# Arbitration in Moderation

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Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 **Harv. Neg. L. Rev.** 29 (2018).

Moderation isn't always sexy. The spotlight usually favors powerful progressives and committed conservatives. Politically aligned scholarship makes for pithier titles, punchier abstracts, and perhaps wider readership from likeminded academics and policymakers. Voices from the center are easily drowned out by the rattling din on the ideological edges.

Stephen Ware's *The Centrist Case for Enforcing Adhesive Arbitration Agreements* is a welcome exception. This readable exposition of the politics of arbitration law makes the case that the best cure for arbitration's ailments is found at the political center. This article is Ware's third in a three-part series on this topic.[1] Jurisprudence on both the left and the right, he argues, leaves doctrinally incoherent or incomplete solutions.

Many areas of law have well-trodden ideological battlegrounds with obvious liberal and conservative 'sides.' Arbitration isn't so simple. Red and blue states alike have attempted to regulate arbitration, passing legislation to make certain categories of disputes non-arbitrable (e.g., insurance contracts) and requiring procedural safeguards (e.g., arbitrator conflict disclosures). Such statutes are frequently challenged as violating the Federal Arbitration Act of 1925 ("FAA"), which makes agreements to arbitrate "valid, irrevocable, and enforceable[.]" One might expect the conservative majority of the Supreme Court to resoundingly favor states' rights over the federal statute's intrusion. Not so. With the notable exception of Justice Clarence Thomas, whose position is arguably the most ideologically consistent, both conservative and liberal justices uphold the FAA's supremacy, allowing it to preempt state regulatory laws. Since the 1980s, and particularly over the past decade, the Court has offered a dramatically enhanced interpretation of the FAA's strength – one that enforces agreements to arbitrate even when they are contained in contracts of adhesion, even when they conflict with state law, and even when they effectively allow businesses to use arbitration clauses as a shield against class action liability.

To make ideological sense of the situation, Ware spends time "mapping" various policy positions onto the traditional "left-right" axis. The farthest left position, dubbed the Very Progressive Position, "would require the highest level of consent" for an arbitration agreement to be enforceable. Advocates of this position contend that only post-dispute consent to arbitrate should be valid; both parties must reaffirm their desire to arbitrate rather than litigate *after* the emergence of the dispute, allowing time for the parties to consult with counsel. The Very Progressive Position acknowledges a reality that courts generally do not: "Most individuals manifesting assent to pre-dispute arbitration agreements likely do not read the document's arbitration clause, let alone understand it and reflect on it, and they are extremely unlikely to have discussed it with counsel or negotiated it with the other party."

A so-called Moderately Progressive Position "would enforce pre-dispute arbitration agreements when those agreements are not adhesive." For example, if two businesses freely negotiate a contract with a pre-dispute arbitration clause, that should be enforceable. But if a consumer buys a widget with an arbitration clause contained in the terms and conditions, the clause should be voidable.

On the right side of the spectrum, a Moderately Conservative Position would prevent courts from hearing defenses to enforcement of an arbitration agreement, "but would subject arbitration agreements to otherwise-applicable legal limits

relating to appealing legally-erroneous decisions and to class actions." Under this paradigm, arbitration agreements and awards would be somewhat easier to escape or vacate.

The Very Conservative Position – which Ware argues is reflected by current law – "effectively converts some adhesive arbitration agreements into exculpatory clauses and enforces them in circumstances in which comparable non-arbitration agreements would be unenforceable." Arbitration agreements in contracts of adhesion are enforceable, including those that waive individuals' class action remedies. Vacating an award, even for clear error of law, is extremely difficult.

This leaves us with Ware's Centrist Position. The basic principle underlying his vision is conformity – the notion that "arbitration law should largely conform to non-arbitration law." Adhesive arbitration agreements should be just as enforceable as any other adhesion contract. Ware would maintain the relatively low level of consent required by current law for most contracts of adhesion, where those pesky terms and conditions really do articulate the parties' deal.

Yet the Centrist Position would not allow arbitration agreements to be *more* enforceable than other types of adhesion contracts. Current law, Ware argues, does just that. For example, current law largely prevents courts from hearing defenses to arbitration agreements through the so-called separability doctrine, which permits arbitrators themselves to rule on their jurisdiction. Current law also exempts arbitration agreements from most class action regulation, to the great dismay of many scholars and consumer advocates. And current law also enforces awards that are legally erroneous. Ware argues that the currently-in-vogue Very Conservative Position thus "violates the principle that adhesive arbitration agreements should be as enforceable as other adhesion contracts, not more or less so."

Ware's Centrist Position advocates fairly radical departures from current law. He would repeal the separability doctrine, allowing courts to hear arguments against the enforceability of arbitration agreements. He would also treat arbitral class waivers like non-arbitral class waivers, returning to the days when courts wouldn't enforce adhesion contracts that eliminate the right to participate in a class action. Finally, Ware would allow courts to vacate arbitrators' legally-erroneous decisions on certain claims. Through these shifts, the Centrist Position would blend contractual freedom with oversight, permitting arbitration to "differ from litigation on discovery, evidence, and identity of the adjudicator, but not differ in such a harsh way as to be unconscionable."

Like any good centrist, Ware goes too far and not far enough. Progressives won't like that he explicitly rejects the oft-made argument that individuals "fare worse in arbitration [against corporations] than they do in litigation," citing ample data to argue that this claim is unfounded. He similarly rejects the notion that contracts of adhesion are inherently unfair, finding that they are rightly embedded into traditional common law and our modern economy. Meanwhile, conservatives won't like that Ware would allow courts to hear defenses to arbitrability. Nor will they like that he would eliminate class arbitration waivers, despite the Supreme Court's repeated assurances in recent years that these waivers are valid. Finally, politics aside, members of the judiciary may not like that Ware's proposals could invite significant waves of motion practice. The Centrist Position would undoubtedly open arbitration to greater judicial review (oversight to some, meddling to others).

Still, there's something comforting about a moderate proposal that leaves everyone unsatisfied. As in many areas of policy, the extremes look less appealing on closer inspection. Surely contracts of adhesion will remain enforceable under traditional common law contractual principles. And surely arbitration cannot be a Wild West, largely immune from judicial and statutory oversight. But we can't find a sensible center until we understand what is 'left' and what is 'right.' Our policy conversations need orientation. Thankfully, Professor Ware has now installed some helpful political signage.

1. The first is *The Politics of Arbitration Law and Centrist Proposals for Reform,* 54 **H. J. on Legis.** 711 (2016) and the second is *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 **Fla. L. Rev.** 1224 (2016). [?]

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