracts."<sup>4</sup>

While neither the legislative nor judicial branch has yet to change the law to better reflect her beliefs, Professor Sternlight has certainly been persistent in advancing them. Her persistence is evidenced by several thoughtful articles advancing a variety of arguments against the prevailing contractual approach to arbitration law.<sup>5</sup> One of her arguments is that the

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\* Professor of Law, University of Kansas. Thanks to Chris Drahozal and Doug Cole.

1. See *infra* note 5.

2. 9 U.S.C. §§ 1-307 (2000).

3. 9 U.S.C. § 2. On the incompatibility of Sternlight's views and FAA section 2, see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. § IV (forthcoming 2004) [hereinafter *Arbitration Clauses*].

4. E.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

5. 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) [hereinafter *Mandatory Arbitration*]; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) [hereinafter *Rethinking Constitutionality*]; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding*

constitutional right to a jury trial forbids courts from applying contract-law standards of consent to arbitration agreements. Sternlight argues that the Seventh Amendment to the United States Constitution and similar state constitutional provisions instead require courts to hold arbitration agreements to a higher “knowing-consent” standard.<sup>6</sup> Her argument with respect to the federal constitution is found primarily in an article she published a few years ago, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to Jury Trial*,<sup>7</sup> while her argument with respect to state constitutions is found in her contribution to this symposium.<sup>1</sup> The central normative thesis of her federal article, that the Seventh Amendment requires federal courts to apply knowing-consent standards, rather than contract-law standards, to arbitration agreements, is (I believe) refuted by my article, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*.<sup>8</sup> The central normative thesis of her state article, that many state constitutions require state courts to apply knowing-consent standards to arbitration agreements, may or may not be refuted by this article. Whether the FAA preempts such state constitutions is, I conclude below, an open question lacking a clear or easy answer.

## I. Terminology

Before delving into the particulars of the law on arbitration and jury-trial rights, it will be helpful to define some terms and, in the course of doing so, compare my language with that of Professor Sternlight. I believe that a dispute should be sent to arbitration if the parties have “voluntarily” agreed to arbitrate that dispute. By contrast, I am generally opposed to “mandatory” arbitration. I use the terms voluntary and mandatory as antonyms, and I laud voluntary arbitration while criticizing mandatory arbitration. All the same can be said of Professor Sternlight. Nevertheless, she and I disagree about the way many cases should be decided because we disagree so fundamentally about when arbitration is voluntary and when it is mandatory.

Part of our disagreement may just be semantic. Words like voluntary and mandatory have a lot of rhetorical power in debates about the law. It is perhaps a natural human tendency for a debater to define words in ways

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*Arbitration*, 74 WASH. U. L.Q. 637 (1996) [hereinafter *Panacea*].

6. The phrase “knowing consent” is my summary of a variety of verbal formulations used by Sternlight and others, including courts. See *Arbitration Clauses*, *supra* note 3, at § III.B.

7. See generally *Mandatory Arbitration*, *supra* note 5, at 677–94.

<sup>1</sup> Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration As a Substitute for the Jury Trial*, 38 U.S.F. L. REV. PG?, PIN? (2004),

8. See generally *Arbitration Clauses*, *supra* note 3, at §§ II., III.

that enable him or her to harness as much of that rhetorical power as possible. Certainly, I will resist being characterized as an advocate for making arbitration mandatory or, for that matter, as an advocate for making much else mandatory.

What Sternlight calls mandatory arbitration is better called contractual arbitration because it, unlike some other arbitration, does not occur unless the parties to the arbitration have previously formed a contract stating their agreement to arbitrate the dispute.<sup>9</sup> Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily. The rare cases in which consent to a contract is involuntary—as when “A grasps B’s hand and compels B by physical force to write his name” to the signature line of a contract,<sup>10</sup> or when A puts a gun to B’s head and says “sign or I’ll shoot”—result in contracts that are voidable on the ground of duress.<sup>11</sup> In the absence of duress, it is inaccurate, as well as overly dramatic, to say that a contract containing an arbitration clause results in arbitration that is involuntary or mandatory.

What Jean Sternlight and others are complaining about is not duress. They are complaining about arbitration clauses found in form contracts presented take-it-or-leave-it to consumers, employees and other ordinary individuals. Sternlight and others denigrate these form contracts as adhesion contracts,<sup>12</sup> and rightly point out that the adhering party is unlikely to read or understand the arbitration clause and may not even know there is an arbitration clause on the form.<sup>13</sup>

That is a serious point. And it is a point that applies to a wide range of contracts, not just to arbitration agreements. It has long been a cliché among contracts scholars that mass-produced form contracts far outnumber custom-drafted contracts.<sup>14</sup> The prevalence of adhesion contracts has been

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9. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.2 (2001) .

10. RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a, illus. 1 (1979).

11. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 109 n.120 (1996) (comparing two meanings of involuntary: non-volitional and volitional but coerced).

12. See, e.g., Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 864 n.1 (2002) (“I put the term ‘mandatory’ in quotes as a nod to those who insist that arbitration imposed through contracts of adhesion should be categorized as voluntary. Personally, however, I cannot understand how a person can be said to have ‘voluntarily’ accepted arbitration when it is part of a small print contract of adhesion. Thus, in the remainder of the article I will use the term ‘mandatory’ without putting it in quotation marks.”).

13. *Panacea*, *supra* note 5, at 676 (“Few, if any, would be foolish enough to argue that most employees and consumers actually read and understand the form contracts that they sign which commit them to binding arbitration.”).

14. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of*

a subject of debate among courts and commentators for many generations.<sup>15</sup> All that has been said on all sides of that rich debate applies to form contracts with arbitration clauses just as much as it applies to form contracts without arbitration clauses. But it should be clear however, that those who are arguing for non-enforcement of some or all clauses on form contracts are arguing for non-enforcement because the clauses are too favorable to the drafting party (substantively unconscionable) and/or because the clauses generally do not receive the knowing consent of the non-drafting party, but not because the contracts containing the clauses are mandatory or involuntary. The non-drafting party is always free, in the absence of duress, to simply walk away from the proposed contract.

This is true even if the form contracts of an entire industry all have many of the same clauses. An example is the mortgage (or security interest), a common clause of loan agreements and what enables the lender to take collateral from the borrower if the borrower defaults on the loan. I recently borrowed \$220,000. The lender insisted that I grant it a mortgage on my home. This clause was non-negotiable, take-it-or-leave-it. I am confident that other lenders, when faced with my request for a loan of that amount, would also have insisted on this same non-negotiable clause. I am also confident that the vast majority of other people borrowing that amount of money would have no choice but to accept this clause as well. Does that make my mortgage payments involuntary or mandatory? Of course not. I could have rented a home or perhaps bought a smaller home without borrowed funds. There are always alternatives, albeit more and less attractive ones. I consented, in the absence of duress, to a contract containing the lending industry's take-it-or-leave it clause, just as countless people consent, in the absence of duress, to contracts containing take-it-or-

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*Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (estimating that 99% of all contracts were standard form agreements).

15. See, e.g., Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION DECIDING APPEALS* 362 (1960).

Some of the many recent entrants in this debate include Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393 (2003); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1 (2002); Donald B. King, *Standard Form Contracts: A Call for Reality*, 44 ST. LOUIS U. L.J. 909 (2000); R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635 (1996); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990).

leave-it arbitration clauses. Calling the results of these routine transactions mandatory arbitration is no more sensible than referring to mandatory mortgages. Both the arbitration and the mortgage are entirely voluntary.

I ask Professor Sternlight (and others) to stop calling contractual arbitration mandatory arbitration. Or, Jean, if you decide that you must continue calling it mandatory arbitration then I believe your readers deserve an account of how you are defining your terms. How are you deciding what is mandatory and what is, its opposite, voluntary?<sup>16</sup> I laid out my definitions of these terms ten articles ago, with lengthy footnotes citing a wide variety of philosophical, as well as legal, sources.<sup>17</sup> I believe that you need to do likewise because the line between what is voluntary and what is mandatory is too important to leave unexplained. It is too facile and insufficiently precise to say that if all the parties to an arbitration agreement are “businesses” or “sophisticated businesses”<sup>18</sup> then the arbitration is voluntary, but if one of the parties is a “little guy” then arbitration is mandatory.<sup>19</sup>

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16. See IAN R. MACNEIL, RICHARD E. SPEIDEL, THOMAS J. STIPANOWICH, G. RICHARD SHELL, *FEDERAL ARBITRATION LAW* 2:36 n.5 (1995).

[The term “mandatory”] is sometimes used to describe arbitration resulting from agreements to arbitrate future disputes, since once an enforceable agreement has been made, arbitration is “mandatory.” This is extremely confusing language because it ignores altogether the consensual element in contracts . . . . [I]ts usage resolves linguistically the issues of the reality of consent and the effect to be given to consent by fiat, rather than by analysis revealing the nature of the issues.

*Id.*

17. See Ware, *supra* note 12, at 103–13. That was my first of ten (this is the eleventh) articles engaging Professor Sternlight and others in the debate over the enforcement of arbitration agreements. The other nine articles in which I have cited Sternlight are Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*, 67 *LAW & CONTEMP. PROBS.* (forthcoming 2004); Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 *U. MIAMI L. REV.* 865 (2002); Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP*, 6 *J. SMALL & EMERGING BUS. L.* 129 (2002); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 *J. DISP. RESOL.* 89 (2001) [hereinafter *Paying the Price*]; Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 *OHIO ST. J. ON DISP. RESOL.* 735 (2001) [hereinafter *Effects of Gilmer*]; Stephen J. Ware, *Arbitration and Assimilation*, 77 *WASH. U. L.Q.* 1053 (2000); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 *MINN. L. REV.* 703 (1999); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law*, 29 *MCGEORGE L. REV.* 195 (1998); Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Assocs., Inc. v. Casarotto*, 31 *WAKE FOREST L. REV.* 1001 (1996) [hereinafter *Arbitration After Doctor’s Assocs.*].

18. See *Mandatory Arbitration*, *supra* note 5, at 729–30 (“As I have argued elsewhere, the Federal Arbitration Act was never intended to permit companies to impose arbitration on unknowing consumers and employees, but rather was merely intended to allow two sophisticated businesses to enter into pre-dispute arbitration agreements.”).

19. Sternlight has stated that “it is critical to distinguish between commercial arbitration

A further reason for referring to arbitration arising out of adhesion contracts as contractual, rather than mandatory, is that doing so reserves the word mandatory for arbitration that really is mandatory—arbitration that occurs even though the parties have not contracted for it. For example, the Federal Insecticide, Fungicide, and Rodenticide Act requires chemical manufacturers to arbitrate certain disputes with each other even though neither of them contracted for arbitration.<sup>20</sup> That is truly mandatory arbitration. Arbitration arising out an adhesion contract is not.<sup>21</sup>

## II. FAA Preemption of State Jury-Trial Provisions

As noted above, section 2 of the Federal Arbitration Act requires courts to enforce arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>22</sup> FAA section 2 applies to nearly all arbitration agreements<sup>23</sup> and, like all federal law, preempts inconsistent state law.<sup>24</sup> The FAA does not, however, preempt all state law pertaining to arbitration agreements. As the Supreme Court explained in *Doctor’s Associates, Inc. v. Casarotto*,<sup>25</sup>

[G]enerally applicable contract defenses, such as fraud, duress or

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voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts.” *Panacea*, *supra* note 5, at 642–643. But what is the measure of “bargaining power?” How do we know when the parties have an “approximately equal” amount of it? As Richard Craswell points out, the phrase “unequal bargaining power . . . has never been successfully defined.” Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 50 n.99 (1993). Those who use the term seem to use it as a euphemism for wealth and experience in business. Parties with substantial wealth and experience in business are described as having more “bargaining power” than parties with little wealth and experience in business. See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1249 (1983) (equating “gross inequality of bargaining power” with “a wide disparity of economic resources”); see also *Panacea*, *supra* note 5, at 637 & n.1 (contrasting “large companies such as banks, hospitals, brokerage houses and even pest exterminators” with “customers, employees, franchisees and other little guys”). But why it is *voluntary* to contract with someone of approximately equal wealth and experience in business but *mandatory* to contract with someone who has more of these things is unexplained.

20. WARE, *supra* note 10, § 2.55(b)(1).

21. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 n.10 (1997) (“‘Compulsory’ or ‘mandatory’ arbitration refers to situations where arbitration is imposed by law, without individual assent by contract, and should not be confused with pre-dispute arbitration agreements.”).

22. 9 U.S.C. § 2 (2000).

23. See *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270–73 (1995); see also *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984).

24. See generally U.S. CONST. art. VI, cl. 2.

25. 517 U.S. 681 (1996).

unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] § 2 . . . . Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions . . . . By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed “upon the same footing as other contracts.”<sup>26</sup>

This legal doctrine is the stumbling block for Professor Sternlight and other opponents of the contractual approach to arbitration law. The FAA makes enforcement of arbitration agreements turn on contract law’s standards of consent. By contrast, Sternlight and other critics of the FAA argue that enforcement of arbitration agreements should turn on other, more exacting, standards of consent, such as the knowing-consent standards that many courts apply to jury-waiver clauses.<sup>27</sup> For example, Sternlight argues that “to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary and intelligent, that same standard should be applied to arbitration clauses.”<sup>28</sup>

Sternlight anticipates that “defenders of mandatory arbitration [who are they?] will argue that the FAA preempts reliance on state constitutional jury trial provisions.”<sup>29</sup> To rebut this argument, Sternlight reads both the text of FAA section 2 and the Supreme Court’s decision in *Casarotto* narrowly.

The [*Casarotto* Court] explained that “[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.” Thus, the Court has consistently contrasted general state laws regarding unconscionability or fraud, which clearly can be used to invalidate arbitration clauses, and those state laws that substantively or procedurally single out arbitration contracts for invalidation. To the extent courts hold that only those state statutes or constitutions that *target* arbitration are preempted, no problem is posed for the use of jury trial waiver standards. Clearly, those waiver standards are designed to govern contracts in general, and not specifically to undermine arbitration clauses.<sup>30</sup>

That is the doctrinal point to which the organizers of this symposium have asked me to respond.

A response has already been suggested by Professor Sternlight who

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26. *Id.* at 686–87 (citations omitted); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).

27. See *Arbitration Clauses*, *supra* note 3, § III.B.

28. Sternlight, *supra* note 8, at pg?.

29. *Id.* at ?.

30. *Id.* at ?.



writes that “defenders of mandatory arbitration [again, who are they?] will likely argue that jury trial waiver provisions are not saved from preemption because they do not apply generally to all kinds of contracts in a given state.”<sup>31</sup> Yes, indeed.

Professor Sternlight is surely correct about the easy cases on both extremes. The easy case on one extreme is a ground for the revocation of any contract, such as unconscionability or fraud. Such grounds are plainly not preempted by the FAA.<sup>32</sup> The easy case on the other extreme is a ground for the revocation of an arbitration agreement, but for no other contract—at all. Such grounds are plainly preempted by the FAA. There is a wide consensus on these easy cases at the extremes.<sup>33</sup>

The harder case is the one in the middle, a ground for the revocation of a contract containing an arbitration clause and some other type(s) of contracts, but not of “any contract.”<sup>34</sup> An example is a ground that is available for the revocation of a contract containing an arbitration clause and a contract containing a jury-waiver clause, but that is not available for the revocation of any other contract. This example, of course, includes the state constitutional jury-trial provisions cited by Sternlight. But Sternlight does not find this example a hard case. She reads FAA preemption narrowly so that there are only easy cases: either the ground singles out arbitration agreements and no other kinds of contracts at all, in which case it is easily preempted, or the ground applies to at least one contract lacking an arbitration clause, in which case it is easily not preempted.

By contrast, I am not sure how the hard case should be resolved. On the one hand, I see the sense in limiting preemption to grounds that target arbitration rather than some other (alleged) evil. Sternlight cites an example I used several years ago:

If state law requires the technical terms of all contracts to be explained in plain English, then application of that requirement to arbitration

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31. *Id.* at ?.

32. Some uses of the unconscionability doctrine however, would be preempted. *See generally* WARE, *supra* note 10, § 2.25(b).

33. The above-quoted portion of *Casarotto* states the positive-law answers to these easy questions. *See supra* text accompanying note 26. And in this regard, *Casarotto* was just restating what the Supreme Court had stated in 1987. *See Perry v. Thomas*, 482 U.S. 483, 492–93 n.9 (1987) (“state law, whether of legislative or judicial origin, is applicable [to arbitration agreements] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [FAA] § 2.”) (emphasis in original).

34. *See* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. (forthcoming 2004) (discussing state statutes requiring that any arbitration proceeding or court case be brought in state).

clauses merely places arbitration agreements on the same footing as other contracts [and is, therefore, not preempted by the FAA.]. If, however, state law enforces unexplained technical terms in other contracts, then it may not require more of arbitration clauses. Doing so . . . is . . . preempted by the FAA.<sup>35</sup>

With respect to this example, I wrote that “[t]o avoid FAA preemption, a state law would not have to require explanations of technical terms in, literally, all contracts. If the requirement applied to all ‘consumer’ contracts or all ‘credit agreements,’ then it would apply to arbitration clauses in the relevant class of contracts.”<sup>36</sup>

I am not sure whether I still believe that. I keep coming back to the statutory language which says “any contract.”<sup>37</sup> To be a permissible ground for the revocation of an arbitration agreement, it must be a ground for the revocation of “any contract.” Not “any contract in the relevant class of contracts,” but “any contract.” If we are to take statutory language seriously then I think state jury-trial provisions are, with respect to arbitration agreements, preempted unless there is a way around that word “any.” If the results of taking statutory language seriously displease us, then we can and should ask the legislature to amend the statutory language.

One might also distinguish, for purposes of FAA preemption, plain-English provisions from jury-trial provisions. The essence of the attack on arbitration, after all, is that it deprives consumers, employees and other “little guys” (as Sternlight describes them)<sup>38</sup> of a jury trial which, presumably, would be more favorable to the little guy than arbitration.<sup>39</sup>

By contrast, the purposes of plain-English provisions are at most slightly related to the attack on arbitration. No matter how plainly arbitration is explained to the little guy, Professor Sternlight and her allies do not want the little guy to be presented with take-it-or-leave-it arbitration clauses. This became especially clear to me a couple of years ago when I noticed at a conference that Professor Sternlight had a Gateway computer even though Gateway’s contracts have arbitration clauses. I asked Jean why she chose Gateway when there are other fine computer brands that do not require their customers to agree to arbitration.<sup>40</sup> Jean’s reply, and here I paraphrase, was something like “I should not have to switch

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35. *Arbitration After Doctor’s Assocs.*, *supra* note 18, at 1031.

36. *Id.* at 1031 n.210 (emphasis in original).

37. 9 U.S.C. § 2 (2000).

38. *Panacea*, *supra* note 5, at 637 n.1.

39. In fact, the empirical evidence on this presumption is mixed. See, e.g., *Effects of Gilmer*, *supra* note 18, at 750–57.

40. Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357, 377–83 (2002).

computers in order to avoid arbitration.”

The point for present purposes is that, in Jean Sternlight’s view, even a consumer who needs no plain-English explanation of arbitration—because she knows full well that there is an arbitration clause in the contract and knows as well as anyone what arbitration entails—should not be bound by the arbitration clause. She does not believe consumers should have to think about arbitration when shopping. She does not believe that arbitration should enter into the mix of pros and cons consumers weigh—along with price, quality, warranty, service, etc.—when making decisions. Even conceding for the sake of argument that arbitration clauses lower prices to consumers,<sup>41</sup> she does not want individual consumers to be free to choose between the high-price/no-arbitration option and the low-price/arbitration option. She wants the law to prohibit the second option, forcing consumers to take the first option.<sup>42</sup> That is mandatory. Freedom of contract is voluntary, while consumer “protection” laws, whatever their merits, are mandatory.

So I conclude by saying that I am not sure whether the FAA preempts state laws (such as constitutional jury-trial provisions) that constitute a ground for the revocation of a contract containing an arbitration clause and some other type(s) of contracts, but not of “any contract.” I am sure, however, that I do not advocate mandatory arbitration.

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41. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS. (forthcoming 2003) text at notes 132–46. For my argument that arbitration does lower prices, see generally, *Paying the Price*, *supra* note 18.

42. Of course, Professor Sternlight might be happy for businesses to offer a low-price/no-arbitration option but, by definition, businesses do not do so if we assume that arbitration lowers prices.