

Spring 4-1-2017

The Puzzle of Deflategate: Private Agreements and the Possibility of Biased Justice

Alfred C. Yen
Boston College Law School

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), [Labor and Employment Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Alfred C. Yen. "The Puzzle of Deflategate: Private Agreements and the Possibility of Biased Justice." *Virginia Sports and Entertainment Law Journal*, forthcoming 2017 16, no.1 (2017): 50-86.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

Article

The Puzzle of Deflategate: Private Agreements and the Possibility of Biased Justice

Alfred C. Yen¹

I. INTRODUCTION

In this Article, I study the implications of *National Football League Management Council v. National Football League Players Association*,² the recent decision in which the United States Court of Appeals for the Second Circuit dealt New England Patriots star quarterback Tom Brady a stinging defeat in his so-called “Deflategate” case against the National Football League (“NFL”). I do so because, although most of the court’s opinion follows well-established doctrine, a crucial portion of decision quickly glosses over important unanswered questions about federal arbitration law and the enforceability of pre-dispute arbitration agreements that contemplate the appointment of an evidently partial arbitrator.³ This makes the implications of the Second Circuit’s decision unclear, and it exposes how the Supreme Court’s basic account of federal arbitration law has paid insufficient attention to the frequent and overbearing imposition of arbitration on relatively unsophisticated parties through contracts of adhesion. Indeed, I shall argue that *National Football League Management Council* (to which I will give the shorthand “*NFLMC*”) must be understood and interpreted in a limited and careful way to avoid

¹ Associate Dean of Faculty and Professor of Law, Boston College Law School. The author would like to thank Andrew Smith, Michael Legregni, Kayla Acklin, Erika Steinbauer, and William Howard for their research assistance. Copyright 2016 by Alfred C. Yen.

² Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 527 (2d Cir. 2016).

³ A brief explanation of terminology is appropriate. Although one might expect use of the term “biased” in this sentence, I am using the term “evidently partial” because that is the terminology used in a statutory provision of importance to this Article, namely §10(a)(2) of the Federal Arbitration Act. 9 U.S.C. §10(a)(2)(2016). That section provides that a court may vacate an arbitrator’s award “where there was evident partiality” in one of the arbitrators. *Id.* “Biased” and “evidently partial” are clearly similar terms in that both describe an arbitrator prone to deciding a case for improper reasons unrelated to the merits. However, I am using “evidently partial” so that the relationship between my analysis and the statute remains clear.

damaging the interests of ordinary consumers and employees in a serious and unfair way.

NFLMC has garnered attention because it featured celebrity combatants whose fate would affect the competitive fortunes of perhaps the NFL's most successful franchise.⁴ The NFL is, of course, America's favorite sports league,⁵ with annual revenues of approximately \$12 billion.⁶ The League's Commissioner, Roger Goodell, became famous for leading the NFL to record profitability while receiving annual compensation of over \$34.1 million.⁷ Their antagonist, Tom Brady, is and was probably the NFL's most prominent player - the quarterback of the then four-time Super Bowl champion New England Patriots, three-time league Most Valuable Player, and husband of a supermodel.⁸ His four-game suspension damaged the Patriot's chances of winning what would have been a record fifth Super Bowl,⁹ and

⁴ See David Leonhardt, *The Most Successful N.F.L. Team of the Last Half-Century*, N.Y. Times (Feb. 2, 2015), <http://www.nytimes.com/2015/02/03/upshot/patriots-dynasty-has-a-claim-on-being-the-best.html>; Jackie MacMullan, *Are the Pats the Spurs of the NFL?*, ESPN (Feb. 1, 2015), http://espn.go.com/boston/nfl/story/_/id/12255920/patriots-spurs-nfl; Nate Silver, *Are the Patriots Now the Greatest NFL Dynasty of All Time?*, FiveThirtyEight (Feb. 2, 2015), <http://fivethirtyeight.com/datalab/patriots-nfl-dynasty-greatest-of-all-time/>.

⁵ See Darren Rovell, *NFL most popular for 30th year in a row*, ESPN (Jan. 26, 2014), http://espn.go.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd (reporting poll results indicating that fans strongly consider the NFL their favorite sport).

⁶ See Jackie Wattles, *NFL sees big jump in revenue*, CNN Money (July 20, 2015), <http://money.cnn.com/2015/07/20/news/green-bay-packers-revenue/> (estimating NFL revenue at \$12 billion by examining the finances of the Green Bay Packers, the only publicly held NFL franchise); Jason Belzer, *Thanks to Roger Goodell, NFL Revenues Projected To Surpass \$13 Billion in 2016*, Forbes (Feb. 29, 2016), <http://www.forbes.com/sites/jasonbelzer/2016/02/29/thanks-to-roger-goodell-nfl-revenues-projected-to-surpass-13-billion-in-2016/#5df2e4bd3278> (extrapolating projected earnings from player revenue sharing amounts).

⁷ See Chris Isidore, *NFL earns record profits despite ugly image*, CNN Money (Jan. 20, 2015), <http://money.cnn.com/2015/01/20/news/companies/nfl-profits/> (reporting record profits for NFL in 2014); Darren Rovell, *Roger Goodell Earned \$34.1 Million in 2014 Compensation*, ESPN (Feb. 17, 2016), http://espn.go.com/nfl/story/_/id/14786414/nfl-commissioner-roger-goodell-earned-341-million-compensation-2014-calendar-year (reporting Goodell's compensation, which included a bonus of \$26.5 million).

⁸ See Judy Batista, *Tom Brady relieved after Patriots capture fourth Super Bowl win*, NFL.com (Feb. 2, 2015), <http://www.nfl.com/news/story/0ap3000000467668/article/tom-brady-relieved-after-patriots-capture-fourth-super-bowl-win> (referring to Brady having won 4 Super Bowls); Dan Hanzus, *Tom Brady continues to defy time with performance*, NFL.com (Oct. 26, 2015), <http://www.nfl.com/news/story/0ap3000000566265/article/tom-brady-continues-to-defy-time-with-performance> (referring to Tom Brady having won 3 Most Valuable Player awards); Charlotte Triggs, *Gisele Bundchen on Juggling Modeling, Motherhood, and Marriage to Tom: I Try to Experience 'All the Different Aspects of My Life Without Guilt.'*, People Magazine (April 27, 2016), <http://www.people.com/article/gisele-bundchen-juggling-motherhood-marriage-to-tom-brady> (referring to marriage of supermodel Gisele Bundchen and Tom Brady). Brady and the Patriots have in fact gone on to win their fifth Super Bowl. See Jill Martin, *Patriots complete biggest comeback in Super Bowl history, win fifth title*, CNN (February 6, 2017), <http://edition.cnn.com/2017/02/05/sport/super-bowl-li-falcons-patriots/> (reporting Patriots victory in Super Bowl LI).

⁹ See Erin Matuszewski, *Brady's Suspension Makes Patriots More Beatable at Vegas Books*, Bloomberg News (May 11, 2015), <http://www.bloomberg.com/news/articles/2015-05-12/brady-s-suspension-makes-patriots-more-beatable-at-vegas-books> (describing how odds of Patriots winning Super Bowl lengthened after suspension imposed); Tom Brady's DeflateGate Suspension Impacts Patriots' Super Bowl, AFC East

it originally cost him over \$2 million in salary.¹⁰ The public was understandably fascinated by the spectacle of the rich and famous spending as much as \$20 million to argue about the deflation of footballs.¹¹ Many came to see the litigation as the struggle of an individual (represented by Brady) against unchecked and overbearing institutional power (represented by Goodell and the NFL).¹² From that perspective, the Second Circuit's decision in favor of the NFL represented a clear victory for the power of the institution over the individual.¹³

From a legal perspective, however, *NFLMC* deserves attention because of the way in which the NFL gained its power over Brady and its implications for ordinary individuals. In particular, the Collective Bargaining Agreement ("CBA") between the league and its players union allowed Commissioner Goodell, at his discretion, to sit as arbitrator in any appeal by a player over discipline handed down by the

Odds, NESN.com (May 12, 2015), <http://nesn.com/2015/05/tom-bradys-deflategate-suspension-impacts-patriots-super-bow-afc-east-odds/> (same); Benjamin Morris, What if Tom Brady Missed Four Games Every Year?, FiveThirtyEight.com (May 12, 2015), <http://fivethirtyeight.com/features/what-if-tom-brady-missed-four-games-every-year/> (analysis of how Brady's absence would affect the Patriots if he missed four games).

¹⁰ See Gary Dzen, Here's how much money Tom Brady loses if he's suspended 4 games, Bost. Globe (May 12, 2015), <http://www.boston.com/sports/new-england-patriots/2015/05/12/heres-how-much-money-tom-brady-loses-if-hes-suspended-4-games/> (reporting Brady would lose about \$2 million if suspended for 4 games during 2015 season).

¹¹ See Arielle Aronson, Legal costs of Deflategate approach \$20 million, Fox Sports (Mar. 2, 2016), <http://www.foxsports.com/nfl/story/nfl-tom-brady-new-england-patriots-roger-goodell-deflategate-price-tag-climbs-030216>; John Breech, Deflategate legal costs potentially could reach a staggering \$20 million, CBS Sports (Mar. 3, 2016), <http://www.cbssports.com/nfl/news/deflategate-legal-costs-potentially-could-reach-a-staggering-20-million/>; Darren Rovell, Deflategate Costs Could Be Near \$20 Million, ESPN.com (Mar. 2, 2016), http://espn.go.com/nfl/story/_/id/14884145/deflategate-legal-costs-20-million-nfl.

¹² See Michael Schottery, Every NFL Player And Fan Should Be Rooting For Tom Brady's Deflategate Appeal... Yes, You, Forbes (May 25, 2016), <http://www.forbes.com/sites/michaelschottery/2016/05/25/every-nfl-player-and-fan-should-be-rooting-for-tom-bradys-deflategate-appeal-yes-you/#6ce348d14337> (characterizing Brady's case as one attempting to put "limits on Goodell's righteous, almighty power to dole out discipline"); Mike Lupica, Deflategate ruling means it's game over for Roger Goodell's power trip, New York Daily News (September 4, 2015), <http://www.nydailynews.com/sports/football/lupica-game-roger-goodell-power-trip-article-1.2348420> (comparing Commissioner Goodell and NFL owners to "fading despots"); Mark Patinkin, New Deflategate twists throw Goodell for another loss, Providence Journal (February 4, 2016), <http://www.providencejournal.com/article/20160204/NEWS/160209628/?Start=1> (calling NFL investigation and discipline of Brady a witch hunt).

¹³ See Christopher Gasper, Deflategate is all about Roger Goodell's power, not Brady's punishment, Bos. Globe (Apr. 26, 2016), <https://www.bostonglobe.com/sports/patriots/2016/04/26/deflategate-all-about-goodell-power-not-brady-punishment/HSvWSEfGp88C1qdq1UYKml/story.html> (NFL's victory before Second Circuit confirms league's "plenipotentiary powers" over players); Dieter Kurtenbach, Why Deflategate was about money and control, not air pressure, Fox Sports (July 15, 2016), <http://www.foxsports.com/nfl/story/tom-brady-deflategate-patriots-quarterback-goodell-new-england-psi-pressure-suspension-071516> (Deflategate outcome confirms that Goodell can do "whatever he pleases" to Tom Brady and others associated with the NFL); Brian Smith, Tom Brady ruling reaffirms NFL's power over players, Hous. Chron. (Apr. 25, 2016), <http://www.houstonchronicle.com/sports/columnists/smith/article/Tom-Brady-ruling-reaffirms-NFL-s-power-over-7350676.php> (referring to Goodell as "King Roger" who "overpowered" Patriots owner Robert Kraft and Tom Brady).

league.¹⁴ Thus, when Brady appealed his four-game suspension, Goodell himself heard the appeal and predictably ruled against Brady.¹⁵ Brady objected to this, attacking Goodell as an evidently partial and biased arbitrator who could not properly hear a case involving the actions of his own office.¹⁶ Unfortunately for Brady, the Second Circuit disagreed and ruled that Goodell, however partial he might be, could serve as arbitrator because Brady had agreed to it under the CBA.¹⁷

Ample precedent supported this result. The Supreme Court has clearly stated that federal law makes agreements to arbitrate legal disputes generally enforceable “according to their terms.”¹⁸ Because the arbitration law emphasizes contract,¹⁹ parties to arbitration agreements have considerable discretion to agree to almost anything.²⁰ Granted, parties cannot agree to things that the law prohibits,²¹ but recent Supreme Court precedent strongly suggests that these prohibitions are exceedingly few, even when one of the parties does not know or understand what has been ostensibly agreed to.²² This implies that parties generally have the freedom to permit appointment of an evidently partial arbitrator.²³

Good reasons exist, however, for our legal system to reject the appointment of an evidently partial arbitrator.²⁴ Modern courts give parties the freedom to contract into arbitration because the Supreme Court considers arbitration a fair substitute for litigation.²⁵ It is therefore fundamentally fair to hold parties to the terms of arbitration agreements, even when one party did not genuinely consent, because the party forced into arbitration loses nothing of significant value.²⁶

This reasoning is reasonably persuasive as long as the differences between arbitration and litigation do not include the crucial features that that guarantee the

¹⁴ See NFL Collective Bargaining Agreement, Article 46(2)(a), available at https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Book_marked.pdf (giving Commissioner discretion to sit as hearing officer for any appeal concerning league discipline imposed on a player).

¹⁵ See *infra* notes 68–73 and accompanying text.

¹⁶ See *infra* note 78 and accompanying text.

¹⁷ See *infra* notes 108–110 and accompanying text.

¹⁸ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (courts must enforce arbitration agreements “according to their terms”); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (Federal Arbitration Act “requires courts to enforce agreements to arbitrate according to their terms”); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (Federal Arbitration Act makes arbitration agreements enforceable “as written”). See also *infra* notes 178–181 and accompanying text.

¹⁹ See *Am. Express Co.* 133 S. Ct. at 2309 (overarching principle that arbitration is a matter of contract); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (referring to “fundamental principle that arbitration is a matter of contract”).

²⁰ See Federal Arbitration Act, 9 U.S.C. § 2 (arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

²¹ *Id.*

²² See *infra* Part III.

²³ *Id.*

²⁴ See *infra* note 183 and accompanying text.

²⁵ See *infra* Part III.

²⁶ *Id.*

fundamental fairness of litigation itself. For example, our legal system constantly changes the causes of action and remedies available in litigation, and rules of procedure vary.²⁷ This implies that arbitration rules about procedures, substantive rights and remedies could differ from those found in litigation without compromising the fairness of arbitration in a fundamental way.

By contrast, one thing that never changes in litigation is the impartiality of the judge. Obviously, a biased judge destroys the integrity of litigation because judges are supposed to decide cases on the merits, and not because of self-interest or personal connections to one of the parties.²⁸ The crucial role played by the impartial judge implies that arbitration can be a fair substitute for litigation only when the arbitrator is impartial.²⁹ Biased arbitrators would destroy the fairness of arbitration just as biased judges destroy the fairness of litigation.³⁰ This explains why some courts have refused to enforce arbitration contracts that allow one party to ensure appointment of an evidently partial arbitrator.³¹ These decisions obviously suggest that, despite the primacy of freedom of contract in arbitration law, parties cannot agree to appoint evidently partial arbitrators.³²

The foregoing shows that *NFLMC* presents a legal puzzle. On one hand, the decision could be a completely routine and uncontroversial example of a court enforcing pretty much anything found in an arbitration agreement. From this perspective, the agreement to appoint an evidently partial arbitrator is simply one of many things that parties bargain and compromise over in order to reach a mutually beneficial arrangement. Agreement between the parties presumptively ensures fairness even if the arrangements seem to favor one side over the other. On the other hand, the decision could be a highly problematic extension of the law that overlooks the critical importance of impartiality to arbitration as a fair alternative to litigation. Under this view, arbitration before an evidently partial arbitrator can never be an acceptable substitute for litigation, making *NFLMC* a highly questionable decision.

Resolving the tension behind this puzzle has potentially far reaching consequences. Enforcing arbitration agreements makes sense when the parties genuinely agree about unusual or one-sided provisions. After all, people frequently trade disadvantages in one part of a contract for advantages in other parts.³³ The

²⁷ See *infra* notes 201–04 and accompanying text.

²⁸ *Id.*

²⁹ See *infra* Part IVA.

³⁰ See *infra* notes 203–225 and accompanying text.

³¹ See *infra* at notes 209–226 and accompanying text.

³² See *infra* note 225 and accompanying text.

³³ See *AT&T Mobility LLC*, 563 U.S at 344 (2011) (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”);

Supreme Court has, however, significantly disregarded genuine contractual agreement as a condition for enforcing pre-dispute arbitration agreements.³⁴ Instead, the Court has enforced numerous agreements to arbitrate based only on the ostensible but fictional agreement of adhesion contracts.³⁵ This has sent a clear signal that, as far as the federal law of arbitration is concerned, courts should lump adhesion contracts with other contracts, enforcing both without regard to whether the parties have genuinely agreed to the terms.³⁶

This conflation of ordinary and adhesion contracts makes *NFLMC* a potentially powerful and troubling case. Enforcing an agreement between the NFL and NFLPA to appoint an evidently partial arbitrator makes reasonable sense because both parties bargained over the CBA at arms length and surely had counsel to advise them of the consequences of their agreement.³⁷ Indeed, the two parties had previously litigated the enforceability of a similar arbitration provision, and the Eighth Circuit ruled in the league's favor.³⁸ Accordingly, it is certain that both parties knew exactly what they were doing when they signed the agreement under litigation in *NFLMC*.

If we accept the conflation of adhesion and ordinary arbitration contracts, courts must enforce adhesion contracts just as they would ordinary contracts like the CBA. Accordingly, if the NFL and NFLPA can agree to appoint an evidently partial arbitrator, a business can also use a contract of adhesion to maneuver a consumer or employee into arbitration before a partial, biased arbitrator. For example, a credit card company could require its customers to arbitrate all wrongful charge claims before the company's collection agent. This would, of course, make it very difficult

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (parties trade formalities and opportunity for review in litigation for simplicity, informality, and speed of arbitration).

³⁴ See *infra* notes 127–181 and accompanying text.

³⁵ *Id.*

³⁶ See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 476 (2015) (Enforcing arbitration clause in consumers contract with satellite television provider); *AT&T Mobility LLC*, 563 U.S. at 339 (2011) (Arbitration agreement upheld against consumers whom signed up for free cell phone service); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585 (1991) (Consumer agreement to forum selection clause as part of ticket purchase was enforceable); See also Batya Goodman, Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement As an Adhesion Contract, 21 *Cardozo L. Rev.* 319, 320–21 (1999) (Discussing adhesion contracts and the consumers inability to negotiate the terms despite their enforceability); Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 *Harv. L. Rev.* 1173, 1189 (1983) (Contracts of adhesion terms should be considered unenforceable but currently are presumed enforceable).

³⁷ Maury Brown, NFLPA Memo Details Chronology of CBA Negotiations Over Past Four Years, *Forbes* (May 18, 2011), <http://www.forbes.com/sites/sportsmoney/2011/05/18/nflpa-memo-details-chronology-of-cba-negotiations-over-past-four-years/#17ab706d2bac> (describing detailed and involved negotiations over the CBA); Nate Davis, NFL, players announce new 10-year labor agreement, *USA Today* (July 25, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1#.V2le9OYrL-Y> (noting extensive negotiations over CBA).

³⁸ *Williams v. Nat'l Football League*, 582 F.3d 863, 884–85 (8th Cir. 2009) (affirming arbitration held before the NFL's general counsel pursuant to agreement with NFLPA contained within the NFL's drug testing policy).

for ordinary individuals to vindicate claims through arbitration, and it is troubling because individuals generally have no idea that they have “agreed” to binding arbitration buried in the fine print of service and employment contracts.³⁹

In the pages that follow, I will explore how strongly federal arbitration law, particularly the Supreme Court’s conflation of adhesion with ordinary contracts, supports these potentially troubling implications of *NFLMC*. I conclude that *NFLMC* was correctly decided, but that a nuanced understanding of Supreme Court precedent actually gives *NFLMC* influence over a relatively narrow set of future cases, thereby limiting its potentially troubling implications. I support this conclusion by showing that the Supreme Court’s rationale for conflating adhesion contracts with ordinary contracts does not support the consistent enforcement of all agreements that contemplate evidently partial arbitrators. Instead, despite outward appearances to the contrary, federal arbitration law accepts the appointment of evidently partial arbitrators only when the parties genuinely understand and agree to that arrangement. This rules out the use of adhesion contracts to maneuver ordinary individuals into arbitration before improperly biased arbitrators.

The Article proceeds as follows. Part I describes *NFLMC* and its potential implications. Part II analyzes the Supreme Court’s implementation of freedom of contract, particularly through the Federal Arbitration Act, to enforce pre-dispute arbitration agreements without regard to the use of adhesion contracts, even if the result is potentially unfair. Part III then explores the implications of *NFLMC* by taking a look at Supreme Court jurisprudence in arbitration law, the rationale supporting that jurisprudence, and its application by lower courts. This requires examination of the law governing selection of arbitrators and its relationship to freedom of contract in arbitration. Part IV takes the insights gained in Part III and applies them to show *NFLMC* should be followed only in cases involving genuine agreement over appointment of evidently partial arbitrators, and that contracts of adhesion should not be permitted to procure arbitration before evidently partial arbitrators. The Article concludes with some thoughts about the future of arbitration law in light of *NFLMC*.

³⁹ See Tess Wilkinson-Ryan, A Psychological Account of Consent to Fine Print, 99 Iowa L. Rev. 1745, 1753 (2014) (“The proposition that consumers do not read contracts of adhesion is increasingly uncontroversial.”); See Viva R. Moffat, Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking, 41 U. Cal. Davis L. Rev. 45, 55 (2007) (“Much of the literature on adhesion contracts posits that very few people read, much less understand, form contracts; this view is certainly supported by common sense.”).

II. THE BASICS OF *NFLMC* AND ITS POTENTIAL SIGNIFICANCE

A. The Facts

Appreciation for the legal aspects of *NFLMC* requires a brief exposition of the case, which arose from acts allegedly taken by Tom Brady and members of the New England Patriots staff before the 2015 AFC Championship game between the Patriots and the Indianapolis Colts.⁴⁰ Sometime before the 2015 AFC Championship game, members of the Colts' management became concerned that the Patriots would deliberately under-inflate footballs supplied by the Patriots for use in the game.⁴¹ Because an NFL offense uses only the footballs provided by its team, under-inflated balls would give the Patriots a theoretical unfair advantage because the softer balls would be easier to grip.⁴²

NFL policy required the game officials to check each ball for proper inflation between 12.5 and 13.5 pounds per square inch, and this was done before the game.⁴³ Nevertheless, when Colts linebacker D'Qwell Jackson intercepted a Patriots' pass during the first half, he gave the ball to a Colts' equipment manager who tested the ball and found it under-inflated.⁴⁴ Colts management learned of this and alerted the NFL.⁴⁵ This led to re-testing of the balls during halftime, and balls provided by the

⁴⁰ See Tom Brady carries Pats to rout of Colts, claims sixth Super Bowl trip, ESPN.com (Jan. 19, 2015), <http://espn.go.com/nfl/recap?gameId=400749520> (recap of 2015 AFC Championship Game between New England Patriots and Indianapolis Colts).

⁴¹ See Will Brinson, Ravens warned Colts about Patriots tampering with footballs, CBS Sports (Aug. 4, 2015), <http://www.cbssports.com/nfl/news/ravens-warned-colts-about-patriots-tampering-with-footballs/>; Dan Good and Aaron Katersky, Deflate-gate: Indianapolis Colts Raised Concerns in November About Under-Inflated New England Patriots Balls, ABC News (Jan. 21, 2015), <http://abcnews.go.com/Sports/deflate-gate-indianapolis-colts-complained-november-inflated-england/story?id=28365105>; Theodore V. Wells Jr. et al., Investigative Report Concerning Footballs Used During the AFC Championship Game on January 18, 2015 44 (May 6, 2015), available at <http://static.nfl.com/static/content/public/photo/2015/05/06/0ap3000000491381.pdf> (reporting that Colts General Manager sent email to NFL raising concerns about inflation of Patriots game balls).

⁴² See Ryan Van Bibber, Everything you need to know about the Patriots and DeflateGate, SBNation (Jan. 21, 2015), <http://www.sbnation.com/nfl/2015/1/21/7856953/deflategate-new-england-patriots-footballs-nfl-investigation> (under-inflated balls are easier to grip and each offense uses the balls provided by its team); Ben Volin, Former NFL referee explains protocol with game balls, Bos. Globe (Jan. 24, 2015), <https://www.bostonglobe.com/sports/2015/01/24/expert-explains-protocol-with-nfl-game-balls/fCtQ38pBjBFXId0WJC2wpL/story.html> (explaining why offenses are allowed to use balls provided by their teams); Dion Rabouin, Deflategate: Former Patriots Quarterback Explains Benefits of Under-Inflated Football, Int'l Bus. Times (Jan. 23, 2015), <http://www.ibtimes.com/deflategate-former-patriots-quarterback-explains-benefits-under-inflated-football-1792910> (softer footballs are easier to grip, especially in cold or damp conditions).

⁴³ See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 454 (S.D.N.Y. 2015).

⁴⁴ See Paul, Weiss, Rifkind, Wharton & Garrison LLP, Theodore Wells, Jr., Brad Karp, and Lorin Reisner, Investigative Report Concerning Footballs Used During the AFC Championship Game on January 18, 2015 (May 6, 2015) at 63 [hereinafter "Wells Report"].

⁴⁵ Id.

Patriots did appear to be under-inflated.⁴⁶ The referees re-inflated the balls in question and the game continued, with the Patriots pulling away for a lopsided win.⁴⁷

After the game, social media and news outlets began circulating rumors about the Patriots having tampered with footballs,⁴⁸ and the NFL eventually opened an investigation led by Theodore V. Wells Jr.⁴⁹ This investigation lasted ten months and concluded that Tom Brady was “at least generally aware” of a scheme to deflate footballs carried out by Patriots staff members.⁵⁰ Three major areas of investigation supported this conclusion.

First, the investigation concluded that balls provided by the Patriots were indeed underinflated at halftime, although they had been properly inflated before the game started.⁵¹ Obviously, deliberate tampering by the Patriots would be one explanation for these low pressure readings, but innocent causes were also possible. The game was played in cold weather,⁵² and the referee measured the balls for proper inflation before the game in a warm locker room.⁵³ Accordingly, exposure to the cold could have caused the air in the balls to contract, leading to lower measured inflation.⁵⁴

⁴⁶ Wells Report, *supra* note, at 64–69.

⁴⁷ *Id.* at 69–71; See Gregg Rosenthal, Patriots dominate Colts, to meet 'Hawks in Super Bowl, NFL.com (Jan. 18, 2015), <http://www.nfl.com/news/story/0ap3000000460542/article/patriots-dominate-colts-to-meet-hawks-in-super-bowl> (reporting final score of the 2015-16 AFC Championship game as 54-7 in favor of the Patriots).

⁴⁸ See Jenny Earl, Twitter trolls New England Patriots with #DeflateGate tweets, CBS News (Jan. 21, 2015), <http://www.cbsnews.com/news/twitter-trolls-deflatriots-with-deflategate-tweets/> (reporting social media activity about the alleged deflation of balls by the Patriots); Jason Molinet, Colts player tweets Patriots 'could've played with soap for balls and beat us' - Pats blitzed on Twitter as NFL report accuses them of underinflating footballs, N.Y. Daily News (Jan. 21, 2015), <http://www.nydailynews.com/sports/football/patriots-attacked-social-media-underinflated-balls-article-1.2086279> (reporting about social media and alleged deflation of footballs by Patriots); Steve Silva, Harsh Reaction to Patriots #Deflategate News on Social Media, Bos. Globe (Jan. 21, 2015), http://www.boston.com/sports/extra-points/2015/01/21/harsh_reaction_to_patriots_deflategate_news_on_soc (same).

⁴⁹ Wells Report, *supra* note 44, at 1.

⁵⁰ *Id.* at 2 (“it is more probable than not that Tom Brady (the quarterback for the Patriots) was at least generally aware” of deliberate attempts to deflate footballs by Patriots staff).

⁵¹ *Id.* 68, 111–12.

⁵² The game temperature was about 48 degrees Fahrenheit. See Wells Report at 113; East Foxboro MA Hourly Weather Data for January 18, 2015, The Friendly Forecast (July 7, 2016), <http://www.friendlyforecast.com/usa/archive/archive.php?region=MA&id=156489&date=20150118000000&sort=hour> (reporting temperature in the general area near the game on January 18, 2015 as in the high 40s and low 50s during the late afternoon and evening).

⁵³ The locker room temperature was determined to be about room temperature between 67 and 74 degrees before the game and during halftime. See Wells Report, *supra* note 44, at 113.

⁵⁴ The ideal gas law is $PV=nRT$, which means the product of pressure and volume is proportional to the amount of particles multiplied by the temperature, so when the temperature changes, the pressure changes. See John D. Cutnell et. al., *Physics*, Volume One 370 (Jessica Fiorillo et. al. eds., 10th ed. 2015); Kristian Dyer, Sports Physicist says Temperature could have caused football deflation, Yahoo Sports (Jan. 26, 2015), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/sports-physicist-says-temperature-could-have-caused-football-deflation-234639741.html> (discussing possibility that weather alone caused apparent deflation of footballs in 2015 AFC Championship game); James Glanz, Deflation Experiments Show

The investigative report discounted this possibility for two reasons. As an initial matter, balls provided by the Colts did not measure as significantly underinflated.⁵⁵ Additionally, the decrease in measured pressure in the Patriots' balls was, according to a consultant hired by the NFL, larger than any decrease that exposure to game temperatures would have caused.⁵⁶

Second, the investigation collected oral statements and text messages involving two Patriots staff members.⁵⁷ These suggested that the two of them, officials' locker room attendant James McNally and equipment manager Dave Jastremski, worked together to deflate footballs to Brady's satisfaction during the 2014-15 season.⁵⁸ This evidence included texts in which McNally referred to himself as the "deflator" and apparently complained that Brady was too fussy about football inflation.⁵⁹ In other texts, Jastremski appeared to assure McNally that he would receive balls and shoes autographed by Brady.⁶⁰

Third, video footage taken by a security camera on the day of the AFC championship game showed McNally taking a bag of footballs into a bathroom for a brief moment before continuing on to the field.⁶¹ This suggested to the investigators that McNally had taken the balls from the referees' locker room into the bathroom to be deflated.⁶²

Troy Vincent, the NFL's Executive Vice President for Football Operations, communicated the league's discipline to Brady.⁶³ Vincent concluded that there was "substantial and credible evidence" to conclude that Brady at least knew of a scheme to deflate footballs.⁶⁴ Additionally, Vincent stated that Brady had not fully cooperated with the investigation.⁶⁵ Because the league considered Brady's

Patriots May Have a Point After All, N.Y. Times (Jan. 29, 2015), http://www.nytimes.com/2015/01/30/sports/football/deflation-experiments-show-patriots-may-have-science-on-their-side-after-all.html?_r=0 (discussing application of ideal gas law and calculations supporting conclusion that Patriots did not tamper with footballs); Kristian Dyer, Sports Physicist says Temperature could have caused football deflation, Yahoo Sports (January 26, 2015), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/sports-physicist-says-temperature-could-have-caused-football-deflation-234639741.html> (discussing possibility that weather alone caused apparent deflation of footballs in 2015 AFC Championship game).

⁵⁵ Wells Report, *supra* note 44, at 69.

⁵⁶ *Id.* at 111 (asserting that lower temperatures alone cannot explain drop in pressure for Patriots' footballs).

⁵⁷ See *id.* at 101-110 (recounting statements and text messages made by certain Patriots staff).

⁵⁸ *Id.*

⁵⁹ *Id.* at 75-78.

⁶⁰ *Id.* at 87-94.

⁶¹ *Id.* at 57-58.

⁶² *Id.* at 124.

⁶³ See Troy Vincent's Letter to Tom Brady, (May 12, 2015), available at http://espn.go.com/nfl/story/_/id/12873455/troy-vincent-letter-tom-brady.

⁶⁴ *Id.*

⁶⁵ *Id.*

behavior “conduct detrimental to the integrity and public confidence in the game of professional football,” Vincent suspended Brady for four games.⁶⁶

Reaction from Brady, the Patriots, and their supporters was predictably swift and vehement. Brady of course maintained his innocence, stating his intention to appeal.⁶⁷ This meant going before an arbitrator of the NFL’s choosing, and Commissioner Goodell appointed himself as the arbitrator.⁶⁸ This did not sit well with the NFLPA and Brady for obvious reasons. Goodell’s position as Commissioner practically guaranteed that he would look favorably on the league’s action, as he had a personal stake in ensuring that the league could discipline players as it saw fit. Accordingly, Brady asked Goodell to recuse himself from the case, but Goodell refused.⁶⁹

Not surprisingly, Goodell affirmed the NFL’s discipline of Brady.⁷⁰ The Commissioner held a hearing that lasted about ten hours and affirmed the four-game suspension.⁷¹ Moreover, Goodell found that Brady had obstructed the NFL’s investigation.⁷² He found that Brady had engaged in conduct detrimental to the integrity of football and that the penalty imposed by the league was reasonable, especially when compared with other serious offenses like the use of performance enhancing drugs.⁷³

B. *NFLMC* at the District Court

Goodell’s decision set the stage for the *NFLMC* litigation. Anticipating that Brady would resort to litigation, the NFL filed suit in New York to confirm the

⁶⁶ Troy Vincent’s Letter to Tom Brady, (May 12, 2015), available at http://espn.go.com/nfl/story/_/id/12873455/troy-vincent-letter-tom-brady.

⁶⁷ See Jack Andrade, Tom Brady’s agent: NFL’s punishment ‘has no legitimate basis’, Boston.com (May 11, 2015), <http://www.boston.com/sports/new-england-patriots/2015/05/11/tom-bradys-agent-nfls-punishment-has-no-legitimate-basis> (reporting statement of Brady’s agent contending that “no evidence” supported Brady’s involvement in scheme to deflate footballs); Mark Maske, Tom Brady Suspended Four Games, Patriots fined \$1 million and docked two draft choices as ‘DeflateGate’ punishment, Wash. Post (May 11, 2015), <https://www.washingtonpost.com/news/sports/wp/2015/05/11/tom-brady-suspended-four-games-patriots-fined-1-million-and-docked-two-draft-choices-as-deflategate-punishment/> (reporting Brady’s intention to appeal).

⁶⁸ See 2011 Nat’l Football League Collective Bargaining Agreement, Art. 46, §2(a) (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8> (giving Commissioner the power to appoint hearing officers for appeals of discipline, but also providing that “the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.”).

⁶⁹ Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 534, 534–35 (2d Cir. 2016).

⁷⁰ Id. at 535.

⁷¹ Id.

⁷² Id.

⁷³ Id.

arbitration award.⁷⁴ Soon thereafter, Brady and the NFLPA sued in Minnesota to have the award vacated, but the NFL successfully moved to have both actions consolidated in the Southern District of New York before Judge Richard Berman.⁷⁵

Brady made three general arguments to support his claim that Goodell's decision should be overturned. First, he contended that Goodell had exceeded his arbitral authority under the CBA by failing to give Brady notice about potential discipline for his alleged behavior.⁷⁶ Second, he asserted that Goodell's procedural rulings rendered the arbitration fundamentally unfair.⁷⁷ Third, he maintained that Goodell was "evidently partial" within the meaning of section 10(a)(2) of the Federal Arbitration Act.⁷⁸ Judge Berman agreed with Brady's first two arguments and vacated Brady's suspension.⁷⁹ Berman chose not to rule on Goodell's alleged partiality because a finding on the issue would not affect the outcome of the case.⁸⁰

With respect to Goodell's authority under the CBA, Judge Berman recognized that courts give arbitrators considerable latitude in interpreting arbitration agreements.⁸¹ Nevertheless, Judge Berman found limits to that deference, refusing to confirm an award that he considered unfair or lacking in due process.⁸² This led him to scrutinize the process by which the NFL disciplined Brady and interpret the CBA in a manner that led to overturning Goodell's decision. In particular, Berman focused on the NFL's failure to notify Brady specifically that he could be suspended for tampering with footballs or not cooperating with the NFL's investigation.⁸³ The NFL argued that the CBA gave the league authority to impose this discipline under Article 46(a), which contemplates discipline for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."⁸⁴ Berman disagreed. Although the CBA did not contain any provisions specifically requiring notice to Brady, the court held that the CBA incorporated earlier arbitral rulings and

⁷⁴ *Nat'l Football League Mgmt. Council*, 820 F.3d at 535.

⁷⁵ *Id.*

⁷⁶ Mem. of Law in Supp. of Mot. to Vacate Arbitration Award, at 2–9, *Nat'l Football League Mgt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449 (S.D.N.Y. 2015) (No. 15-5916), (Aug. 7, 2015).

⁷⁷ *Id.* at 14–15.

⁷⁸ 9 U.S.C. §10(a)(2)(2002) (providing for vacatur when arbitrator is "evident[ly] partial"); See Mem. of Law in Supp. of Mot. to Vacate Arbitration Award, at 14, *Nat'l Football League Mgt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449 (S.D.N.Y. 2015) (No. 15-5916), (Aug. 7, 2015).

⁷⁹ *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 463–73 (S.D.N.Y. 2015).

⁸⁰ *Id.* at 473–74.

⁸¹ *Id.* at 463 ("The Court is fully aware of the deference afforded to arbitral decisions, but, nevertheless, concludes that the Award should be vacated.").

⁸² *Id.* at 462–63.

⁸³ *Id.* at 463–69.

⁸⁴ *Id.* at 469; 2011 *Nat'l Football League Collective Bargaining Agreement*, Art. 46, §1(a) (Aug 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>.

cases that made notice a prerequisite to discipline.⁸⁵ Accordingly, the NFL's failure to give specific notice violated the CBA and rendered the discipline of Brady invalid.⁸⁶

The court applied a similar level of scrutiny to Goodell's procedural rulings during the arbitration. Here, however, the court did not find limits to Goodell's authority in the CBA. Instead, Judge Berman relied on minimum standards of fairness expected in all arbitrations under the Federal Arbitration Act.⁸⁷ This led Judge Berman to conclude that Goodell made two important procedural errors. First, he denied Brady access to files generated by the investigation.⁸⁸ Second, he refused to hear testimony from NFL General Counsel Jeff Pash.⁸⁹ The NFL considered both of these decisions to be well within the arbitrator's discretion, for the law does not require arbitration to offer participants the same level of discovery or access to witnesses found in litigation.⁹⁰ Nevertheless, Judge Berman thought that Brady suffered enough prejudice from Goodell's rulings to render the entire proceeding "fundamentally unfair."⁹¹

C. *NFLMC* at the Second Circuit

Judge Berman's decision to reinstate Brady caused an enormous uproar.⁹² Not surprisingly, the league promptly appealed to the Second Circuit. That court reversed Judge Berman in a 2-1 decision.⁹³

In an opinion written by Judge Parker, the Second Circuit made clear that the District Court had given Commissioner Goodell the insufficient deference.⁹⁴ According to the court, Goodell's award was valid as long as he was arguably within the authority granted by the arbitration agreement. Judge Parker wrote,

⁸⁵ *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 469–70.

⁸⁶ *Id.* at 470.

⁸⁷ *See id.* at 471.

⁸⁸ *Id.* at 472–73.

⁸⁹ *Id.* at 471.

⁹⁰ *Id.* at 471–472.

⁹¹ *Id.* at 473.

⁹² *See* Patriots and NFL Players React Tom Brady Suspension Ruling, N.Y. Times (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/sports/football/patriots-and-nfl-players-react-to-tom-brady-suspension-ruling.html?_r=0; Jason Gay, Deflategate, Brady, Turtle, Rabbit, Juice Box, Wall St. J. (Sept. 3, 2015), <http://www.wsj.com/articles/deflategate-brady-turtle-rabbit-juice-box-1441323447>; *See also* Doug Most, Ortiz, Trump, and more react to ruling, Bost. Globe (Sept. 3, 2015), <https://www.bostonglobe.com/sports/2015/09/03/reaction-judge-ruling-nullifying-tom-brady-nfl-suspension-pours/q4QNkTYvn73LfNn2yVAnO/story.html> (reporting various reactions on social media to Judge Berman's ruling).

⁹³ *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016).

⁹⁴ *Id.* at 532, 536–37 (review of arbitrator is "very limited").

“[O]ur task is simply to ensure that the arbitrator was ‘even arguably construing or applying the contract and acting within the scope of his authority’ and did not ‘ignore the plain language of the contract.’ Even failure to ‘follow arbitral precedent’ is no reason to vacate an award.”⁹⁵ This meant that the NFL was correct in arguing that the league did not have to give Tom Brady notice before imposing discipline for tampering with footballs and failing to cooperate with the league’s investigation.⁹⁶ Remember, the CBA contained a provision contemplating discipline for “conduct detrimental” to football.⁹⁷ Although parties might reasonably differ on whether this provision obviated notice to Brady, all that mattered was Goodell being *arguably* correct in his determination that he did not have to give notice.⁹⁸ The Second Circuit believed he was and therefore reversed the District Court on this issue.⁹⁹

The Second Circuit gave Goodell similar deference on the issues of access to files and testimony from Mr. Pash, but constructed that deference in a slightly different way. As noted above, interpretation of the CBA controlled whether Brady was entitled to notice. As long as Goodell was arguably within the boundaries of the CBA, his decision would stand.¹⁰⁰ By contrast, the CBA did not – at least initially – resolve whether Brady was entitled to get access to files and testimony from Pash. Instead, the limits on Goodell’s authority turned on basic standards of fairness embodied in the Federal Arbitration Act.¹⁰¹ The court noted that the FAA permitted vacatur only if “fundamental fairness” is violated.¹⁰² Judge Parker then used the CBA to help determine what would be fundamentally fair between the parties.¹⁰³

With respect to Pash’s testimony, the court noted that the CBA did not require the NFL’s investigation to be independent, and this made Pash’s testimony about editing the report less relevant to the Commissioner’s determination.¹⁰⁴ Similarly, the court pointed out that the CBA required only the exchange of documents relied on by parties at the hearing before the Commissioner, and the NFL did not rely on the investigative files at the hearing.¹⁰⁵ These observations led Parker to conclude

⁹⁵ *Nat’l Football League Mgmt. Council*, 820 F.3d at 537 (citations omitted) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

⁹⁶ *Id.* at 538–45.

⁹⁷ *Id.* at 537–38, 544–45.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 537.

¹⁰¹ *Id.* at 545 (noting “narrow exception” under the Federal Arbitration Act that permits vacation of arbitration award if arbitrator is “guilty of misconduct” in failing to consider certain evidence).

¹⁰² *Id.* at 546 (Commissioner’s ruling vulnerable only if it violated “fundamental fairness”).

¹⁰³ *Id.* at 545–46 (analyzing whether Commissioner’s behavior was consistent with broad authority granted by the CBA).

¹⁰⁴ *Id.* at 546.

¹⁰⁵ *Id.* at 546–47.

that it was not fundamentally unfair for Goodell to refuse hearing Pash's testimony and deny Brady access to investigative files not relied upon at the arbitration hearing.¹⁰⁶

The Second Circuit could have reversed and remanded to the District Court solely on its rulings about notice, access to files, and testimony from Mr. Pash. However, the court apparently wanted to end the proceedings definitively and reached to rule on the claims that the District Court had not yet decided, resolving all of them in favor of the NFL.¹⁰⁷ For purposes of the Article, the most important of these concerned Brady's claim that the court should vacate Goodell's ruling because he exhibited "evident partiality" under Federal Arbitration Act §10(a)(2).¹⁰⁸

The Second Circuit summarily rejected this argument as a matter of basic contract law. The union had agreed to the CBA, binding Brady to its provisions. Accordingly, Brady could expect whatever level of fairness the contract embodied.¹⁰⁹ Unfortunately for Brady, this included the possibility of Goodell sitting as arbitrator. The Court wrote:

[A]rbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen. ... Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes "conduct detrimental," and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement.¹¹⁰

D. The Potential Significance of *NFLMC*

The routine treatment given to Commissioner Goodell's evident partiality hides challenges implicit in the holding of *NFLMC* and some potentially troubling implications. Goodell clearly met the definition of an evidently partial arbitrator.

¹⁰⁶ *Nat'l Football League Mgmt. Council*, 820 F.3d at 546–47.

¹⁰⁷ *Id.* at 547–48.

¹⁰⁸ *Id.* at 548; Section 10(a)(2) of the Federal Arbitration Act permits vacating of arbitration awards 'where there was evident partiality' on the part of an arbitrator. 9 U.S.C. § 10(a)(2) (2016).

¹⁰⁹ *Nat'l Football League Mgmt. Council*, 820 F.3d at 548.

¹¹⁰ *Id.*

Although the Supreme Court has not provided an authoritative definition of “evident partiality,” courts of appeal generally find that evident partiality exists when facts establish a reasonable impression of partiality.¹¹¹ Because Goodell was the NFL Commissioner, he managed the entity whose interests were directly adverse to Brady’s. Indeed, he had appointed himself to review the fairness of decisions made by his own staff.¹¹² Given these facts, a reasonable person would surely conclude that Goodell was predisposed to side with the NFL against Brady.

Nevertheless, Brady lost because the CBA required the court to ignore the possibility of evident partiality.¹¹³ After all, the CBA was a valid contract, and acceptance of that validity implied holding Brady to its terms.¹¹⁴ Acceptance of this reasoning could greatly influence the future of arbitration law by encouraging the adoption and enforcement of arbitration agreements that bind NFL stars and ordinary individuals alike to arbitration before evidently partial arbitrators. The NFL and NFLPA agreed to the CBA after a long and detailed process of negotiation, making actual agreement to its terms fairly likely.¹¹⁵ However, many arbitration agreements get made without negotiation over the relevant terms and consequences. Most notably, modern businesses frequently use contracts of adhesion to maneuver individuals (often ordinary consumers or employees) into arbitration and other potentially undesirable situations.¹¹⁶ These customers give assent by “clicking through” pages of text on the Internet or signing documents they do not read or fully understand. Although arguments for the invalidity of these contracts exist, courts routinely enforce them.¹¹⁷ If, as *NFLMC* suggests, it really is

¹¹¹ See *New Regency Prod., Inc. v. Nippon Herald Films*, 501 F.3d 1101, 1106 (9th Cir. 2007) (legal standard for evident partiality satisfied by facts showing a reasonable impression of partiality); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (to satisfy evident partiality test, party challenging award must show that a reasonable person would conclude arbitrator was biased); *Morelite Constr. Co. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (“evident partiality” exists “where a reasonable person would have to conclude that an arbitrator was partial.”).

¹¹² Letter from Roger Goodell to NFLPA regarding Brady appeal, NFL.com (June 2, 2015), <http://www.nfl.com/news/story/0ap3000000495253/article/letter-from-roger-goodell-to-nflpa-regarding-brady-appeal> (setting forth Goodell’s refusal to recuse himself as arbitrator and stating that discipline imposed on Brady was done under the Commissioner’s authority).

¹¹³ *Nat’l Football League Mgmt. Council*, 820 F.3d at 548.

¹¹⁴ *Id.*

¹¹⁵ See *Brown*, supra note 37 (describing detailed and involved negotiations over the CBA); see also *Davis*, supra note 37 (noting extensive negotiations over CBA).

¹¹⁶ See *The Problem*, Citizen Works, 2014, <http://www.faircontracts.org/problem> (listing various types of clauses placed in consumer adhesion contracts).

¹¹⁷ See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (arbitration agreement that was part of satellite television contract enforced); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (enforcing mandatory arbitration contained in credit card agreement); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (enforcing waiver of class relief found in arbitration agreement that was part of contract for cellular phone service). See also 2 E-Com. and Int. L. 21.03[2] (2015 update) (click through and browse-wrap agreements upheld by federal and state courts); Cheryl B. Preston, “Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?, 64 *Am. U. L. Rev.* 535, 540–52 (2015) (describing routine enforcement of adhesion contracts, including click-through and browse-wrap contracts).

the norm to enforce agreements to appoint evidently partial arbitrators, then businesses apparently have the power to force ordinary individuals into highly unfavorable systems of dispute resolution. For example, a credit card company could draft customer contracts that require consumers to arbitrate any dispute with the company before the company's debt collection manager. Consumers forced to arbitrate under such terms would almost certainly lose, even if they had valid claims.

The foregoing raises the question of whether the Second Circuit reached the correct result in *NFLMC* and, if so, how broadly courts should understand and apply the decision. Answering this question requires exploration of the role that freedom of contract plays in arbitration law and the premises on which that role is based. This involves exploration of three related facets of arbitration law – the primacy of freedom of contract, the relationship between unbiased arbitrators and fair arbitration, and waivers of complaints about evidently partial arbitrators.

III. THE PRIMACY OF FREEDOM OF CONTRACT IN ARBITRATION LAW

As many courts have stated, arbitration law rests on contract,¹¹⁸ and courts should enforce arbitration agreements remorselessly according to their terms.¹¹⁹ This doctrine exists because the Supreme Court has used the Federal Arbitration Act to preempt state law with federal law that enforces arbitration agreements as written. Section 2 of the FAA provides:

A written provision in any ... contract ... to settle by arbitration a controversy thereafter arising out of such contract or transaction, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹²⁰

On its face, this provision seems unremarkable. It treats an arbitration agreement like any other contract – enforceable unless doctrines such as unconscionability dictate otherwise. In the hands of the Supreme Court, however, this provision has become law that requires literal and remorseless enforcement of arbitration agreements, even to the point of insulating arbitration agreements from meaningful judicial review.¹²¹ Accordingly, parties have the freedom to agree to almost anything in arbitration, even if the resulting bargain seems unfair.

¹¹⁸ See supra note 19 and accompanying text.

¹¹⁹ See supra note 18 and accompanying text.

¹²⁰ 9 U.S.C. § 2 (2016).

¹²¹ See infra notes 159–166 and accompanying text.

The reasons for this are somewhat complicated and reflect two themes: the presumptive desirability of enforcing mutually agreed upon contracts and the inherent fairness of arbitration as a substitute for litigation. Mutual agreement offers the most obvious justification for enforcing arbitration agreements. Because litigation is slow and costly, parties may rationally prefer to arbitrate their disputes because doing so can save considerable time and expense.¹²² Accordingly, if two parties have genuinely agreed that they would prefer arbitration instead of litigation, it seems perfectly fair to hold them to that bargain.¹²³

Things get a bit trickier when a party to a pre-dispute arbitration agreement claims that she did not genuinely agree to arbitrate her claim. For example, individuals often sign or “click through” contracts of adhesion that provide for mandatory arbitration without reading or negotiating over the terms.¹²⁴ This frequently happens when a person signs up for a credit card or cell phone service, or when an employer requires him to sign an employment agreement.¹²⁵ In these situations, the absence of genuine consent means that the parties never reached a meeting of the minds about preferring arbitration, and the fairness of holding an unwilling party to her “bargain” becomes debatable.¹²⁶ This suggests that courts should not routinely enforce pre-dispute mandatory arbitration agreements contained in contracts of adhesion.

The Supreme Court solved this problem by treating arbitration as a fundamentally fair substitute for litigation. According to the Court, arbitrators can competently find facts and follow the law.¹²⁷ Although arbitration lacks some of litigation’s safeguards such as full discovery and appeal, parties to arbitration also

¹²² See *Concepcion*, 563 U.S. at 348 (arbitration offers less costly and speedier alternative to litigation).

¹²³ See Stewart Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 *Cardozo L. Rev.* 481, 489 (1981) (“To the extent that an arbitration clause or other forum selection clause is the product of arm’s-length negotiation between informed parties, there is generally no reason not to enforce the agreement between the parties. Where parties are free to resolve particular contract questions explicitly, there is little reason to forbid them to delegate the resolution of the same questions to an impartial third party.”); See also Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *Harv. L. Rev.* 1173, 1187 (1983) (voluntary assumption of obligation generally gives contract law its ethical force).

¹²⁴ See *supra* notes 116–117 and accompanying text.

¹²⁵ *Id.*

¹²⁶ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.”); Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement As an Adhesion Contract*, 21 *Cardozo L. Rev.* 319, 327–28 (1999) (lack of true mutual assent weakens case for enforcing adhesion contracts).

¹²⁷ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231–32 (1987) (noting Supreme Court’s rejection of idea that judges cannot adequately resolve disputes and follow the law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 633 (1985) (“[A]daptability and expertise are hallmarks of arbitration.”); See also *infra* notes 151–156 and accompanying text.

gain because arbitration is faster and less expensive than litigation.¹²⁸ Accordingly, there is nothing fundamentally unfair about using contracts of adhesion to impose mandatory arbitration, even if one of the parties has not genuinely consented to the arbitration.

To see the development of the law favoring mandatory arbitration, let us begin with *Wilko v. Swan*,¹²⁹ a case in which the Supreme Court actually refused to enforce mandatory arbitration of a federal securities law claim brought by Wilko against his brokerage firm. The contract that Wilko signed contained a mandatory arbitration clause, and the defendant moved under the Federal Arbitration Act to stay the litigation started by Wilko.¹³⁰ Wilko countered, arguing that the arbitration clause was unenforceable because Section 14 of the Securities Act voided any contractual provision waiving compliance with the Securities Act.¹³¹ Wilko maintained, and the District Court agreed, that binding arbitration of Wilko's claim amounted to such a waiver because litigation before courts was the only way to guarantee full vindication of Wilko's rights under the Securities Act.¹³² The District Court therefore refused to stay Wilko's lawsuit, but the Court of Appeals reversed.¹³³ Ultimately, however, the Supreme Court reviewed the case and agreed with the District Court.¹³⁴

In so ruling, the Court considered the defendant's argument that "arbitration is merely a form of trial to be used in lieu of a trial at law."¹³⁵ This claim had a point. Arbitrators had to follow federal law, just as judges would.¹³⁶ No waiver of the securities laws existed, so arbitrators and judges would necessarily make effectively

¹²⁸ See *Concepcion*, 563 U.S. at 344 (Goal of the Federal Arbitration Act is to provide streamlined alternative to litigation); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (Arbitration offers a less expensive alternative to consumers challenging big business); *Mitsubishi Motors Corp.*, 473 U.S. at 634 (1985) (parties choose arbitration over litigation to get the benefits of streamlined proceedings, expeditious results, and lower costs).

¹²⁹ *Wilko v. Swan*, 346 U.S. 427 (1953).

¹³⁰ *Id.* at 429; The provision of the Federal Arbitration Act at stake provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. §3 (2016).

¹³¹ *Wilko*, 346 U.S. at 430.

¹³² *Id.*

¹³³ *Id.* at 429–30.

¹³⁴ *Id.* at 438.

¹³⁵ *Id.* at 433.

¹³⁶ See *id.* at 433–34.

identical determinations when deciding cases.¹³⁷ The Court rejected this argument, in part because the Court cared about the unequal positions of the two parties.

The Court noted that the federal securities laws exist to protect buyers.¹³⁸ Sellers generally better understand the pros and cons of certain investments than buyers do, making it important that sellers treat buyers fairly.¹³⁹ In the context of arbitration agreements, the inexperience of buyers prevents them from knowing how valuable litigation can be.¹⁴⁰ This made enforcing the arbitration agreement against an ordinary person like Wilko unfair, and the Court refused to do so.¹⁴¹

Wilko heavily influenced the law of arbitration for about twenty years by preventing contractual mandatory arbitration of federal statutory claims. After that, however, judicial attitudes towards arbitration changed as judges stopped thinking of arbitration as avoidance of the legal system. Instead, they began to see arbitration as simply another forum in which to resolve legal disputes and vindicate legal rights. For example, in *Shearson/American Express, Inc. v. McMahon*,¹⁴² the Court considered again the enforceability of a pre-dispute arbitration agreement between a brokerage firm and its customer.¹⁴³ In October of 1984, the McMahons sued Shearson/American Express, alleging fraudulent behavior and excessive trading on their account under §10(b) of the Exchange Act and Rule 10b-5, a RICO claim, and various state law claims for fraud and breach of fiduciary duty.¹⁴⁴ Shearson/American Express responded with a motion to compel arbitration under the mandatory arbitration clause of the McMahons' brokerage contracts.¹⁴⁵ Although *Wilko* could easily have governed the outcome of this case, the Supreme Court chose instead to interpret *Wilko* narrowly and enforce the arbitration agreement.¹⁴⁶

Justice O'Connor's majority opinion began by citing the Federal Arbitration Act, particularly its language that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

¹³⁷ *Wilko*, 346 U.S. at 433–34 ("We agree that in so far as the award in arbitration may be affected by legal requirements, statutes or common law, rather than by considerations of fairness, the provisions of the Securities Act control.")

¹³⁸ *Id.* at 431.

¹³⁹ *Id.* at 437.

¹⁴⁰ *Id.* at 439–40.

¹⁴¹ *Id.* at 440 (Frankfurter, J., dissenting).

¹⁴² *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

¹⁴³ *Id.* at 222.

¹⁴⁴ *Id.* at 223.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 228–29.

revocation of any contract.”¹⁴⁷ This meant that federal law now had a clear policy favoring arbitration,¹⁴⁸ requiring rigorous enforcement of agreements to arbitrate.¹⁴⁹

The Court then explained that *Wilko* was an unusual case that rested on the specific language of §14 of the Securities Act and the Court’s conclusion that arbitration could not properly vindicate the peculiar substantive rights at issue in that case.¹⁵⁰ Justice O’Connor then pointed out how cases after *Wilko* had firmly established the general acceptability of arbitration as a substitute for litigation.¹⁵¹ This acceptability looked past any potential unfairness arising from unequal bargaining power or the absence of genuine negotiation and agreement.¹⁵² Instead, Justice O’Connor focused on three reasons to have confidence in arbitration as a substitute for litigation. First, arbitrators had the ability to resolve complex questions of fact.¹⁵³ Second, the streamlined procedures of arbitration did not imply a meaningful restriction on substantive rights.¹⁵⁴ Third, arbitrators would follow the law.¹⁵⁵ This made it possible for the Court to conclude that there was no good statutory or policy reason to prevent enforcement of the arbitration agreement against the *McMahons*.¹⁵⁶

The trend embodied by *McMahon* continued in 1989, when the Supreme Court formally overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*¹⁵⁷ In the years that followed, the Court further strengthened the enforceability of arbitration agreements by using the Federal Arbitration Act to prevent consideration of state law claims that might otherwise invalidate arbitration agreements. Two cases, *AT&T Mobility, LLC v. Concepcion*¹⁵⁸ and *Rent-A-Center,*

¹⁴⁷ *McMahon*, 482 U.S. at 226 (quoting 9 U.S.C. §2).

¹⁴⁸ But see Christopher Leslie, *The Arbitration Bootstrap*, 94 *Tex. L. Rev.* 265, 300–320 (2015) (questioning whether the Supreme Court’s understanding of the purpose behind the FAA is accurate and contending that the policy in favor of arbitration was directed at commercial disputes involving sophisticated parties).

¹⁴⁹ *McMahon*, 482 U.S. at 226 (The Court cited with approval quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985): “The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate.”).

¹⁵⁰ *Id.* at 228.

¹⁵¹ See *id.* at 232.

¹⁵² *Id.* at 230.

¹⁵³ *Id.* at 232.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 233–42; See also *Mitsubishi Motors Corp. v. Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–30 (1991) (arbitration fully compatible with proper resolution of claims under the Age Discrimination and Employment Act); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009) (Supreme Court has clearly abandoned skepticism about the use of arbitration to vindicate statutory rights).

¹⁵⁷ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

¹⁵⁸ *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011).

West, Inc. v. Jackson,¹⁵⁹ show the Court moving ever closer to giving drafters of arbitration agreements plenary power to define the scope of the parties' rights, even if the provisions seem fundamentally unfair.

In *Rent-A-Center, West, Inc. v. Jackson*,¹⁶⁰ the Court considered an arbitration agreement that required the plaintiff Jackson to arbitrate any dispute with his employer Rent-A-Center.¹⁶¹ Jackson wished to challenge the validity of this arbitration agreement in court, but the agreement contained a clause that gave the arbitrator sole power to decide whether the arbitration agreement was enforceable.¹⁶² This clause represented a very interesting maneuver by Rent-A-Center. In *Rodriguez*, the Court itself decided that Rodriguez's arbitration contract was enforceable.¹⁶³ Even though this review was very deferential, it reserved to judges the basic task of determining whether an arbitration contract was legally valid. However, acceptance of the *Rent-A-Center* clause implied taking this power away from courts because anyone drafting an arbitration agreement could use a similar provision to defeat judicial review.

One might ordinarily think that the Supreme Court would refuse to enforce clauses like this in order to preserve the judiciary's power. In this case, however, the Court ceded its power. Justice Scalia's majority opinion emphasized that arbitration is governed by contract, and that the Federal Arbitration Act requires courts to enforce them "according to their terms."¹⁶⁴ He went on to treat the delegation provision as an arbitration agreement that stood on its own, separate from the rest of the contract.¹⁶⁵ Because Jackson did not come up with a timely argument about the unconscionability of the separate agreement, the Court had no choice but to uphold it.¹⁶⁶

Rent-A-Center did a great deal to establish the enforceability of arbitration agreements drafted by savvy parties, for it allowed clever drafters to prevent courts from deciding whether an arbitration would go forward under the terms found in the arbitration agreement. However, the decision did not guarantee the validity of all arbitration agreements. Two possible holes remained. First, it was at least theoretically possible that an arbitrator would declare an arbitration agreement

¹⁵⁹ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

¹⁶⁰ *Rent-A-Center, W., Inc.*, 561 U.S. at 63.

¹⁶¹ *Id.* at 65.

¹⁶² *Id.*

¹⁶³ *Rodriguez*, 490 U.S. 477, 486 (1989) (affirming Court of Appeals decision enforcing pre-dispute arbitration agreement).

¹⁶⁴ *Id.* at 67–68.

¹⁶⁵ *Id.* at 69–70.

¹⁶⁶ *Id.* at 72–77.

unenforceable.¹⁶⁷ Second, courts could still review and potentially invalidate arbitration agreements that did not contain delegation clauses.

The Court made these possibilities rather unlikely in *AT&T Mobility, LLC v. Concepcion*.¹⁶⁸ In that case, the Concepcions sued AT&T in the Southern District of California for improperly charging them for sales taxes.¹⁶⁹ Their complaint became consolidated with a potential class action contending that AT&T had engaged in fraud by advertising cell phones as free while charging sales tax.¹⁷⁰ AT&T responded by moving to compel arbitration under the relevant clause of the Concepcions' service contract.¹⁷¹ Among other things, this clause prohibited class-wide arbitrations, thereby preventing consumers like the Concepcions from banding together to prosecute their claims.¹⁷²

The class-relief prohibition gave *Concepcion* a most interesting twist, for the California Supreme Court had previously adopted the so-called *Discover Bank* rule, which declared arbitration agreements containing waivers of class actions unconscionable and invalid.¹⁷³ Because the Federal Arbitration Act did not require enforcement of arbitration agreements when law or equity called for revocation, the Concepcions could argue that their arbitration agreement was invalid as a matter of California law, and that the Federal Arbitration Act could not be used to force arbitration.¹⁷⁴ Both the District Court and the Ninth Circuit agreed.¹⁷⁵ The Supreme Court granted certiorari and reversed, stating that the Federal Arbitration Act preempted state law that interfered with the federal policy favoring enforcement of arbitration agreements.¹⁷⁶ According to the Court, the *Discover Bank* rule was just this type of state law, and it had to yield to the Federal Arbitration Act's preference for enforcing arbitration agreements.¹⁷⁷

Concepcion supported *Rent-A-Center* by instructing judges and arbitrators alike to ignore state law that is hostile to enforcing an arbitration agreement, even if the

¹⁶⁷ In theory, the arbitrator could declare the arbitration agreement unenforceable and send the dispute to the courts. However, that outcome seems quite unlikely because the arbitrator has a personal stake in whether the arbitration goes forward. After all, the typical arbitrator gets paid for his services, and declaring arbitration agreements unenforceable surely reduces the arbitrator's pay.

¹⁶⁸ *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011).

¹⁶⁹ *Id.* at 337.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 338.

¹⁷³ *Id.* at 333–34.

¹⁷⁴ *Id.* at 334.

¹⁷⁵ *Id.* at 338.

¹⁷⁶ *Id.* at 353.

¹⁷⁷ See *id.*; See also *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (citing *Concepcion* to reverse West Virginia Supreme Court of Appeals decision refusing to enforce arbitration agreement).

agreement in question is fundamentally unfair. Indeed, AT&T had used a contract of adhesion to not only maneuver the Concepcions into arbitration, but also to discourage them from bringing a claim at all. AT&T's alleged offense of charging sales tax inflicted relatively little injury upon the Concepcions, so the costs of arbitration would surely have overwhelmed any recovery they could hope for in an individual action. Class action would restore the possibility of meaningful recovery by sharing expenses across a number of similarly situated plaintiffs, and it would provide meaningful incentives for injured parties to hold AT&T accountable for any wrongs it committed. However, if class action was not possible, injured parties like the Concepcions would probably never pursue their claims, allowing AT&T to avoid accountability for any wrongdoing it may have committed.

Given these consequences, the California Supreme Court's *Discover Bank* rule seemed eminently sensible. It was fundamentally unfair for an arbitration agreement to strip a consumer of procedural options that made recovery possible, and the Supreme Court could easily have used *Discover Bank* to refuse enforcement of the arbitration agreement under the Federal Arbitration Act. However, by interpreting the Act to preempt California contract law, the Court showed that it did not want judges or arbitrators to consider state law doctrines that might prevent the enforcement of arbitration agreements. Instead, it preferred to enforce arbitration agreements as written¹⁷⁸ because doing so gave the parties full discretion to define arbitration procedures tailored to their potential disputes.¹⁷⁹

The line of cases that includes *McMahon*, *Rodriguez*, *Rent-A-Center* and *Concepcion* send a clear signal that, as far as the Supreme Court is concerned, courts must enforce pre-dispute arbitration agreements according to their terms.¹⁸⁰ Tellingly, none of these cases involved agreements negotiated by parties at arms' length. Instead, all appear to involve adhesion contracts.¹⁸¹ Accordingly, there is a

¹⁷⁸ *Concepcion*, 563 U.S. at 339 (courts must enforce arbitration agreements "according to their terms"); *id.* at 344 (FAA generally requires enforcement of arbitration agreements "as written").

¹⁷⁹ *Id.* at 339 (The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.)

¹⁸⁰ For other cases taking the same position, see *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (courts must enforce arbitration agreements "according to their terms"); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (Federal Arbitration Act "requires courts to enforce agreements to arbitrate according to their terms").

¹⁸¹ See *Concepcion*, 563 U.S. at 333 (2011) (Customers signed mandatory arbitration agreement as part of their service contract for cell phones); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, (2010) (Petitioner signed an arbitration agreement with his former employer as a condition to employment.); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989) (Securities investors signed a standard customer agreement including an agreement to settle disputes through binding arbitration unless the agreement was found unenforceable.); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (Customer agreements with a brokerage firm petitioners signed as individuals and representatives of trusts containing arbitration agreement).

clear argument that the law allows businesses to use contracts of adhesion to bind consumers to arbitration under whatever conditions the business prefers.

IV. EVIDENTLY PARTIAL ARBITRATORS, FAIRNESS IN ARBITRATION, AND WAIVER

Although the cases discussed above do not rule directly on the enforceability of agreements to appoint evidently partial arbitrators, the primacy of freedom of contract in arbitration strongly suggests that courts would enforce such agreements. As the *NFLMC* court recognized, if well-established doctrine enforces arbitration agreements (including ones procured through adhesion contracts) as written, why wouldn't an evidently partial arbitrator be among the things two parties could agree on?¹⁸² The answer to this question requires a closer look at law directed towards biased arbitrators and the vital role that neutral arbitrators play in justifying freedom of contract in arbitration law.

The starting point for this examination is §10 of the Federal Arbitration Act, which empowers courts to vacate arbitration awards when the arbitrator is "evidently partial."¹⁸³ This language alone shows that Congress considered neutral arbitrators critical to the fairness of arbitration. Accordingly, there is a good argument that the federal policy favoring arbitration assumes that arbitration takes place before a neutral arbitrator.

The Supreme Court interpreted the Federal Arbitration Act this way in *Commonwealth Coatings Corp. v. Continental Casualty Co.*¹⁸⁴ In that case, Commonwealth pursued a claim against Continental for payments allegedly owed by Continental as the surety for a prime contractor with whom Commonwealth had done business.¹⁸⁵ Commonwealth's contract with the prime contractor required arbitration of the claim before three arbitrators.¹⁸⁶ Each party selected one arbitrator, and the two selected arbitrators chose a third neutral arbitrator.¹⁸⁷ Unfortunately, the third arbitrator did not disclose to the parties that he had close business dealings with the prime contractor over a period of several years, and the arbitration went forward with Continental unaware of this potential bias.¹⁸⁸ Continental learned of these connections after the award was rendered, and it

¹⁸² See *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016).

¹⁸³ 9 U.S.C. § 10(a)(2) (2016).

¹⁸⁴ *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

¹⁸⁵ *Id.* at 146.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

immediately moved to vacate the award.¹⁸⁹ The Supreme Court supported Continental, ruling that arbitrators had a duty to disclose dealings with the parties that might create an impression of bias.¹⁹⁰

In so ruling, the Court's plurality opinion drew specific attention to section 10 of the Federal Arbitration Act as the embodiment of Congress' desire for impartial arbitration.¹⁹¹ The Court went on to state that courts should be "even more scrupulous to safeguard the impartiality of arbitrators than judges" because arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review."¹⁹² Making arbitrators disclose possible conflicts of interest would not hamper the effectiveness of arbitration, and making such information available would help insure the integrity of the arbitration process.¹⁹³

Commonwealth Coatings has spawned two somewhat contradictory lines of cases that influence the extent to which parties may agree to the appointment of evidently partial arbitrators. One line invalidates agreements imposed on employees to procure ostensible consent about the appointment of evidently partial arbitrators. These results emphasize the importance of impartiality to the fairness of using arbitration as a substitute for litigation. The second line recognizes waiver by those who know about possible bias but do not object to the appointment of an evidently partial arbitrator. These results include an Eighth Circuit holding that the NFLPA had waived claims concerning an evidently partial arbitrator in a case involving an agreement similar to the one in *NFLMC*, and they reflect the notion that consent, whether actual or ostensible, can justify arbitration procedures that would otherwise be objectionable.

A. The Central Importance of Impartial Arbitrators

Commonwealth Coatings' strong endorsement of arbitral neutrality suggests that freedom of contract in arbitration has its limits, especially when it comes to the appointment of evidently biased arbitrators. Freedom of contract heavily influences arbitration law on the theory that when two parties agree to a specific arbitration process, the two parties have determined that the arbitration serves their interests more effectively than litigation would.¹⁹⁴ It is therefore fair to enforce whatever

¹⁸⁹ *Commonwealth Coatings Corp.*, 393 U.S. at 146.

¹⁹⁰ *Id.* at 147–49.

¹⁹¹ *Id.* at 147.

¹⁹² *Id.* at 149.

¹⁹³ *See id.*

¹⁹⁴ *See supra* notes 119–123 and accompanying text.

arbitration the parties agreed to, including the appointment of evidently partial arbitrators, because agreement implies that the arbitration does not unduly harm either party.¹⁹⁵ If arbitration really were horribly detrimental to one of the parties, that party would presumably not have agreed to arbitration.¹⁹⁶

The importance of impartial arbitrators comes to the fore when we contemplate arbitrations procured in contracts of adhesion. Parties making those contracts often do so without reviewing or negotiating about the terms involved.¹⁹⁷ Accordingly, those parties do not agree in the sense that parties to other contracts do.¹⁹⁸ Contracts of adhesion therefore represent a fictionalized form of agreement. This undermines the argument in favor of freedom of contract in arbitration because the absence of genuine, formal agreement vitiates the claim that each party prefers arbitration to litigation.¹⁹⁹

If the simple existence of genuine agreement cannot fully support robust freedom of contract in arbitration, more justification for the routine enforcement of arbitration agreements as written becomes necessary. As noted earlier, the Supreme Court solved this problem characterizing arbitration as a reasonably fair substitute for litigation.²⁰⁰ Doing so allowed the Court to look past the fact that the party trying to avoid mandatory arbitration might not have genuinely agreed to arbitration. It was still fundamentally fair to force that party to honor its arbitration agreement, even if procured in a contract of adhesion, because the arbitration was a fair substitute for litigation. To put it slightly differently, mandatory arbitration agreements remained enforceable because parties to arbitration did not give up anything of fundamental importance in arbitration. Arbitration simply represented the resolution of the parties' disputes in a different forum, not the substantive loss of rights.²⁰¹

Arbitration as fair substitute for litigation makes impartial arbitrators hugely important. Many procedural and substantive choices can be made about litigation without compromising its fundamental fairness. For example, different burdens of proof,²⁰² specialized rules of evidence,²⁰³ and varying local rules²⁰⁴ all occur without

¹⁹⁵ See supra note 123 and accompanying text.

¹⁹⁶ See id.

¹⁹⁷ See supra note 39.

¹⁹⁸ See supra notes 123–126 and accompanying text.

¹⁹⁹ See supra note 126 and accompanying text.

²⁰⁰ See supra notes 142–156 and accompanying text.

²⁰¹ Id.

²⁰² Compare *Gross v. FBL Fin. Serv.*, 557 U.S. 167, 177–78 (2009) (plaintiff must prove case by preponderance of evidence) with *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 95 (2011) (defendant must prove patent invalidity by clear and convincing evidence) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986) (plaintiff must establish actual malice in libel case by clear and convincing evidence).

²⁰³ See Fed. R. Evid. 412 (creating specialized rules of evidence for sex-offense cases).

making litigation fundamentally unfair. By contrast, our legal system finds biased judges completely unacceptable because judicial bias totally compromises fundamental fairness.²⁰⁵

If impartial judges form a *sine qua non* of fair litigation, it follows that arbitration must involve impartial arbitrators to be a fair substitute for litigation. In the context of adhesion contracts, a party that ostensibly agrees to evidently partial arbitrators will probably be surprised to learn that he has agreed to a one-sided dispute resolution process. It might enter his mind that resolution of any disputes would be arbitrated, but the idea that biased decision makers would control the process would be a shock. It therefore would be fundamentally unfair to force this person to arbitrate before evidently partial arbitrators on the pretext of enforcing a fictional agreement.

Case law reflects this thinking. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*,²⁰⁶ the Supreme Court considered an argument that enforcing an arbitration agreement would be unfair, in part because of the risk that arbitrators might be biased.²⁰⁷ The Court accepted that such bias would be problematic, but enforced the arbitration agreement because the rules of the arbitration contained protection against biased arbitrators.²⁰⁸

Similarly, courts have refused to compel arbitration in cases where the agreed upon process of selection raised an unacceptable risk of biased arbitrators. For example, in *Hooters of America, Inc. v. Phillips*,²⁰⁹ the Fourth Circuit refused to compel arbitration of a sexual harassment claim brought by Phillips against her employer, the Hooters restaurant chain.²¹⁰ Phillips had worked as a bartender for Hooters and claimed that a Hooters official had sexually harassed her by touching her inappropriately.²¹¹ She asked her manager for help and was encouraged to “let it

²⁰⁴ See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. Pa. L. Rev. 1567, 1572–1573 (1991) (describing proliferation of local rules in Federal Court and their benefits); Gregory C. Sisk, *The Balkanization of Appellate Justice: the Proliferation of Local Rules in the Federal Circuits*, 68 U. Colo. L. Rev. 1, 7–8 (1997) (discussing local rules in federal courts of appeal).

²⁰⁵ See *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (holding that a judge should recuse himself from case in which he has a direct interest); *In re Murchison*, 349 U.S. 133, 136 (1955) (noting that a fair trial is basic requirement of due process, and that requires a judge with no interest in the case and an absence of actual bias); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 879–880 (2009) (stating that constitutional principles of due process require objective test about unconstitutionality potential for bias); *Concrete Pipe and Prods. of Cal., Inc., v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993) (ruling that due process requires a “neutral and detached judge”); *W Va. Judicial Inquiry Comm’n v. Dostert*, 165 W. Va. 233, 246 (1980) (“It is axiomatic that a judge serves as a neutral and detached magistrate.”).

²⁰⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

²⁰⁷ *Id.* at 30.

²⁰⁸ *Id.* at 28–31.

²⁰⁹ *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

²¹⁰ *Id.* at 935.

²¹¹ *Id.*

go.”²¹² Instead, Phillips resigned and claimed a violation of her rights under Title VII.²¹³ Hooters responded by invoking a mandatory arbitration agreement signed by Phillips during her employment.²¹⁴ Phillips refused, and Hooters sued to compel arbitration.²¹⁵

The Fourth Circuit recognized the benefits of arbitration and the general policy favoring arbitration,²¹⁶ but it refused to enforce the arbitration agreement because the agreement allowed Hooters to draft the rules of arbitration as it saw fit.²¹⁷ Hooters had indeed exercised this right to draft very one-sided rules that, among other things, gave Hooters control over appointment of the arbitrators, even to the point of appointing its own managers.²¹⁸ The court considered such behavior inconsistent with the implied neutrality inherent in any arbitration agreement.²¹⁹ This made the Hooters rules “so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.”²²⁰ This led to the conclusion that Hooters had breached the arbitration agreement, and the court released Phillips from any obligation to arbitrate.²²¹

The Sixth Circuit employed similar reasoning in *McMullen v. Meijer, Inc.*²²² This case involved an appeal about termination by McMullen, a store detective, against her former employer Meijer.²²³ Among other things, that appeal was subject to an arbitration agreement giving Meijer the ability to compile unilaterally a list of five arbitrators from whom the McMullen and Meijer would choose.²²⁴ In refusing to enforce the selection rule, the court recognized the general enforceability of arbitration agreements,²²⁵ but worried that Meijer’s control would lead to bias, in part because Meijer could use the promise of repeat business to incentivize arbitrator behavior favoring Meijer.²²⁶ The resulting lack of neutrality prevented the ensuing arbitration from being an appropriate substitute for litigation.²²⁷

²¹² *Phillips*, 173 F.3d at 935.

²¹³ *Id.*

²¹⁴ *Id.* at 936.

²¹⁵ *Id.*

²¹⁶ *Id.* at 936–38.

²¹⁷ *Id.* at 936, 938.

²¹⁸ *Id.* at 938–39.

²¹⁹ *Id.* at 938 (“Hooters and Phillips agreed to settle any disputes between them not in a judicial forum, but in another neutral forum—arbitration.”).

²²⁰ *Id.*

²²¹ *Id.* at 940.

²²² *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2003).

²²³ *Id.* at 487.

²²⁴ *Id.* at 488.

²²⁵ *Id.* at 489.

²²⁶ *Id.* at 493–94.

²²⁷ *Id.* at 494 (concluding that Meijer’s termination appeal policy was “[not an] effective substitute for a judicial forum”).

Cases like *Phillips* and *McMullen* show that courts consider the appointment of biased arbitrators deeply problematic even though freedom of contract normally makes arbitration agreements enforceable as written. By refusing to enforce arbitration agreements designed to select biased arbitrators, these cases suggest that parties to arbitration can never agree to such appointments, freedom of contract notwithstanding. However, before we so conclude, we should also consider cases that permit parties to waive complaints about evidently partial arbitrators.

B. Waiving Claims of Evident Partiality Against Arbitrators

Commonwealth Coatings speaks powerfully to the importance of neutral arbitrators, but its holding also implies that a party can waive its right to having one. By requiring an arbitrator to disclose facts betraying possible bias, the Court gave potentially prejudiced parties the opportunity to ask for the arbitrator's removal. If the request gets made, but the arbitrator continues to serve, the possibility of a legal action to vacate the arbitrator's award on grounds of evident partiality remains. However, if the request is not made, the potentially injured party cannot maintain such an action because he has waived his right to object. Indeed, two cases (including one that involved the NFL and its union) effectively hold that a party, particularly the NFLPA, can agree to the appointment of a biased arbitrator.

In *Garfield v. Wiest*,²²⁸ the Second Circuit considered a claim about arbitration under the membership agreement of the New York Stock Exchange ("NYSE").²²⁹ The case arose from a dispute between NYSE member Garfield & Co. and Wiest, a former Garfield partner who had resigned and joined another NYSE member firm.²³⁰ Under the terms of the NYSE membership agreement, the dispute was subject to arbitration before a panel composed of arbitrators from NYSE member firms.²³¹ Garfield lost the arbitration and sued to vacate the award on the ground that the arbitrators did not disclose their "almost certain" dealings with Wiest's new firm.²³²

Judge Waterman's opinion rejected this argument by applying *Commonwealth Coatings*. He wrote:

[C]ommonwealth Coatings teaches that when parties agree to arbitration, the arbitrators, in order to avoid even the appearance of bias, must disclose any nontrivial dealings with one party which are not known to the other party. A

²²⁸ *Garfield v. Wiest*, 432 F.2d 849 (2d Cir. 1970).

²²⁹ *Id.* at 851.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 852.

necessary corollary is that, once disclosure has been made, the arbitrator may be challenged for cause if the dealings are nontrivial. The obverse of this last proposition is that when such challenges are waived in advance by the parties as to certain transactions, arbitrators are not required to disclose participation in such transactions.²³³

The court then concluded that Garfield had waived in advance any objections concerning bias arising from the arbitrators' routine business transactions as NYSE member.²³⁴ When Garfield joined the NYSE, it agreed to mandatory arbitration of disputes like the one at hand.²³⁵ The arbitration rules specified that the arbitrators would be from NYSE member firms, so Garfield "most certainly knew" and accepted that the arbitrators had business dealings with Wiest's new firm.²³⁶ Despite this knowledge, Garfield never formally moved for the arbitrators to recuse themselves for bias.²³⁷ Accordingly, it could not now complain of being misled by arbitrators trying to hide their biases.²³⁸

Similarly, in *Williams v. National Football League*,²³⁹ the Eighth Circuit applied almost identical reasoning to apply waiver to player claims of bias in arbitrations held under an earlier version of the NFL's Collective Bargaining Agreement.²⁴⁰ In that case, Williams and other players challenged suspensions handed down for alleged violation of the NFL's Policy on Anabolic Steroids and Related Substances ("Policy").²⁴¹ The players had tested positive for a banned substance and received four-game suspensions pursuant to the Policy.²⁴² They appealed, and the league appointed Jeffrey Pash, the league's Vice President and General Counsel, as arbitrator.²⁴³ Pash ruled against the players, who filed suit seeking, among other things, vacation of the award on grounds of Pash's bias.²⁴⁴ This argument failed at both the district court and court of appeals because the Policy specified that "either the Commissioner or his designee" would serve as arbitrator.²⁴⁵

²³³ *Garfield*, 432 F.2d at 853.

²³⁴ *Id.* at 853–54.

²³⁵ *Id.* at 854.

²³⁶ *Id.*

²³⁷ *Id.* at 853. Garfield did ask the arbitrators to not proceed with the arbitration on the ground that the arbitrators might be embarrassed to decide a case given their business dealings with Wiest's new firm. However, the court decided that even if this request constituted timely objection to the arbitrators, the businesses connections did not evidence the kind of bias warranting disclosure. *Id.*

²³⁸ *Id.*

²³⁹ *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009).

²⁴⁰ *See id.* at 886.

²⁴¹ *Id.* at 869.

²⁴² *Id.* at 870.

²⁴³ *Id.* at 871.

²⁴⁴ *Id.* at 872.

²⁴⁵ *Id.* at 869, 873, 885–86.

The Eighth Circuit understood that evident partiality allowed the court to vacate the award against the players.²⁴⁶ However, waiver applied because the players had agreed to arbitration before the Commissioner or his designee via the CBA, which incorporated the Policy.²⁴⁷ Echoing *Wiest*, the court believed that the agreement made it impossible for the players to claim any surprise about facts suggesting Pash's bias.²⁴⁸ This made vacating the awards inappropriate.²⁴⁹

Cases that allow waiver of claims against biased arbitrators, and especially *Williams*, significantly complicate the legacy of *Commonwealth Coatings*. If only cases like *Phillips* and *McMullen* existed, it would be relatively straightforward to conclude that courts refuse to extend freedom of contract to the appointment of biased arbitrators because doing so destroys arbitration as a fair substitute for litigation. However, cases like *Wiest* and *Williams* show that courts are also willing to enforce choices made by parties who understand the risks of biased arbitrators and accept them. When combined with the primacy of freedom of contract in arbitration, the possibility of waiver makes it difficult to conclude that the law never permits agreements to appoint a biased arbitrator. As I will now discuss, resolving this tension properly requires sensitivity to a line the Supreme Court has been reluctant to recognize in arbitration law.

V. SORTING OUT *NFLMC*: ENDING ROUTINE CONFLATION IN THE LAW OF ARBITRATION

A. The Proper Understanding of *NFLMC*

NFLMC has puzzling and potentially troubling implications because the Supreme Court has made arbitration law insensitive to differences among pre-dispute arbitration agreements. In particular, the Court has consistently applied freedom of contract to enforce arbitration clauses without truly considering whether parties have genuinely agreed to or understood the arrangements being enforced. This has left the entirely justified impression that, as far as the enforcement of arbitration agreements is concerned, courts must enforce all contracts according to their terms.²⁵⁰

²⁴⁶ *Williams*, 582 F.3d at 885.

²⁴⁷ *Id.* at 885–86.

²⁴⁸ *Id.* at 886.

²⁴⁹ *Id.* at 885–86. A recent case decided after after *NFLMC* followed *Williams* to again enforce the current CBA's selection of arbitrator provisions. See *National Football League Players Association of behalf of Peterson v. National Football League*, 831 F.3d 835, 998 (8th Cir. 2016).

²⁵⁰ See *supra* Part III.

If *NFLMC* truly represents the latest in a string of cases enforcing arbitration agreements as written, fissures in the law emerge. If courts must enforce all arbitration agreements according to their terms, then of course Brady must accept a biased arbitrator, and so must employees like McMullen and Phillips. To put it somewhat differently, *NFLMC* could imply that *McMullen* and *Phillips* were wrongly decided, and that businesses can use contracts of adhesion to maneuver consumers and employees into one-sided arbitrations.²⁵¹ Such a result would, in my opinion, be rather troubling because it would exacerbate what many already consider the overuse of arbitration agreements to limit the rights of consumers and ordinary employees.²⁵²

Fortunately, a nuanced reading of the case law avoids this problem. As noted earlier, the Supreme Court's freedom of contract in arbitration cases make two separate arguments that work together to make enforcing pre-dispute arbitration agreements in adhesion contracts fair. First, when two parties agree to arbitrate a dispute, their consent makes arbitration presumptively fair.²⁵³ Second, arbitration itself is a fair substitute for litigation.²⁵⁴ Accordingly, it is fair to enforce arbitration agreements against a party whose only consent is the fictitious variety found in contracts of adhesion.

The relationship between these arguments implies a distinction between arbitration agreements where one party does not know or understand what it is getting into from agreements where the parties do. For arbitration agreements where a party does not know or understand what is going on, the appointment of biased arbitrators makes fundamental fairness impossible. The lack of understanding removes consent as a reason for enforcement, and biased arbitration cannot provide a fair substitute for litigation. Things are different, of course, if both parties understand what is going on in an arbitration agreement. In such a case, fairness derived from genuine agreement compensates for the unfairness inherent in arbitration before a biased arbitrator. Indeed, this explains why lower courts have refused to enforce arbitration agreements that appoint evidently partial arbitrators in

²⁵¹ It is of course possible to understand *NFLMC* as wrongly decided. However, I reject that possibility as inconsistent with Supreme Court decisions establishing the primacy of freedom of contract in arbitration law and other decisions, including *Williams*, holding that pre-dispute arbitration agreements can establish waivers of claims against evidently partial arbitrators.

²⁵² See Christopher Leslie, *The Arbitration Bootstrap*, 94 *Tex. L. Rev.* 265, 266 (2015) (criticizing the use of arbitration clauses found in adhesion contracts to disadvantage consumers); Jill Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 *Brook. L. Rev.* 111, 116 (2015) (criticizing Supreme Court's arbitration jurisprudence as harming the interests of consumers); David Schwartz, *Claim Suppressing Arbitration: The New Rules*, 87 *Ind. L.J.* 239 (2012) (arguing that Supreme Court's arbitration jurisprudence is designed to suppress consumer claims); Jean Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 *Or. L. Rev.* 703 (2012) (describing *Concepcion* as destroying the claims of many potential plaintiffs).

²⁵³ See *supra* notes 122–123 and accompanying text.

²⁵⁴ See *supra* notes 149–156 and accompanying text.

cases like *Phillips* and *McMullen* while allowing waiver of claims about biased arbitrators in cases like *Wiest* and *Williams*.

Both *Phillips* and *McMullen* were ordinary employees who probably did not understand what they were agreeing to and were highly unlikely to have knowingly consented to arbitration before an evidently partial arbitrator. Courts understandably considered this fundamentally unfair and refused to enforce the arbitration agreements. By contrast, in *Wiest* and *Williams* the disappointed parties were sophisticated actors who knew and understood what they were getting into. As a member of the NYSE, Garfield operated at an entirely different level of legal sophistication than did *McMullen* or *Phillips*. As the court noted, Garfield surely knew that the individuals who would serve as arbitrators regularly did business with NYSE member firms. Similarly, in *Williams* the NFLPA regularly negotiated with the NFL and knew exactly what it was doing when it ceded control of the arbitrator to the league. Having agreed to the appointment of potentially biased arbitrators, neither Garfield nor *Williams* could complain that they had been treated unfairly. To put it slightly differently, courts saw nothing fundamentally unfair about holding Garfield or *Williams* to an arbitration bargain that they or their representatives understood. Their knowing consent provided fairness in a way that the illusory consent of *Phillips* and *McMullen* could not.

The foregoing explains how courts should understand and apply *NFLMC*. In a nutshell, the Second Circuit decided *NFLMC* correctly, but its result should apply only in cases where a reasonably sophisticated party knows that it has agreed to an evidently partial arbitrator and understands the consequences. *NFLMC* clearly involved parties who understood that they had agreed to an evidently partial arbitrator and the possible consequences. The parties agreed to its terms after months of detailed negotiations, and the parties were both sophisticated, with ample access to counsel if the legal implications of the agreement proved unclear. Although it is not possible to know exactly why the NFLPA accepted Goodell as a potential arbitrator, the union knew exactly who Goodell was and understood that his position made him likely to favor the league in any dispute. Indeed, given the result in *Williams*, the NFLPA had actually experienced enforcement of arbitration awards given by arbitrators employed by the NFL. It was therefore entirely fair to hold Brady and the union to the bargain they had made. By contrast, however, it would not be fair to extend *NFLMC* to cases where a party does not have comparable knowledge and understanding. *NFLMC* should not control cases involving consumers and ordinary employees who agree to biased arbitration because those people, like *McMullen* and *Phillips*, do not know enough to give the kind of consent needed to justify enforcing what would otherwise be an unfair, biased arbitration.

B. Doctrinal Implementation of *NFLMC*

The proper understanding of *NFLMC* raises an interesting question of how to implement that understanding in doctrine. In theory, one could adopt a rule designed to implement the principles behind *NFLMC* perfectly. Such a rule would enforce agreements to appoint biased arbitrators only when both parties genuinely know and understand what they are agreeing to. As a matter of practice, however, this rule would become unworkable because ambiguities about what parties genuinely know and understand invites litigation that would undo the benefits of arbitration. For example, a sophisticated party might agree to the appointment of a particular arbitrator and then refuse to arbitrate on the supposed ground that she did not truly know or understand what she had agreed to. Determining the truth of this assertion would require litigation that would be difficult to conclude at summary judgment. The possibility of expense and delay would invite parties to play games that defeat the prompt and cost-effective dispute resolution associated with arbitration.

The foregoing shows that effective implementation of *NFLMC* requires easily applied rules that adequately protect unknowing parties from unfair arbitration while permitting sophisticated parties to arrange arbitration as they see fit. I propose doing this by identifying the situations that are likely to feature unknowing fictitious agreement and parties relatively susceptible to exploitation by unfair arbitration. This leads to a rule that refuses to enforce pre-dispute arbitration agreements that contemplate evidently partial arbitrators when 1) the agreement is part of an adhesion contract; and 2) the contract is deployed against ordinary individuals acting as consumers or non-unionized employees.

As an initial matter, this proposed rule is easy to apply. Judges are quite familiar with contracts of adhesion, and it is readily apparent whether a party to arbitration has agreed to one. It is equally easy to identify if a party is an ordinary individual acting as a consumer or non-unionized employee.

Additionally, because contracts of adhesion are frequently used to maneuver the unwitting into arbitration with undesirable terms, focusing the prohibition on adhesion contracts captures situations in which unwitting agreement is most likely to occur. By contrast, if parties genuinely bargain over the terms of an arbitration agreement, they probably know and understand what they have agreed to. Thus, although it is possible that a non-adhesion contract could contain an unfair agreement about biased arbitrators, the chances are sufficiently low that it is not worth litigating these possibilities.

Finally, applying the prohibition only to agreements involving a consumer or non-unionized employee focuses even more tightly on situations likely to involve

unfairness while leaving appropriate room for freedom of contract. Although adhesion contracts raise significant risk of unfairness, sophisticated parties sometimes use them appropriately. For example, in *Wiest*, the parties to the arbitration agreement were an NYSE member firm and one of its partners. They agreed to a contract promulgated by the NYSE, and it made sense for the contract to be signed on a take-it-or-leave-it basis because the NYSE likely needed all of its members to agree to the same terms and conditions. Granted, it was possible that the arbitrators selected under that agreement would prove biased. However, given the need for uniformity and the sophistication of the parties, forcing Garfield to live up to the agreement seemed reasonably fair. Cases like *Wiest* show why applying the prohibition to all adhesion contracts does not make sense. Corporate entities and individuals acting outside their consumer capacity are relatively likely to know what they are doing, so it seems fair to preserve their ability to contract freely about the terms of arbitration.

Similarly, it makes sense to exclude unionized employees from protection because the collective bargaining process adds both protection and expertise. A union that agrees to arbitration of employee claims surely understands what it is doing. If impartiality matters to the union, it will review the agreement to ensure the appointment of unbiased arbitrators. If the employer offers other concessions such as higher pay in exchange for a biased arbitration process, that bargain should be honored as fair. Indeed, this is precisely what happened in *Williams* and *NFLMC*.

Because it is an approximation for the exact policy implied by *NFLMC*, the rule proposed here can be criticized for failing to prohibit some cases of unfair arbitration. Some business actors will be as ignorant as consumers about arbitration, and they will sign arbitration agreements that will probably be enforced. Similarly, there will be cases in which a consumer or non-unionized employee agrees to appointment of a biased arbitrator, but without signing a contract of adhesion. The rule proposed here would probably mishandle these situations by enforcing the arbitration agreements in question. Nevertheless, I would be reluctant to expand the reach of the prohibition against biased arbitrators because other possible rules would probably unduly interfere with freedom of contracts. For example, a rule focused solely on adhesion contracts would prohibit agreements reached by sophisticated parties like Garfield and *Wiest*. Similarly, a rule focused solely on consumers would wind up prohibiting agreements in which the likelihood of genuine agreement is relatively high. It therefore makes sense to stick with the rule proposed here, even though it is imperfect.

VI. CONCLUSION

The Supreme Court's arbitration law jurisprudence emphasizes freedom of contract, and the Second Circuit's decision in *NFLMC* makes sense because the NFL and NFLPA genuinely agreed to the appointment of Commissioner Goodell as arbitrator. Ironically, however, studying *NFLMC* reveals that there is good reason for limiting freedom of contract in arbitration law, especially when it comes to the appointment of evidently partial arbitrators. This leads to the realization that courts should refuse to enforce pre-dispute arbitration agreements when they involve adhesion contracts and ordinary consumers or non-union employees because these cases involve a relatively high risk of unfairness. Hopefully future courts will adopt this understanding of *NFLMC* and use it to improve federal arbitration law.